

**Medeck v Antis**

2016 NY Slip Op 31682(U)

August 17, 2016

Supreme Court, New York County

Docket Number: 805318/2012

Judge: Joan B. Lobis

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 6**

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JAMES MEDECK, as Administrator of the Estate of  
MICHELLE MEDECK, JAMES MEDECK, Individually,  
M\_ M\_, a minor under the age of 14 years by her Father  
and Natural Guardian, JAMES MEDECK, and G\_ M\_, a  
minor under the age of 14 years by her Father and  
Natural Guardian, JAMES MEDECK,

Plaintiffs,

Index No. 805318/2012

-against-

**Decision and Order**

SATWATIE ANTIS, F.N.P., LAWRENCE VINCENT  
CRAFA, D.O., KIMBERLY J. HENDERSON, M.D., P.C.,  
MINUTE CLINIC, L.L.C., and CVS CAREMARK  
CORPORATION,

Defendants.

-----X  
In this medical malpractice action, defendants Sawatie Antis, Family Nurse  
Practitioner (F.N.P.)<sup>1</sup>, Kimberly J. Henderson, M.D., P.C. (Henderson P.C.), Minute Clinic,  
L.L.C., and CVS Caremark Corporation move for summary judgment.<sup>2</sup> Plaintiffs do not oppose  
the motion as to Minute Clinic, LLC, and CVS Caremark Corporation (collectively, CVS).  
Plaintiffs do not challenge those aspects of the motion seeking to dismiss the claim for lack of  
informed consent. For the reasons below, the Court denies the remaining branches of the motion.

Decedent Michelle Medeck, who was forty-one years old, presented to CVS on  
February 10, 2011, complaining of nasal congestion, facial and head pain measuring five on a scale  
of one through five, throat pain, ear discomfort, and pain in her upper teeth. In addition, she had

<sup>1</sup> Defendant's expert Dr. Farber states Nurse Antis has a doctorate in this field so is now a D.N.P.

<sup>2</sup> In its decision in motion sequence number five, the Court granted defendant Lawrence Vincent Crafa, D.O.'s motion to dismiss claims against him. The motion was not opposed.

run a low-grade temperature of ninety-nine degrees. She allegedly indicated that she had these symptoms for weeks and they were escalating. Nurse Antis, an employee of Henderson P.C., examined Ms. Medeck. Nurse Antis was able to consult Dr. Henderson, who was out of the office, or Dr. Crafa when she was confronted with problems outside her expertise.

Upon examination, Nurse Antis determined that Ms. Medeck had a normal temperature and vital signs, but nasal crusting, drainage, swelling and redness in the nasal cavities, and tenderness around the sinus and throat. Without additional testing the nurse diagnosed Ms. Medeck with sinusitis, prescribed azithromycin, and told her to contact Henderson, P.C. if her symptoms worsened or if they were not resolved within two weeks. Three days later, Ms. Medeck died in her home. An autopsy revealed that the cause of death was streptococcal sepsis, an invasive bacteria causing sepsis, which plaintiffs allege was due to her upper respiratory tract infection with sinusitis. As the lawsuit currently stands, plaintiffs sue Nurse Antis and Henderson P.C. for malpractice based on their alleged failures to perform adequate and proper tests on Ms. Medeck on February 10, 2011, to observe her symptoms sufficiently and diagnose her properly, to consider differential diagnoses, and to refer her to Dr. Crafa for further treatment.

Defendants support their summary judgment motion with several expert affidavits. Dr. Bruce Farber, a New York licensed physician board certified in internal medicine-infectious disease opines, to a reasonable degree of medical certainty, that Nurse Antis did not deviate from the standard of care applicable to a nurse practitioner. He further alleges her actions did not proximately cause Ms. Medeck's death. He claims that Ms. Medeck presented to the nurse with symptoms typical of sinusitis, and that she did not have symptoms such as stiff neck, altered mental

state, or high fever which would have signaled meningitis or another serious infection. Along with Ms. Medeck's normal vital signs and her clinical history, he claims, the nurse's failure to conduct further tests or seek a medical consultation was not a deviation. Her prescription of azithromycin was appropriate, he states, in light of the decedent's allergy to penicillin. He states that Group A streptococcus (GAS) generally is mild, that "[s]inusitis is not a common presentation for a GAS infection," Farber Aff. ¶ 27, and that here as in most cases the cause of the infection is unknown. He contends that Ms. Medeck's GAS was invasive and thus moved very rapidly. He opines that when Ms. Medeck presented to Nurse Antis, she was in the prodrome period of infection, when her symptoms were generalized and GAS was clinically undetectable. He states that Nurse Antis acted consistently with the applicable standards when she sent Ms. Medeck home with a prescription and told her to contact the clinic if her symptoms worsened or they did not resolve within two weeks.

