

Schwartzberg v Huntington Hosp.

2015 NY Slip Op 31244(U)

July 1, 2015

Supreme Court, Suffolk County

Docket Number: 07-34716

Judge: Mark D. Cohen

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MEMORANDUM DECISION

INDEX No. 07-34716
CAL. No. 14-00123MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 28 - SUFFOLK COUNTY

P R E S E N T : Hon. MARK D. COHEN
Acting Justice of the Supreme Court

MOTION DATE 6-12-14 (004 &006)
MOTION DATE 6-5-14 (005)
MOTION DATE 1-15-15 (007)
ADJ. DATE: 6-24-15
Mot. Seq. # 004 - MG # 006 -MotD
005 -MG # 007 - MG

X-----X
CARA SCHWARTZBERG, an infant over the age of
14 years by her mother and natural guardian, JILL SCHWARTZBERG,
and JILL SCHWARTZBERG, Individually,

Plaintiffs,

- against -

HUNTINGTON HOSPITAL; DAVID SHIH, M.D.;
JOANNE VITALE, P.A.; SEAFORD PEDIATRICS, PLLC;
DAVID MECKES, M.D.; PEDIATRIC CARDIOLOGY OF L.I., P.C.;
AMROSE M. VALLONE, M.D.; MEDICAL ARTS RADIOLOGICAL GROUP, P.C.;
MICHAEL SHAPIRO, M.D.; CECILY ANTO, M.D.;
OSTEOPATHIC MANIPULATIVE MEDICINE ASSOCIATES, P.C.;
and DENNIS J. DOWLING, D.O.,

Defendants.

X-----X

KELNER AND KELNER, ESQS.
Attorney for Plaintiffs
140 Broadway, 37th Floor
New York, New York 10005

KERLEY, WALSH, MATERA and CINQUEMANI, P.C.
Attorney for Defendants Vitale, P.A., Huntington Hospital and Shih, M.D.
2174 Jackson Avenue
Seaford, New York 11783

PATRICK F. ADAMS, P.C.
Attorney for Defendants Meckes, M.D. and Seaford Pediatrics
3500 Sunrise Highway
Great River, New York 11739

CALLAN, KOSTER, BRADY & BRENNAN
Attorney for Defendants Medical Arts and Shapiro, M.D.
One Whitehall Street, 10th Floor
New York, New York 10004

In this medical malpractice action sounding in failing to diagnose, defendants have moved and cross moved for summary judgment. The plaintiffs also have moved for an order precluding defendants who are not dismissed from the action from limiting their liability at the time of trial pursuant to article 16 of the CPLR.

On January 18, 2006, Cara Schwartzberg [plaintiff herein]¹, at the time 15 years old, presented herself with her mother, to the emergency room of Huntington Hospital. Her symptoms included right wrist pain, numbness in her right finger, pain radiating to the wrist, tingling in her right index finger, which had turned blue during a shower. Some of the symptoms had been ongoing. Dr. Shih was the emergency room attending physician, who, after examination including x-rays, discharged the plaintiff with a splint for her right wrist, anti-inflammatories and recommended that she follow-up with an orthopedist and hand specialist, plus her primary medical doctor.²

On January 24, 2006, the plaintiff saw Dr. Svelilich, an orthopedic surgeon, whose working diagnosis for the wrist pain was latent ganglion cyst, right trapezial myositis and right cervical radiculopathy. The plaintiff also had blood work and an cervical MRI, which were normal.

With continuing symptoms, the plaintiff was seen by Dr. Djokic, an infectious disease specialist on February 20, 2006. Dr. Djokic ruled out any infectious source for the plaintiff's condition. On March 1, 2006, the plaintiff was seen by her pediatrician, Dr. Meckes, of Seaford Pediatrics PLLC, reporting her symptoms, who noted that tingly and cold feelings in her right hand was more apparent and more frequent. After he examined the plaintiff, he believed that she had thoracic outlet syndrome. He recommended a CT scan, Doppler study and evaluations by a thoracic surgeon, neurologist, orthopedic surgeon and hematologist. Dr. Meckes advised the plaintiff's mother to undertake his recommendation quickly.

