York v Catskill Regional Med. Ctr.
2016 NY Slip Op 32905(U)
September 28, 2016
Supreme Court, Sullivan County
Docket Number: 1059-2012
Judge: Stephan Schick

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SULLIVAN

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Dayshawn York, A minor, by his Parent Deshawn York, and Deshawn York, individually,

Plaintiffs,

-against-

DECISION & ORDER

Catskill Regional Medical Center, Amarjit Gill, MD, Carlos Holden, MD, and Paramjeet Singh, MD.,

Defendants,

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Motion Return Date: May 31, 2016
RJI No.: 52-33469 2012
Index No.: 1059-2012

Appearances:

Antoinette L. Williams, Esq.
Attorney for the Plaintiff
PO Box 8556
Pelham, NY 10803

Caryn L. Lilling, Esq.
Mauro Lilling Naparty LLP
100 Crossways Park Drive West, Suite 310
Woodbury, NY 11797
of counsel to:
Schiavetti Corgan DiEdwards
Weinberg & Nicholson, LLP
Attorneys for Dr. Amarjit Gill
Suite 205
709 Westchester Ave.
White Plains, NY10604

Schick, J.:

This matter comes before this Court by way of Defendant's motion pursuant to CPLR §4401. First made at the close of Plaintiff's case, the Court denied the motion. Now, after the jury deadlocked and did not arrive at a verdict, Defendant renews the motion in writing. Plaintiff opposes.

"A directed verdict pursuant to CPLR 4401 is appropriate when, viewing

> the evidence in a light most favorable to the nonmoving part[ies] and affording such part[ies] the benefit of every inference, there is no rational process by which a jury could find in favor of the nonmovant[s]" ... To establish a prima facie case of medical malpractice, plaintiffs were required to submit "expert testimony that there was a deviation from accepted standards of medical care and that such deviation was the proximate cause of the injury" ... (citations omitted.)[1]

Accordingly, this Court will consider "the evidence in a light most favorable to the [plaintiff] and affording [Plaintiff] the benefit of every inference..."[2]

On October 18, 2011, nine year old Dayshawn York was brought to his pediatrician, Dr. Gill. For two days he had been suffering from vomiting, diarrhea, blood in his urine, and fever. His mother alleges that Dr. Gill was told the child also had stomach pain. Dr. Gill disputes this and his notes do not reflect it.

Dr. Gill determined that the child was severely dehydrated, weak, and lethargic. The child's abdomen was soft, non-tender, non-distended; no guarding or rigidity; bowel sounds were present; and there were no enlarged organs. Dr. Gill directed the mother to bring the child to the emergency room at Catskill Regional Medical Center for intravenous fluids. Dr. Gill telephoned the ER Physician, advising him the child was on his way and would require an immediate IV.

The Plaintiff's mother informed the Emergency Room nurse that the child was complaining of stomach pains, vomiting, and diarrhea for the past two days. The ER Nurse noted "abdominal pain diffuse" and started an IV for treatment of the dehydration.

Dr. Carlos Holden, the Emergency Room doctor, noted that the child complained of vomiting and diarrhea. Dr. Holden noted that the child did not have abdominal pain. His examination showed the abdomen to be soft, not distended, no tenderness, no guarding, no rebound, no rigidity, no palpable masses and normal bowel sounds.

The child's white blood cell count was 13,100, within normal limits. His creatinine was elevated at 1.4, with normal being 1. Dr. Holden's impression was gastroenteritis and dehydration. He did not order any consults and the child was transferred to a floor.

The next day, October 19, 2011, Dr. Gill saw the child in the hospital. The child was still having watery stools, felt weak and complained of abdominal pain. The abdomen was soft

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[1] *Peluso v C.R. Bard, Inc.*, 124 A.D.3d 1027, 1028 (3rd Dept. 2015).

[2] *Peluso v C.R. Bard, Inc.*, 124 A.D.3d 1027, 1028 (3rd Dept. 2015).

with "minimal tenderness." His WBC was normal, but his absolute band count was up from 650 to 3300. The normal count is 1000. There was nothing in Dr. Gill's notes reflecting his thoughts regarding the abnormal band count. Dr. Gill noted that Plaintiff tested positive for clostridium difficile, also known as C. Diff.

A surgical consult was held on October 20, 2011, with Dr. Paramjeet Singh, who suggested a CT scan of the abdomen should the abdominal pain continue.

Whether or not the child had been complaining of pain during his stay in the hospital was in dispute with each side presenting facts to support their view.

Dr. Gill's notes reflected that his impression was still acute gastroenteritis, but he was uncertain of the etiology. Plaintiff's band percentage was at 31%, while a normal amount was 11%. Moreover, Plaintiff began having high grade fevers on October 20th.

On October 21st Dr. Gill again saw the child in the hospital. Dr. Gill's notes indicate a plan for a CT scan, but it was not ordered.

