

**Gullo v Bellhaven Ctr. for Geriatric and
Rehabilitative Care Inc.**

2015 NY Slip Op 30885(U)

May 15, 2015

Supreme Court, Suffolk County

Docket Number: 09-25986

Judge: Thomas F. Whelan

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 12-20-13
ADJ. DATE 5-15-15
Mot. Seq. # 008 - MG; CASEDISP

-----X
LENNY GULLO, MARIA S. GULLO and :
CATHERINE GULLO, :
: Plaintiffs, :
: - against - :
BELLHAVEN CENTER FOR GERIATRIC AND :
REHABILITATIVE CARE INC., a/k/a :
BELLHAVEN NURSING CENTER, "ABC" :
CORPORATION a/k/a BELLHAVEN NURSING :
CENTER, APEX LABORATORY, INC. and :
MARK SHAPIRO, M.D., :
: Defendants. :
-----X

JOSEPH C. STROBLE, ESQ.
Attorney for Plaintiffs
40 Main Street, P.O. Box 596
Sayville, New York 11782

KERLEY, WALSH, MATERA &
CINQUEMANI, P.C.
Attorney for Defendants Bellhaven
2174 Jackson Avenue
Seaford, New York 11783

GABRIELE & MARANO, LLP
Attorney for Defendant Shapiro
100 Quentin Roosevelt Boulevard
P.O. Box 8022
Garden City, New York 11530

Upon the following papers numbered 1 to 63 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (008) 1-46; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 47-63; Replying Affidavits and supporting papers ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (008) by defendant Mark Shapiro, M.D. pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against him is granted and the complaint and any cross claims asserted against him are dismissed.

This negligence/medical malpractice action was commenced on July 2, 2009 by the plaintiff, Lenny Gullo, alleging that defendant Mark Shapiro, M.D. negligently departed from good and accepted standards of care in failing to consider his blood test results of November 2005, particularly related to liver function, and failed to timely diagnose and treat him for Hepatitis C. The plaintiff was hired as a custodian at defendant Bellhaven Center for Geriatric and Rehabilitative Care, Inc. (Bellhaven), which required that he undergo a physical examination and blood work as part of the employment application process. The blood work was drawn at Bellhaven on November 28, 2005, and sent to defendant APEX Laboratory, Inc. (APEX) for testing.

By virtue of prior motion practice, the within action was stayed following the February 26, 2014 issuance of a decision by the Appellate Division, Second Department which directed the plaintiff to promptly apply to the Workers Compensation Board as it was found to have primary jurisdiction over the claims interposed herein (*see Gullo v Bellhaven Center for Geriatric and Rehabilitative Care, Inc.*, 114 AD3d 905, 981 NYS2d 140 [2d Dept 2014]; Short Form Order of this Court dated March 19, 2014). The stay was lifted following the Board's January 5, 2015 determination that the plaintiff's claims were not work related. By letter dated May 14, 2015 counsel for Bellhaven advised that the plaintiff's claims against it were resolved by settlement. The claims against defendant APEX Laboratory, Inc. were previously discontinued by stipulation dated September 22, 2009.

Mark Shapiro, M.D., the sole remaining defendant in this action, seeks summary judgment dismissing the complaint on the basis that he did not order the subject blood test, was not aware of the results, did not treat the plaintiff for liver disease or Hepatitis C, and did not proximately cause the injuries claimed by Lenny Gullo.

In support of this motion for summary judgment, defendant Shapiro submitted, inter alia, an attorney's affirmation; the expert affirmation of Vincent Garbitelli, M.D.; copies of the summons with notice, complaint, amended complaints, answers and amended answers, plaintiffs' verified bill of particulars, plaintiff's amended supplemental bill of particulars, plaintiff's supplemental and second supplemental verified bills of particulars; copy of order dated October 11, 2012 (Whelan, J.); copies of the deposition transcripts of Mark Shapiro, M.D. dated June 27, 2013, Lenny Gullo, Maria Gullo and Catherine Gullo each dated October 27, 2011, and Carmella Swinton on behalf of Bellhaven dated February 29, 2012; and various medical records and laboratory reports. In opposing this motion, the plaintiffs submitted, inter alia, affidavits from each plaintiff and the affirmed report of plaintiffs' expert Richard Siegfried, M.D.; affidavits of co-plaintiffs; and letters from various health care providers.