The additional experts agree with Dr. Farber's contentions. In addition, Dr. Brian Feingold, a New York licensed physician board certified in internal medical, opines that Nurse Antis complied with Henderson P.C.'s guidelines and the governing standards for nurse practitioners. Affiant Dr. Kimberly J. Henderson, a New York licensed doctor with a board certification in emergency medicine, owned and was sole shareholder of Henderson P.C. during the relevant period. She emphasizes that none of the criteria for referral were present in Ms. Medeck when she presented at the clinic and it was not a deviation for Nurse Antis to conclude that a referral was not necessary. Judith Barberio, a New Jersey certified nurse practitioner with a Ph.D. in nursing and several certifications, also submits an affidavit which opines that Nurse Antis fully conformed to the standard of care. Nurse Antis submits her own affidavit. In addition to the

above assertions, she states she did not deviate from the standard of care in deciding no differential diagnosis was needed because Ms. Medeck clearly presented with sinusitis.

Finally, defendants argue that plaintiffs' claims for wrongful death and loss of services lack merit. For one thing, they state, because the malpractice claims have no merit the ancillary claims must fall. For another, they argue that plaintiffs have expressly stated there is no pecuniary loss to the next of kin and made no assertion that plaintiffs incurred funeral expenses.

Plaintiffs submit two expert affidavits in opposition to defendants' motion. First is the deposition of a New York-licensed doctor board certified in infectious diseases, whose name has been redacted for the purposes of this motion. The doctor contends that Nurse Antis deviated from the standard of care by not doing further testing when Ms. Medeck presented to the clinic on February 10, 2011, and by not referring her case to a doctor or consulting with a physician to determine the proper diagnosis and treatment. The expert opines that when she presented to Nurse Antis at Henderson P.C. Ms. Medeck suffered from an early stage of streptococcal infection and meningitis and Nurse Antis failed to recognize this and treat the decedent accordingly. In particular, according to the expert, the facts that Ms. Medeck's headaches were as severe as they were and that she stated her symptoms were worsening should have alerted the nurse to realize the potential seriousness of the infection. The expert states the nurse should not have told Ms. Medeck to wait two weeks to see whether the symptoms resolved because she'd already been experiencing these symptoms for three weeks. The expert explains that the failure to make a differential diagnosis was a deviation and that GAS should have been part of that differential diagnosis. The determination of the cause of death at the autopsy, the expert opines, confirms that the decedent

suffered from these infections on February 10, 2011, because “[s]epsis and meningitis do not develop overnight from a GAS infection” but “are results of an infection which has become invasive over time and allowed to spread.” Expert Aff. at ¶ 28. Further, the expert states, the failure to intervene at this juncture proximately caused her death. The expert opines that had a differential diagnosis been made, Ms. Medeck would have been tested for more serious infections and her true condition could have been detected. With “diagnosis and appropriate treatment, including admission to the hospital and additional and antibiotics, would have in all probability been curative.” Id. at ¶ 40.

In addition, plaintiffs submit the redacted affidavit of a nurse practitioner licensed in New York with advanced degrees in nursing and experience in diagnosing acute conditions. In addition to echoing the opinion of the expert physician, the nurse practitioner opines to a reasonable degree of medical certainty that Nurse Antis deviated from the standard of care in prescribing azithromycin. Instead, the expert states, the standard of care in accordance with the guidelines of the Infectious Disease Society of America would have been to prescribe doxycycline, which is “highly active against respiratory pathogens” and – unlike azithromycin, according to the nurse – is less likely to encounter resistance from infections. Nurse Practitioner Aff. ¶ 31.

In reply, defendants state: 1) that plaintiffs have waived their lack of informed consent, wrongful death, and loss of services claim, 2) that plaintiffs’ experts impermissibly rely solely on the autopsy report to conclude there was malpractice and are otherwise conclusory, and 3) that their experts’ affidavits are comprehensive and sufficient to mandate dismissal.

