

Porticelli v Schrager
2014 NY Slip Op 32533(U)
January 8, 2014
Supreme Court, Westchester County
Docket Number: 13963/10
Judge: Robert M. DiBella
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FILED

JAN - 9 2014

To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order with notice of entry, upon all parties.

**TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER**

**FILED
AND
ENTERED
ON Jan 8, 2014
WESTCHESTER
COUNTY CLERK**

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

-----x
**AGOSTINO PORTICELLI, as the Administrator of
the Estate of VICKI PORTICELLI, deceased, and
AGOSTINO PORTICELLI, Individually,**

Plaintiffs,

-against-

**DECISION AND ORDER
Motion Seq. No. 002**

ALAN SCHRAGER and GREENWICH HOSPITAL,

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Defendants.

-----x
DIBELLA, J.

The following papers have been read and considered on this motion by defendant Alan Schrager for summary judgment dismissing the complaint:

- 1) Notice of Motion; Affirmation in Support of Kristen J. Halford, Esq.; Exhibits A-O; Affidavit of Barry S. Schwartz, M.D.;
- 2) Affirmation in Opposition of Merryl F. Weiner, Esq.; Exhibits 1-4; Expert Affirmation dated June 27, 2013; Expert Affirmation dated June 26, 2013; and
- 3) Reply Affirmation of Kristen J. Halford, Esq., Supplemental Affirmation of Barry F. Schwartz, M.D.

In this medical malpractice action, defendant Alan Schrager moves for summary judgment dismissing the complaint against him, pursuant to CPLR 3212. Plaintiffs oppose the motion. For the reasons set forth below, the motion is denied.

Plaintiffs commenced this medical malpractice action alleging that Dr. Alan Schrager, a board-certified urologist, negligently failed to diagnose renal cell carcinoma during his treatment of plaintiff from January 2007 to January 2010.

Dr. Schrager first evaluated plaintiff on July 31, 1995 in connection with certain urologic symptoms she had been experiencing for some time. Mrs. Porticelli had been

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referred to Dr. Schrage by her primary care physician, Dr. Preston Lurie, who advised her that her urological problems were likely a consequence of her Multiple Sclerosis. Mrs. Porticelli next returned to Dr. Schrage five years later on August 14, 2000. From 2000 to 2006, Dr. Schrage saw plaintiff three to four times per year, on average. Each office visit included a consultation, a urinalysis, and a urine culture. In 2002, Dr. Schrage treated Mrs. Porticelli for a urinary infection. Over the course of the following years, Dr. Schrage obtained bladder ultrasounds and periodically performed a cystoscopy and urethral dilation. Mrs. Porticelli's bladder condition worsened and Dr. Schrage started her on clean intermittent catheterization. By 2005, Mrs. Porticelli began developing more frequent urinary infections. Mrs. Porticelli visited with Dr. Schrage through 2009. On November 3, 2009, Dr. Schrage observed white blood cells and an occasional red blood cell in the urine.

On January 2, 2010, Mrs. Porticelli presented to the Greenwich Hospital Emergency Room with a primary complaint of blood coming out of the urethra for the past couple of days. A urine analysis showed large amounts of bacteria and red blood cells. She was sent home with a prescription and advised to follow-up with her doctor. On January 5, 2010, Mrs. Porticelli returned to Dr. Schrage, at which time he scheduled some further testing for January 19, 2010. Mrs. Porticelli did not keep that appointment, but instead came under the care of another urologist, Dr. Bryan Blair. A CT scan on January 14, 2010 revealed a left renal mass suspicious for carcinoma. Mrs. Porticelli was ultimately diagnosed with Stage III renal cell carcinoma, clear cell, Fuhrman grade III/IV; and

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underwent a laparoscopic radical nephrectomy by Dr. Blair on March 8, 2010. Mrs. Porticelli died on May 8, 2012.

Summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law. *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986). However, it should be denied if the opposing party presents admissible evidence establishing that there is a genuine issue of fact remaining. *Zuckerman v. City of New York*, 49 NY2d 557, 560 (1980). “Moreover, the motion court should draw all reasonable inferences in favor of the nonmoving party in determining whether to grant summary judgment.” *F. Garofalo Elec. Co. v. New York Univ.*, 300 AD2d 186, 188 (1st Dep’t 2002). In deciding such a motion, the court’s role is “issue-finding, rather than issue-determination.” *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957) (internal quotations omitted).