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). To establish liability of a physician for medical malpractice, plaintiff must prove that the physician deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries (*Fink v DeAngelis*, 117 AD3d 894, 986 NYS2d 212 [2d Dept 2014] quoting *DeGeronimo v Fuchs*, 101 AD3d 933, 936, 957 NYS2d 167 [2d Dept 2012, quoting *Stukas v Streiter*, 83 Ad3d 18, 23, 918 NYS2d 176 [2d Dept 2011].) "Accordingly, '[a] physician moving for summary judgment dismissing a complaint alleging medical malpractice must establish, prima facie, either that there was no departure or that any departure was not a proximate cause of the plaintiff's injuries'" (*Fink v DeAngelis*, 117 AD3d 894, supra, quoting *Gillespie v New York Hosp. Queens*, 96 AD3d 901, 902, 947 NYS2d 148 [2d Dept 2012]). "Once a defendant physician has made such a showing, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact, but only as to the elements on which the defendant met the prima facie burden" (*Matos v Khan*, 119 AD3d 909, 2014 WL 3732819 [2d Dept 2014]; see *Stukas v Streiter*, 83 AD3d 18 at 30, supra). "Summary judgment is not appropriate in a medical malpractice action where the parties adduce

conflicting medical expert opinions (*Fink v DeAngelis*, 117 AD3d 894, *supra*; *Feinberg v Feit*, 23 AD3d 517, 519, 806 NYS2d 661 [2d Dept 2005]), as “such conflicting medical opinions will raise credibility issues, which can only be resolved by a jury” (*Fink v DeAngelis*, 117 AD3d 894, *supra*; *DeGeronimo v Fuchs*, 101 AD3d at 936, 957 NYS2d 167 [2d Dept 2012]).

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” (*Lau v Wan*, 93 AD3d 763, 940 NYS2d 662 [2d Dept 2012]; *Micciola v Sacchi*, 36 AD3d 869, 828 NYS2d 572 [2d Dept 2007]; *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, 690 NYS2d 762 [3d Dept 1999]).

To rebut a prima facie showing of entitlement to an order granting summary judgment by the defendant, the plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert’s affidavit of merit attesting to a deviation or departure from accepted practice, and containing an opinion that the defendant’s acts or omissions were a competent-producing cause of the injuries of the plaintiff (*see Lifshitz v Beth Israel Med. Ctr-Kings Highway Div.*, 7 AD3d 759, 776 NYS2d 907 [2d Dept 2004]; *Domaradzki v Glen Cove OB/GYN Assocs.*, 242 AD2d 282, 660 NYS2d 739 [2d Dept 1997]).

Dr. Shapiro testified to the extent that he owned Moriches Medical Care from August 1988 through January 2008. Jennifer Castelli and Melissa Mullins were physician’s assistants employed in his office and practiced under his supervision. In 2008, he left his practice when he sold it to Brian McNulty, M.D. of Prime Care Medical of Long Island. All of his patient’s medical records were transferred to Dr. McNulty. Two EKG reports, a bill sent to the insurance company for a November 2007 visit, and two laboratory reports comprised the office record of the plaintiff maintained by Dr. McNulty. Dr. Shapiro stated that he had no independent recollection of the plaintiff.

Lenny Gullo testified to the extent that he worked as a forklift driver with A & P for 33 years and retired. He did not have yearly physicals during that employment, and only went to the doctor every couple of years if he felt sick. He never went to Dr. Shapiro for annual physicals. He began employment with Bellhaven in 2005. A physical and blood test were required for that employment, but he was not provided with the results of the laboratory tests taken by Bellhaven. Dr. McNulty was his primary care physician for approximately five years, and before that, Dr. Shapiro, for about five or more

years. In January 2009, he applied for life insurance with William Penn and submitted to a blood test which was positive for Hepatitis C. He knew of no abnormal liver function tests prior to that time. He went to Dr. McNulty and showed him the letter and copy of the blood test from William Penn. Dr. McNulty then did further testing. In May 2009, he had a liver biopsy performed by Dr. Kerchner, and was started on Interferon and Ribavirin in 2009 to bring down his viral load. He gave a history of marijuana use 30 years ago and cocaine use once when he was 17 years old. He followed with Dr. Palmer for treatment for the Hepatitis. Subsequent blood tests indicated his viral load was zero. He was told by Dr. Palmer and Dr. Kerchner that he could have had the Hepatitis C for his whole life and not known it. Mr. Gullo testified that the last time he saw Dr. Shapiro must have been in 2005 when he performed a physical for his employment at Bellhaven. He stated that blood work was drawn there and also at Bellhaven. He never told Dr. Shapiro that he had fatigue, tiredness, itchiness, dry skin, muscle aches, fevers, or jaundice or yellowing of the skin. After his diagnosis of Hepatitis C, no restrictions were placed on his employment.