Initially, the plaintiff saw Dr. Vallone, a cardiologist at Pediatric Cardiology of L.I., P.C. on March 1. After his examination, he determined that the plaintiff had no underlying structural or

¹ "Plaintiffs" indicate both Cara Schwartzberg and her mother, Jill Schwartzberg, individually.

²His impression was Raynaud's syndrome or a snuffbox injury.

functional heart disease. On March 3, a MRI was performed on her right wrist at the Medical Arts Radiology. A report was faxed to Dr. Meckes indicating no evidence of acute bony abnormality but a small amount of fluid in the wrist joint. A further Doppler study was undertaken by Medical Arts Radiology on March 8, involving a vein study to rule out vein thrombosis. Dr. Shapiro interpreted the Doppler study and issued the radiology report. He determined, after the first test, that all was normal and no venous clots present. Dr. Shapiro, after further review, performed a further Doppler examination where he found that when the plaintiff's arm was raised over her head, there was a change in the arterial signal, which indicated a decrease in velocity. Dr. Shapiro told the plaintiff's mother about this finding and forward a report to Dr. Meckes, which indicated the possibility of thoracic outlet had to be entertained clinically.³

After reviewing the radiology report, Dr. Meckes opined that the plaintiff suffered from thoracic outlet syndrome. On March 13, Dr. Meckes indicated to the plaintiff's mother that additional referrals to a vascular surgeon and neurologist should be undertaken. On the same day, the plaintiff was examined by Dr. Anto, a neurologist. After an examination and review of medical history, Dr. Anto impression was possible thoracic outlet syndrome, with no diagnosis of impending stroke. Dr. Anto recommended the plaintiff be evaluated by a vascular surgeon.

On March 14, 2006, the plaintiff went to Dr. Dowling of Osteopathic Manipulative Medicine Associates, P.C. for osteopathic manipulative treatment. Dr. Dowling had discussed the plaintiff's symptoms and diagnosis with Dr. Meckes. Dr. Dowling performed osteopathic manipulation of the wrist, elbow, the thoracic outlet region in the posterior aspect and cervical and lumbar regions, finding that the diagnosis was thoracic outlet syndrome.

On March 16, 2006, the plaintiff went to Winthrop University Hospital with symptoms of a stroke. The plaintiff was diagnosed with total occlusion of the right subclavian artery, no flow in the right middle cerebral artery and a right middle brain infarct. She was found to suffer from a congenital abnormality and an accessory right rib. Surgery was performed to remove the accessory rib and the clot was removed from arteries.

The plaintiffs commenced this action sounding in medical malpractice based upon the failure to diagnose the plaintiff.

Initially, the defendants, Medical Arts Radiological Group, P.C. and Michael Shapiro, M.D., moved for summary judgment. Next, defendants, Huntington Hospital, David Shih, M.D. and Joanne Vitale, P.A., moved for summary judgment. Finally, the defendants, Pediatric Cardiology of L.I., P.C., Ambrose M. Vallone, M.D., Osteopathic Manipulative Medicine Associates, P.C. and Dennis J. Dowling, D.O., have moved for summary judgment.

As the Second Department recently articulated, "the essential elements of a cause of action to

³. The plaintiff was seen by Dr. Jennifer Lamonica, a chiropractor, on March 4, 2006. The plaintiff was also taking an Aspirin and Motrin for headaches.

recover damages for medical malpractice are a deviation or departure from accepted medical practice and evidence that such departure was a proximate cause of injury. On a motion for summary judgment dismissing a cause of action to recover damages for medical malpractice, a defendant physician must make a prima facie showing that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby. Once a defendant has made such a showing, the burden shifts to the plaintiff to 'submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician' (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572), but only as to those elements on which the defendant met the prima facie burden." *Harris v. Saint Joseph's Medical Center*, 128 A.D.3d 1010, 1011.