Defendant Schragger moves for summary judgment contending he did not depart from good and accepted standards of medical care and any alleged failure on his part was not the proximate cause of plaintiff’s injuries. In support, defendant attaches an expert Affirmation of Barry S. Schwartz, M.D., a board-certified urologist, who opines, to a reasonable degree of medical certainty, that there was no negligent failure by Dr. Schragger to diagnose or treat renal cell cancer in Mrs. Porticelli. Further, Dr. Schwartz opines that Dr. Schragger had no reason to suspect renal cancer in Mrs. Porticelli and had no reason to obtain imaging studies of the kidneys, bladder or urinary tract. In sum, Dr. Schwartz opines that Dr. Schragger did not depart from good and accepted medical practice either

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in failing to diagnose or treat renal cell carcinoma, or in failing to obtain any imaging, testing or other work-up that may have revealed the presence of the left renal mass.

In opposition, plaintiffs contend that defendant Schrage's motion for summary judgment should be denied and submits two expert Affirmations of physicians licensed to practice medicine in New York (a board-certified urologist and a board-certified hematologist/oncologist) which create questions of fact on the issues of defendant's malpractice and proximate cause.

"The essential elements of a medical malpractice claim are (1) a deviation or departure from accepted medical practice, and (2) evidence that such departure was a proximate cause of injury." *Hayden v. Gordon*, 91 AD3d 819, 820 (2d Dep't 2012). A defendant moving for summary judgment dismissing a medical malpractice action must submit competent medical evidence, in the form of an affidavit of a physician, that the care and treatment rendered did not depart from the standard of care, or that the care and treatment at issue did not proximately cause the claimed injury to the patient. See *Gargiulo v. Geiss*, 40 AD3d 811 (2d Dep't 2007).

Defendant has met his *prima facie* burden of establishing entitlement as a matter of law, by submission of competent medical evidence, the affidavit of Dr. Schwartz, which provides sworn testimony that defendant's treatment comported with the applicable standards of care and did not proximately cause any injury. The burden now shifts to plaintiffs to produce evidentiary proof in admissible form that there are genuine, material issues of fact remaining which require denial of the summary judgment motion.

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The medical expert testimony provided by plaintiffs is sufficient to demonstrate that there are issues of fact remaining and, thus, summary judgment in favor of defendant must be denied. Conflicting expert opinions as to whether defendant-doctor departed from accepted standards of medical care and whether such departure was the proximate cause of the decedent's injuries are questions of material fact which must be determined by the trier of fact. See *Hayden v. Gordon*, 91 AD3d 819 (2d Dep't 2012). Both affirmations of physicians submitted in opposition to the motion state that, it is their opinion within a reasonable degree of medical certainty, that defendant Dr. Schrage departed from accepted standards of medical care in his treatment of Mrs. Porticelli, and that those departures were the proximate cause of her injuries. They opine that defendant Dr. Schrage was negligent when he failed to perform routine, regular ultrasound examinations and CT scans to assess whether the neurologic impairment of the bladder had progressed to involve her kidneys; when he failed to perform annual upper urinary tract studies over a six-year period; when he failed to develop a differential diagnosis which should have included kidney tumor, kidney problems, the progression of her Neurogenic Bladder disease, or progression of her multiple sclerosis; and when he failed to perform any radiological or diagnostic tests from August 2004 through January 2010. These physicians further opine that these failures were the direct and proximate cause of the failure to timely diagnose Mrs. Porticelli's renal cancer, thus preventing her from any chance of preventing metastatic disease and her ultimate death.

Such challenges and conflicting medical testimony can only be resolved by a jury.

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Id. "Summary judgment may not be awarded in a medical malpractice action where the parties adduce conflicting opinions of medical experts. When experts offer conflicting opinions, a credibility question is presented requiring a jury's resolution." *Shields v. Baktidy*, 11 AD3d 671 (2d Dep't 2004) (internal citations omitted).

Accordingly, it is

ORDERED that defendant Alan Schragers motion for summary judgment is denied; and it is further

ORDERED that counsel are directed to appear for a settlement conference on March 12, 2014 at 9:30 AM in Courtroom 1600 of the Westchester County Courthouse in White Plains, New York.

This is the Decision and Order of the Court.

Dated: January 8, 2014
White Plains, New York


Hon. Robert DiBella, JSC

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