Vincent P. Garbitelli, M.D., the expert physician for Dr. Shapiro, affirms that he is licensed to practice medicine in New York State and is board certified in internal medicine. He set forth the materials and records which he reviewed and opined within a reasonable degree of medical certainty that Dr. Shapiro did not depart from the accepted standard of care in the field of internal medicine regarding Lenny Gullo, and that no acts or omissions by Dr. Shapiro were the proximate cause of his alleged injuries. Dr. Garbitelli stated that the medical record from Moriches Medical Care consisted of ECGs date-stamped November 15, 2005 and November 9, 2007, and Sunrise Medical Laboratory reports dated November 17, 2005 and November 19, 2005. He stated that there is no indication that the plaintiff was seen on those dates by Dr. Shapiro or that he ordered any blood work for the plaintiff. There is also no indication that Dr. Shapiro saw the results of those Sunrise Medical Laboratory reports because the physician's assistants names were on the handwritten portions.

Dr. Garbitelli stated that Ms. Swinton of Bellhaven testified that Lenny Gullo presented to Apex Laboratory for blood work including Hepatitis C antibody analysis, on or about November 28, 2005 as part of his employment with Bellhaven. The report from Apex was received by Bellhaven on or about December 1, 2005, indicating Mr. Gullo tested positive for the Hepatitis C antibody. Dr. Garbitelli stated that Hepatitis C is a blood-borne virus that patients contract through some form of blood-to-blood contact, often through blood transfusions, tattooing, needles, or unprotected sex. He continued that Dr. Shapiro did not order this test and was never made aware of the results from Apex or Bellhaven. He stated that Ms. Swinton testified that a physician employed by Bellhaven, Dr. Roche, would have done the physical examination required for the plaintiff's employment. In February 2009, the plaintiff learned he was positive for the Hepatitis C antibody when he underwent blood testing as part of his application for life insurance. After testing, plaintiff Catherine Gullo was advised on March 13, 2009, that she did not have Hepatitis C. Plaintiff Maria Gullo was likewise advised on March 14, 2009, that she did not have Hepatitis C. Dr. Garbitelli described the plaintiff's medical care and treatment, including blood testing, and a liver biopsy which showed no evidence of cirrhosis.

Dr. Garbitelli opined that in November 2005, the treatment for a patient with a Hepatitis C antibody condition was to monitor the patient or administer treatment with Interferon and Ribavirin. In November 2005, the standard of care for a physician or physician's assistant was to evaluate the liver function reported with blood testing to determine if further laboratory testing was indicated. On November 15, 2005, Mr. Gullo had two isolated transaminase levels on a laboratory study, and never complained of symptoms which might indicate a liver functioning problem. The physician's assistant properly and correctly assessed that blood test and determined that there was no need for further testing, as the transaminase levels (SGOT and SGPT) were slightly above normal and isolated. The remainder of the liver function tests were normal and unaccompanied with symptoms in the plaintiff. He stated that if an active smoker is experiencing liver function problems, smoking would have been distasteful. The plaintiff smoked between 2005 and 2007, but did not find it distasteful.

With respect to the November 17, 2005 Sunrise Medical Laboratory report to Moriches Medical Care, it is not documented that Dr. Shapiro saw the plaintiff or the laboratory report, and the report did not indicate any treatment was necessary, as again, the two isolated transaminase levels were slightly elevated and required no further action on the part of Dr. Shapiro or the physician's assistants. Dr. Garbitelli continued that in comparing the 2005 blood results with the 2009 blood results, the other related liver function results were all within normal limits, thus these levels would not have resulted in further liver function testing or consult to a specialist. Thus, stated Dr. Garbitelli, the standard of care was met on February 6, 2007, October 9, 2007, and October 11, 2007, as there was no indication for ordering blood work or any assessment of the plaintiff's liver.