To prevail on summary judgment in a medical malpractice case, a defendant must demonstrate that he or she did not depart from accepted standards of practice or that, even if he or she did, this did not proximately cause the patient's injury. Rogues v. Noble, 73 A.D.3d 204, 206 (1st Dep't 2010). The movant must provide an expert opinion that is detailed, specific and factual in nature. E.g., Joyner-Pack v. Sykes, 54 A.D.3d 727, 729 (2d Dep't 2008). The defense expert's opinion should state "in what way" a patient's treatment was proper and explain the standard of care. Ocasio-Gary v. Lawrence Hosp., 69 A.D.3d 403, 404 (1st Dep't 2010). Further, it must "explain 'what defendant did and why.'" Id. (quoting Wasserman v. Carella, 307 A.D.2d 225, 226 (1st Dep't 2003)). If the movant fails to make a prima facie showing, then the burden does not shift to the plaintiff. Makinen v. Torelli, 106 A.D.3d 782, 784 (2nd Dep't 2013). If the defendant does make a prima facie showing, on the other hand, the plaintiff must "produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact . . . ." Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986). To meet that burden, a plaintiff must submit an expert affidavit attesting the defendant departed from the accepted standard of care and this proximately caused the injuries. See Rogues, 73 AD.3d at 207. Summary judgment is improper where conflicting expert opinions exist. Elmes v. Yelon, 140 A.D.3d 1009, - (2nd Dep't 2016). Instead, the conflicts must be resolved by the factfinder. See id.

Based on these standards, the Court finds that defendants have made a prima facie showing as to their entitlement to summary judgment on the issue of medical malpractice. In response, however, plaintiffs raise triable issues of fact. Both of plaintiffs' experts stated that several of the decedent's symptoms, including the severity of the pain in her head, her facial pain, the earlier existence of a low grade fever, should have alerted Nurse Antis to the possibility of a

more serious infection. Also, they argue that because the symptoms had persisted and worsened over the course of three weeks, Nurse Antis should not have given her condition another two weeks to resolve but performed a differential diagnosis immediately. Plaintiffs' nurse practitioner expert further challenges the prescription Nurse Antis provided as a deviation. Contrary to defendants' contention, these experts do not rely entirely on the autopsy report but use it to confirm the opinions which they have substantiated and explain. In addition, plaintiffs' countered defendants' arguments in favor of dismissing the wrongful death claim in the expert affirmation, which stated at paragraph twelve that defendants' deviations caused Ms. Medeck's untimely death. See also Aff. in Opp. ¶ 39. Further, defendants are incorrect that there was no claim for funeral expenses. See Bill of Particulars at ¶ 13(f). Thus, at a minimum, there are some asserted damages. Moreover, even where plaintiffs do not assert pecuniary losses, "loss of support, services, voluntary assistance, the prospect of inheritance and medical and funeral expenses" are compensable. Fell v. Presbyterian Hospital in the City of New York at Columbia—Presbyterian Medical Center, 98 A.D.2d 624, 625 (1st Dep't 1963); see Rose v. Conte, 107 A.D.3d 481, 484 (1st Dep't 2013) (sustaining jury verdict). Plaintiffs' complaint alleges loss of support and services on behalf of the minor, and defendants' current motion does not assert any argument as to these allegations.

Accordingly, it is

ORDERED that the motion to dismiss is denied except as to the claim for lack of informed consent and to the claims asserted against Minute Clinic, LLC, and CVS Caremark Corporation, and the Clerk shall enter a judgment of dismissal as to these defendants; and it is further

ORDERED that the caption is amended to read as follows:

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 6**

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JAMES MEDECK, as Administrator of the Estate of  
MICHELLE MEDECK, JAMES MEDECK, Individually,  
M\_ M\_, a minor under the age of 14 years by her Father  
and Natural Guardian, JAMES MEDECK, and G\_ M\_, a  
minor under the age of 14 years by her Father and  
Natural Guardian, JAMES MEDECK,

Plaintiffs,

Index No. 805318/2012

-against-

SATWATIE ANTIS, F.N.P., and KIMBERLY J.  
HENDERSON, M.D., P.C.,

Defendants.

-----X  
All further papers shall use this caption, and the Clerk is directed to amend the caption accordingly;


and it is further

ORDERED that the parties shall appear in Part 6, 60 Centre Street room 345 at 9:30

a.m. on September 6, 2016 for a pretrial conference.

Dated: *Aug 17*, 2016

ENTER:

  
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JOAN B. LOBIS, J.S.C.