With respect to defendants, Medical Arts Radiological Group, P.C., Michael Shapiro, M.D., Huntington Hospital, David Shih, M.D. , Joanne Vitale, P.A., Pediatric Cardiology of L.I., P.C., and Ambrose M. Vallone, M.D., they have presented a prima facie case. The plaintiff has submitted no proof to raise an issue of fact. Consequently, these defendants motions for summary judgment are granted.

Focusing on the motion of the defendants, Osteopathic Manipulative Medicine Associates, P.C. and Dennis J. Dowling, D.O., the plaintiff was referred to Dr. Dowling by Dr. Meckes for osteopathic manipulative treatment, based upon suspected thoracic outlet syndrome. Dr. Dowling reviewed reports of MRIs of the plaintiff's wrist and spine, plus blood work results. The plaintiff indicated right hand pain, described as sharp, constant, numb, tingling and nagging, with color changes and elbow locked, plus circulation problems. Dr. Dowling believed that the plaintiff's circulation problems were either primary or secondary; with primary compression of the vessels, whether it was arterial to reduce flow or venous to reduce return or secondary circulation issues involving the sympathetic nervous system with vasoconstriction of the small blood vessels. Dr. Dowling did note temperature decreased in the hand. Dr. Dowling was informed that Doppler of the right shoulder was performed and that it was normal except for decreased flow when the arm was elevated.⁴

Dr. Dowling's examination indicated that T1, first rib and C7 had restricted motion of the rib. His examination also found limitations plus with respect to the right radial pulse, a decrease, that signified a possible vascular compromise. Dr. Dowling believed, based upon the physical examination and history, that she may have had thoracic outlet syndrome, Raynaud's phenomenon, joint pain of the wrist and somatic dysfunctions of the upper extremity. He was unsure if the plaintiff's condition was due to a vascular or neurological cause.

Dr. Dowling treated the plaintiff's wrist, elbow and thoracic outlet region, plus the cervical and lumbar region. He performed seven manipulations. He indicated that he would get results from other doctors to have complete information and determine if other tests were required.

In support of their motions, Osteopathic Manipulative Medicine Associates, P.C. and Dennis J. Dowling, D.O., submit the affidavit of Dr. Hagopian, a board certified doctor in Osteopathic

⁴. A faxed copy did not arrive during the visit. It was to be provided in follow up visits.

Manipulative Medicine and Cranial Osteopathy. Based upon his review of the Bill of Particulars, relevant transcripts and the medical records for the plaintiff, he opines, with a reasonable degree of medical certainty that the care provided by the moving defendants was at all times in conformity with accepted osteopathic medicine as it existed in 2006. Although there was a finding of a possible vascular compromise, these findings were nonspecific. The findings of the plaintiff was consistent with thoracic outlet syndrome. He agrees with the finding that the mechanism of the injury could include congenital malformations (such as a cervical rib), spasm of the muscles or congenital muscle malformation. A congenital malformation such as a cervical ribs rarely can be palpated but can be evaluated by x-rays or other radiology studies. Furthermore, it was not customary to consider a clot for the plaintiff. Furthermore, the treatment not of forceful or thrusting maneuver which would no result in vessels being compromised relating to treatment of the upper thoracic area posteriorly while the plaintiff was in a supine position.⁵ Dr. Hagopian further opines that the defendants did not cause or contributed to the plaintiff's stroke. That the plaintiff suffered from an extremely rare medical complications of rare medical anomalies, i.e. a structural anomaly of a cervical rib which was present since birth, suddenly causing injury to a nearby structure, without any recent history of trauma or new activity patterns, plus the occurrence of an embolus traveling in a retrograde fashion through the subclavian artery into the carotid artery causing a stroke.

In order to meet the initial burden, a physician's sworn statements can be sufficient provided that the affidavit is detailed, specific and factual in nature. *Rivera v. Albany Medical Center Hosp.*, 119 A.D.3d 1135. Here, the defendants have provided a sufficient affidavit to establish a prima facie case for summary judgment. The burden then shifts to the plaintiffs to raise an issue of fact. *Kunic v. Jivotovski*, 121 A.D.3d 1054.