As Dr. Darahan Trivedi covered for Dr. Gill that weekend. Dr. Gill did not return to the hospital until October 24th. The child's white blood count had continued to rise and was now at 23,300.

A CT scan was finally obtained and Dr. Singh was called in on another consult. The scan showed a cecal wall thickening in the right lower quadrant, calcifications extending in the right lower quadrant which might have represented fecaliths; the distal bowel appeared decompressed; there were enlarged lymph nodes in the right lower quadrant; and there was a large collection seen in the pelvis measuring 12.6 x 12.9 x 8.4 centimeter.

The size of the abscess indicated that it had been present for many days. The child had to be transported to Albany Medical Center where he underwent a CT guided drainage of the abscess, which involved inserting a needle through the rectum to drain the abscess, and the insertion of a PICC line to allow for the administration of antibiotics for two weeks following his discharge home.

The child suffered no further complications and was discharged after four days at Albany Medical Center.

Returning to the Third Department's decision in *Peluso v C.R. Bard, supra*:

> To establish a prima facie case of medical malpractice, plaintiffs were required to submit "expert testimony that there was a deviation from accepted standards of medical care and that such deviation was the

proximate cause of the injury" ... (citations omitted.)[3]

Plaintiff has consistently argued that Dr. Gill's failure to expand his diagnosis and order a CT Scan was a departure from accepted medical practice and that, as a result, the child's appendicitis was not treated and progressed, "percolated," from perforation to abscess to large collection. Plaintiff alleges that this untreated progression resulted in the child's being transported to a tertiary care center where the collection was drained and a picc line inserted for two weeks of intravenous antibiotic treatments.

Plaintiff's expert, Dr. Saleeby, testified that it was his expert opinion within a reasonable degree of medical certainty that Dr. Gill's failure to expand the diagnosis and order a CT Scan was a departure from accepted medical practice. Dr. Saleeby further testified that as a result of the delay in the correct diagnosis, the condition progressed, "percolated," and the Child was allowed to eat, further exacerbating the condition and enlarging the size of the collection.

Dr. Saleeby further noted that a patient with C. Diff. can have no symptoms, which would indicate a C.Diff colonization, or can have real symptoms, indicating an infection. A patient with a C.Diff infection usually has been on antibiotics, received cancer therapies, chemotherapy, or has had feeding tubes inside the abdominal wall. The child had none of these normal causes of a C. Diff infection. However, Dr. Gill prescribed Flagyll to treat the C. Diff.[4]

Defendant argues that Plaintiff did not suffer an injury as the procedure the Child underwent at Albany Medical Center was less invasive than an appendectomy. Moreover, Defendant argues that the Child's weight and asthma made this a safer alternative than surgery.

Examining these facts in the light most favorable to the Plaintiff a prima facie case of medical malpractice was proven. Moreover, again considering these facts in the light most favorable to the Plaintiff, it cannot be said that "there is no rational process by which a jury could find in favor of the [Plaintiff]."

A juror, using rational process, could find that Dr. Gill's failure to enlarge the diagnosis and order the CT Scan allowed the Child's condition to unnecessarily worsen and required his transfer to a tertiary care center several hours away where the condition could be appropriately treated.

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[3]*Peluso v C.R. Bard, Inc.*, 124 A.D.3d 1027, 1028 (3rd Dept. 2015).

[4]The child was initially prescribed the wrong dosage of Flagyll.

A juror, using rational process, could dismiss Defendant's argument regarding the less invasive procedure, and instead find that just because this ended without tragedy, does not mean it was a positive development.

This Court finds that examining these facts in the light most favorable to Plaintiff, a juror, using rational process, could find for the Plaintiff and, accordingly, it is

ORDERED, that the Defendant's 4401 motion is denied.

All other issues have been considered and found wanting.

This shall constitute the Decision of the Court. The original Decision and Order and all papers are being forwarded to the Sullivan County Clerk's Office for filing. Counsel are not relieved from the provisions of CPLR §2220 regarding service with notice of entry.

SO ORDERED

Dated: Monticello, NY
September 28, 2016

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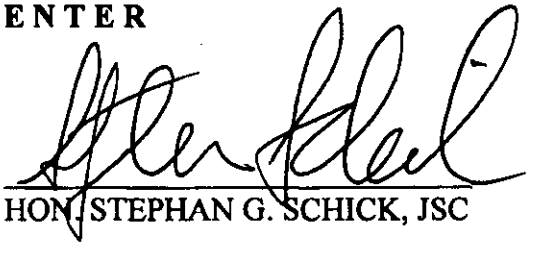

HON. STEPHAN G. SCHICK, JSC

Papers considered:

Defendant's CPLR §4401 motion dated April 14, 2016.
Plaintiff's affirmation in opposition dated May 24, 2016.
Defendant's reply affirmation dated May 26, 2016.