Dr. Garbitelli stated that even assuming that the plaintiff chose to undergo treatment with Interferon and Ribavirin from November 2005 through 2007, the outcome would not have changed because of the nature of his condition and not by any acts or omissions on the part of Dr. Shapiro. In 2009, the plaintiff underwent treatment with the same medications he would have received in 2005 through 2007, however, he was a non-responder and his virus would not have cleared between November 2005 through 2007. Nothing for the course of Maria Gullo or Catherine Gullo would have changed as a consequence.

Based upon the foregoing, Dr. Shapiro has demonstrated prima facie entitlement to summary judgment dismissing the complaint on the basis that he did not depart from the accepted standard of care and treatment and did not proximately cause the injuries claimed by the plaintiffs.

The plaintiffs have submitted the letter to plaintiff's counsel/ report/out-of-state affidavit of Richard N. Siegfried, M.D. who states that he is licensed to practice medicine in New Jersey and is board certified in anesthesiology with a subcertification in pain medicine. He does not indicate his training or work experience, and has not submitted a curriculum vitae to qualify as an expert. Dr. Siegfried set forth the materials, records, and reports which he reviewed, and opined within a reasonable degree of medical certainty that Dr. Shapiro departed from good and accepted medical practice in failing to appropriately investigate the elevated liver transaminase levels detected on November 15, 2005; that

Gullo v Bellhaven
Index No. 09-25986
Page No. 6

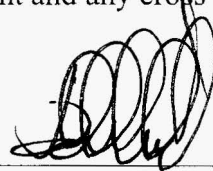
he should have obtained further history and physical examination to detect the cause of the elevation; and thereafter should have attempted to reverse the causative factors and repeat testing. If no cause was detected, Dr. Shapiro should have conducted Hepatitis A, B, and C serologies. Dr. Siegfried continued that the CDC guidelines in 2005 recommended testing for Hepatitis C infection in the presence of elevated liver transaminase levels, however, he does not indicate the triggering level of transaminase elevation, if it pertained to an isolated elevation, and whether or not the plaintiff's transaminase levels met that criteria.

Dr. Siegfried stated that Dr. Shapiro failed to inform the plaintiff of the elevated transaminase level to give him the opportunity to further investigate the cause. He continued that because Mr. Gullo did not become aware of the Hepatitis C infection until after his blood testing on February 13, 2009 for his life insurance application, that Dr. Shapiro's departures from good and accepted medical practice were a substantial factor in causing the delay in the diagnosis of the condition, delay in the treatment, exposed family members and coworkers to a blood-borne pathogen, caused the plaintiff pain and suffering, and his family emotional distress. Dr. Siegfried also opined that Dr. Shapiro, as the supervising physician in his office, should have, inter alia, reviewed the laboratory results himself and advised the plaintiff of the elevated transaminase levels.

Dr. Siegfried opined that the departures he set forth caused the delay in the diagnosis and treatment of the plaintiff's condition. However, Dr. Siegfried has not opined that there were damages or injury caused by the delay in diagnosing or treating the plaintiff's condition, or that the plaintiff's condition progressed or worsened. Thus, Dr. Siegfried's report does not relate the departures to any injury caused by the delay in diagnosing and treating plaintiff's Hepatitis C. Dr. Siegfried does not indicate that treatment would have been any different were the diagnosis made in 2005 or 2009. He does not indicate the degree of injury, such as liver damage, if any, caused by the delay, and does not dispute that the diagnostic tests and biopsy revealed that the plaintiff did not sustain cirrhosis of the liver. Dr. Siegfried does not dispute Dr. Garbitelli's statement that the plaintiff was diagnosed as a non-responder to treatment, and that even after treatment with Interferon and Ribavirin, the Hepatitis C virus did not clear. Therefore, plaintiff's expert has failed to raise a triable factual issue relating to proximate cause and the claim that the plaintiff suffered injury or damages he would not have suffered had the diagnosis been made sooner, and treatment begun earlier, precluding summary judgment (*see Stukas v Streiter*, 83 Ad3d 18, 23, 918 NYS2d 176 [2d Dept 2011]). For these same reasons the claims of plaintiff's Catherine Gullo and Maria S. Gullo are lacking in merit.

Accordingly, motion (008) is granted and the complaint and any cross claims asserted against Mark Shapiro, M.D. are dismissed.

Dated: 5/15/15



THOMAS F. WHELAN, J.S.C.