

<b>Spencer v Northern Westchester Hosp.</b>
2014 NY Slip Op 32811(U)
July 7, 2014
Supreme Court, Westchester County
Docket Number: 56717/2011
Judge: Francesca E. Connolly
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
HAZEL SPENCER,

Plaintiff,

-against-

DECISION and ORDER  
Sequence Nos. 3 & 4  
Index No.: 56717/2011

NORTHERN WESTCHESTER HOSPITAL, MOUNT  
KISCO MEDICAL GROUP, P.C., EUGENE TOLUNSKY  
and EUGENE SPAGNUOLO,

Defendants.

-----X  
CONNOLLY, J.

The following documents were read in connection with the defendants Northern Westchester Hospital and Eugene Spagnuolo's motion for summary judgment and the defendants Mount Kisco Medical Group, P.C., and Eugene Tolunsky's motion for summary judgment:

NHW and Spagnuolo's notice of motion, affirmation, memo of law, exhibits	1-19
MKMG and Tolunsky's notice of motion, affirmation, exhibits	20-35
Affirmation in opposition, exhibit	36-37
Affirmation in reply	38

The plaintiff commenced this action against the defendants to recover damages for personal injuries she allegedly sustained as the result of the defendants' medical practice that occurred on March 13, 2010. The plaintiff alleges that the defendants deviated from the standard of care by, among other things, delaying the diagnosis and treatment of the plaintiff's cerebral aneurysms, including performing a cerebral angiogram and surgical clipping while her neurological condition was stable, which delay in treatment increased the plaintiff's likelihood of a stroke and permanent neurological deficits.

FACTUAL AND PROCEDURAL BACKGROUND

Pending before the Court are two motions for summary judgment: (1) a motion by the defendants Northern Westchester Hospital (NWH) and Eugene Spagnuolo, and (2) a separate motion by defendants Mount Kisco Medical Group, P.C. (MKMG) and Eugene Tolunsky.

### The deposition testimony

Both motions rely upon, among other things, the deposition testimony of the plaintiff and Drs. Spagnuolo, Tolunsky, and Benzil.

According to the plaintiff's testimony, she began experiencing painful headaches in early 2010. On February 23, 2010, the plaintiff saw Dr. Lenci, her rheumatologist, complaining that she had been experiencing severe headaches. Dr. Lenci referred the plaintiff for an MRI and a Magnetic Resonance Angiogram (MRA). On March 13, 2010, Dr. Lenci contacted her with the results of the MRI and MRA, advised her that the imaging revealed two right-sided cerebral aneurysms, and directed her to immediately go to the emergency room at NWH.

The plaintiff presented to the emergency room at NWH on March 13, 2010 and was treated by the defendant Dr. Spagnuolo, the emergency room physician. After being at the hospital for approximately one and a half hours, Dr. Spagnuolo advised the plaintiff that he spoke with her neurosurgeon, the defendant Dr. Tolunsky from MKMG, and they decided that the plaintiff could be discharged from NWH. According to the plaintiff, Dr. Spagnuolo did not perform an examination.

Two days later, on Monday morning, the plaintiff presented at MKMG to Dr. Leni, who referred her to Dr. McBride, a neurosurgeon. The plaintiff would normally see her own neurologist Dr. Tolunsky, however, he was out of the office on that day. Dr. McBride advised the plaintiff that she had limited medical knowledge regarding aneurysms, and referred the plaintiff to Dr. Benzil, a neurologist at MKMG. The plaintiff presented to Dr. Benzil, who advised the plaintiff that she would need more tests and that if she experienced any headaches, she should go directly to the emergency room.

Thereafter, on or about March 23, 2010, the plaintiff presented at Columbia Presbyterian Hospital with complaints of pain, numbness, headaches, and dizziness. The plaintiff was admitted into the hospital and was advised that she would need surgery, specifically a "clipping" procedure. Dr. Connolly advised her that a stroke was a possible complication/risk of the clipping procedure. On or about March 25, 2010, Dr. Connolly performed the surgery on the plaintiff to clip the aneurysms. Dr. Connolly informed the plaintiff that, immediately after the procedure, she sustained a stroke.

According to Dr. Spagnuolo's testimony, on March 13, 2010, he contacted the plaintiff's treating physician to establish a treatment plan based on the results of the MRI and MRA. Based upon the plaintiff's condition and his conversation with Dr. Tolunsky, Dr. Spagnuolo did not believe it was necessary to have a neurologist examine her immediately. As an emergency physician, Dr. Spagnuolo "looks into the emergency problems, things that need immediate treatment." Further, he does not look into "the ongoing future of needed treatment for these issues" and he "felt that to follow up with [Dr. Tolunsky] would be important."

According to Dr. Tolunsky, as the on-call neurologist, he was contacted by Dr. Spagnuolo on March 13, 2010 and learned from him that the plaintiff had been having headaches for two months and did not have any other neurological symptoms or deficits. He instructed that the plaintiff be told to follow up in his office at Mount Kisco Medical Group, two days later. Dr. Tolunsky's intent was for the patient to ultimately be referred for a cerebral vascular work-up including cerebral angiogram at either Columbia Presbyterian Hospital or Mt. Sinai Hospital.