The plaintiffs include an expert affidavit⁶ of a physician who is Board Certified in the Field of Family Practice. The expert indicates that Dr. Dowling because aware of the plaintiff's "elevated first rib" indicating that the patient was suffering from a vascular thoracic outlet and that Dr. Dowling was should have referred the plaintiff to a thoracic, vascular surgeon as soon as possible to rule out an arterial thrombus partially occluding the circulations to the right upper extremity cause by the cervical rib/thoracic outlet syndrome. Such a referral would have prevented the stroke by the plaintiff.

The plaintiffs also include an expert affidavit of a Board Certified doctor in the field of Neurology who had review the records and deposition transcripts involving the plaintiff. After explaining the biology of a Thoracic Outlet Syndrome, he noted that it has a variety of causes and varying presenting semiology. The expert notes that Arterial Thoracic Outlet Syndrome is the leeast frequent, it has the most potential dangerous and "prompt recognition of arterial TOS is critical, as delays in diagnosis and treatment may allow avoidable sudden irreversible ischemic damage to any structure served by the brachiocephalic system as occurred in Cara

⁵. The force was no greater in form than throwing a baseball or throwing a basketball.

⁶. The Court has reviewed the unredacted affidavits and returned them to the plaintiffs' attorney. Of course, they must be kept if required for appellate review.

Schwartzberg's case when she avoidably suffered an ischemic right middle cerebral artery territory stroke..." The expert opines that Dr. Dowling did not properly assess the plaintiff, failed to develop a proper differential diagnosis and failed to facilitate tests or seek immediate vascular surgical evaluation.⁷ This was based, inter alia, upon a Doppler which indicated a decrease blood flow in a segment of the brachiocephalic system.


The expert notes that Dr. Dowling, plus the defendant's expert, fail to understand that proper testing to understand the plaintiff's condition prior to performing osteopathic maneuvers was a deviation from reasonable care. Furthermore, had Dr. Dowling required proper radiological studies and vascular studies, he would have prevented the plaintiff's stroke.

The plaintiffs have raised an issue of fact requiring denial of the motion. See *Harris v. Saint Joseph's Medical Center*, 128 A.D.3d 1010; *Hofsiss v. Goodman*, 128 A.D.3d 898. Consequently, that part of the motion seeking summary judgment for defendants, Osteopathic Manipulative Medicine Associates, P.C. and Dennis J. Dowling, D.O., is denied.

The plaintiffs have cross moved to preclude any remaining defendant from limiting their liability at the time of trial pursuant to CPLR article 16. CPLR article 16 are forfeited as to any codefendant who has been awarded summary judgment in its favor. *Hendrickson v. Philbor Motors, Inc.*, 102 A.D.3d 251. As Professor Alexander noted in his commentaries, "When a co-defendant is dismissed from an action as a result of summary judgment (CPLR 3212), the remaining defendant has no basis thereafter for an Article 16 apportionment of liability with respect to the dismissed party. This is because summary judgment is the functional equivalent of a trial on the merits, meaning that the court has found, as a matter of law, that the dismissed party is free of liability." Vincent C. Alexander, *Practice Commentaries, McKinney's Cons.Laws of NY, Book 7B, CPLR, CC1603, Supp. p. 29-30*. Therefore, to rebut the motion, the opposing party must submit evidence in admissible form. See *Drooker v. South Nassau Communities Hosp.*, 175 Misc.2d 181. Here, none of the oppositions submitted any evidence to raise any issue of fact. Consequently, the plaintiffs' motion is granted.

Settle order.

Dated: July 1, 2015



 MARK D. COHEN, A.J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION

⁷. The plaintiffs' verified bill of particulars sufficiently particularizes that the Dr. Dowling failed to vigorously investigate the plaintiff's complaints.

TO: SANTANGELO & SLATTERY
Attorney for Defendant Anto, M.D.
1800 Northern Boulevard
Roslyn, New York 11576

ANTHONY P. VARDARO, P.C.
Attorney for Defendants Pediatric Cardiology, Vallone, M.D.,
Osteopathic Manipulative Medicine and Dowling, D.O.
732 Smithtown Bypass, Suite 203
Smithtown, New York 11787