According to Dr. Benzil, the plaintiff was referred to her by Dr. McBride to review films and determine the proper course of treatment for the plaintiff. The plaintiff was seen by Dr. Benzil on March 16, 2010. At the time of the visit, Dr. Benzil explained to the plaintiff that she had an aneurysmal hemorrhage about a month prior to her visit. Dr. Benzil's interpretation was based on the combination of her clinical assessment and her imaging studies. Dr. Benzil attempted to make arrangements for the plaintiff to see a cerebral vascular neurosurgeon at Columbia Hospital, Dr. Alexander Connolly, for further evaluation of the aneurysms and to determine what, if any, treatment intervention was required. She advised the plaintiff that she should immediately schedule an appointment with Dr. Connolly. She also advised the plaintiff that should she experience any change in symptoms she should go directly to an emergency room.

#### NWH and Dr. Spagnuolo's motion for summary judgment

NWH and Spagnuolo move for summary judgment dismissing the complaint insofar as asserted against them on the ground that there were no departures from the standard of care in the course of the plaintiff's emergency room presentation at NWH on March 13, 2010, and the care rendered by Dr. Spagnuolo during that visit. In support of the motion, they submit various medical records and expert affirmations from Anthony Mustalish, M.D., M.P.H., and Arthur Rosiello, M.D.

According to the medical records submitted in support of the motion, the plaintiff presented to the emergency room at NWH on March 13, 2010 with complaints of headaches for two months and numbness in her head. The records indicate that Dr. Spagnuolo was the treating emergency room physician. The records also indicate that the plaintiff was sent to the emergency room by her primary doctor for evaluation of MRI and MRA results. The plaintiff stated that she was having headaches, but she denied having a headache during her visit at NWH. Dr. Spagnuolo's notes indicate no need for further testing or treatment after he consulted with Dr. Tolunsky regarding the plaintiff's medical records. The plaintiff was discharged from NWH with instructions to follow up with Dr. Tolunsky for her condition and to return to the emergency room for any new or worsening problems. The records indicate that at the time the plaintiff was discharged, she was stable, alert, and oriented, with no motor neurological sensory deficits.

Dr. Mustalish opines, with a reasonable degree of medical certainty, that Dr. Spagnuolo acted appropriately in contacting the patient's neurologist, Dr. Tolunsky, and deferring to his expertise. Further, Dr. Mustalish opines that the determination of the significance of cerebral aneurysms is outside of the purview of an emergency medicine physician, such as Dr. Spagnuolo, and thus, he met the standard of care by contacting the appropriate specialist for the patient. The need for further testing or immediate evaluation by a neurologist, admission to the hospital, or transfer to a different

facility, under these circumstances, was a determination within the speciality of the neurologist, not Dr. Spagnuolo. Dr. Mustalish opines NWH and Dr. Spagnuolo's responsibilities to the plaintiff were appropriately discharged and that the treatment rendered to her on March 13, 2010 was within the standard of care. He concludes that the plaintiff's injuries were not caused by any act or omission during her emergency room visit. Specifically, Dr. Mustalish opines that the plaintiff's stroke, which occurred on March 28, 2010, the day after she underwent a craniotomy with clipping of the aneurysms, was unrelated to NWH and Dr. Spagnuolo's treatment on March 13, 2010, and is a well-known complication of surgery on the brain.

Dr. Rosiello, in his expert affirmation, also opines, among other things, that the plaintiff's stroke was a result of the surgical clipping procedure, and was not caused by the treatment rendered by the defendants. He further opines that the plaintiff's subarachnoid hemorrhage occurred prior to the alleged acts and omissions of the defendants and that the plaintiff remained neurologically stable until after the clipping procedure.

The plaintiff does not oppose NWH and Spanguolo's motion.

#### MKMG and Dr. Tolunsky's motion for summary judgment

The defendants MKMG and Dr. Eugene Tolunsky move for summary judgment dismissing the complaint insofar as asserted against them. MKMG and Tolunsky rely upon the parties' depositions, the plaintiff's medical records, and the expert affirmation of Dr. Rosiello.

As is relevant to this motion, Dr. Rosiello's affirmation additionally states that the plaintiff's cerebral angiogram does not demonstrate any vasospasm, which the plaintiff alleges the defendants failed to diagnose and treat. Further, he opines that the MRI and angiograms performed after the clipping procedure definitively indicate that the plaintiff's stroke was a result of the surgery, and that the plaintiff remained stable until the procedure on March 27, 2010. Moreover, Dr. Rosiello opines that the timing of the clipping procedure would have had no impact on the stroke sustained by the plaintiff.

In opposition to the motion, the plaintiff submits the affirmation of a neurologist who opines, with a reasonable degree of medical certainty, that Dr. Tolunsky, Dr. Benzil, and Dr. McBride departed from good and accepted medical practice, which acts were a substantial factor in delaying necessary medical treatment to the plaintiff, failing to prevent injuries to the plaintiff, and contributing to her injuries including a stroke. He affirms that his opinions are based upon a review of, among other things, all medical records and diagnostic films. Specifically, he opines that Dr. Tolunsky departed from good and accepted medical practice in the treatment rendered to the plaintiff on March 13, 2010 at NWH when he elected not to go to the emergency room and fulfill his duties as an on-call neurologist and perform an evaluation of the plaintiff. Dr. Tolunsky should have conducted a differential diagnosis that included a sentinel bleed or warning leak from the cerebral aneurysms, and obtained a CT scan to look for evidence of a subarachnoid hemorrhage. He opines that the standard of care on March 13, 2010 would have been to admit the plaintiff to the hospital or transfer her to another hospital capable of performing neurological examinations and a surgical

clipping of both aneurysms before the plaintiff sustained another subarachnoid hemorrhage and/or stroke from a burst aneurysm, or cerebral vasospasm. The appropriate and desired time to perform a cerebral angiogram and surgical clipping was close to March 13, 2010, when the plaintiff was stable, in order to prevent further bleeding, which would complicate the clipping procedure and increase the risk of post-surgery stroke. He opines also that MKMG departed from good and accepted medical practices on March 15, 2010 and March 16, 2010, when the plaintiff returned to MKMG and was examined by Dr. McBride and Dr. Benzil. By failing to perform a CT scan or lumbar puncture, Dr. McBride failed to rule out a sentinel bleed or exclude certain conditions including subarachnoid hemorrhaging. Moreover, Dr. Benzil departed from good and accepted medical practice by failing to have the plaintiff transferred immediately to a cerebrovascular center. The expert opines that he disagrees with the defendants' claim that the plaintiff's stroke was solely a complication of the clipping procedure. The delay in treatment from March 13, 2010, and continuing on March 15 and 16, 2010 was a significant contributing factor in the plaintiff sustaining a stroke.

### DISCUSSION

#### 1. The motion of NWH and Dr. Spagnuolo is granted

NWH and Dr. Spagnuolo met their prima facie burden for summary judgment dismissing the complaint insofar as asserted against them. "The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted community standards of medical practice, and evidence that such deviation or departure was a proximate cause of injury or damage" (*Lau v Wan*, 93 AD3d 763, 765 [2d Dept 2012]). "A defendant physician moving for summary judgment in a medical malpractice action has the initial burden of establishing, prima facie, either the absence of any departure from good and accepted medical practice or that any departure was not the proximate cause of the alleged injuries" (*id.*).

The plaintiff, by failing to oppose the motion, has failed to raise an issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Accordingly, NWH and Dr. Spagnuolo's motion for summary judgment dismissing the complaint insofar as asserted against them is granted.

#### 2. The motion of MKMG and Dr. Tolunsky is denied

MKMG and Dr. Tolunsky also met their prima facie burden for summary judgment dismissing the complaint insofar as asserted against them by submitting the expert affirmation of Dr. Rosiello, who opined that the plaintiff's stroke was solely a result of the subsequent surgical clipping procedure and not the treatment rendered by these defendants, that the plaintiff's subarachnoid hemorrhage occurred prior to the alleged acts and omissions of the defendants, and that the plaintiff remained neurologically stable until after the clipping procedure (*see Lau v Wan*, 93 AD3d at 765). Once a defendant physician has met his or her prima facie burden for summary judgment, "the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact (*Gillespie v New York Hosp. Queens*, 96 AD3d 901, 902 [2d Dept 2012] [citation omitted]).

However, in opposition, the plaintiff raised a triable issue of fact through the affirmation of her expert, who opined, among other things, that her stroke was proximately caused by departures from the standard of care committed by MKMG and Dr. Tolunsky, in that they failed perform specific tests that would have led to an early diagnosis of her condition on March 13, 15, and 16, 2010, and the resultant failure to treat her at that earlier time (see *Garrett v University Assoc. in Obstetrics & Gynecology, P.C.*, 95 AD3d 823, 825 [2d Dept 2012]). Accordingly, the motion of the defendants MKMG and Tolunsky for summary judgment dismissing the complaint insofar as asserted against them is denied.

Based upon the foregoing, it is hereby

ORDERED that the defendants Northern Westchester Hospital and Eugene Spagnuolo's motion for summary judgment dismissing the complaint insofar as asserted against them is granted; and it is further

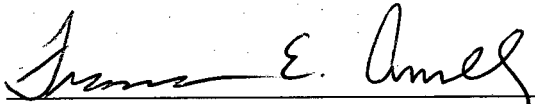
ORDERED that the defendants Mount Kisco Medical Group and Eugene Tolunsky's motion for summary judgment dismissing the complaint insofar as asserted against them is denied; and it is further

ORDERED that the remaining parties are directed to appear in the Settlement Conference Part on August 19, 2014 at 9:15 a.m., in room 1600 of the Westchester County Courthouse located at 111 Dr. Martin Luther King, Jr., Boulevard, White Plains, New York, 10601; and it is further

ORDERED that all other relief requested and not decided herein is denied.

This constitutes the decision and order of the Court.

Dated: White Plains, New York  
July 7, 2014

  
HON. FRANCESCA E. CONNOLLY, J.S.C.

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