

J.T.M. v Parrinello
2018 NY Slip Op 30783(U)
April 26, 2018
Supreme Court, Suffolk County
Docket Number: 11-23997
Judge: Joseph C. Pastorella
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

INDEX No. 11-23997CAL. No. 16-02138MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

MOTION DATE 5-2-17 (007)MOTION DATE 5-7-17 (008)ADJ. DATE 7-5-17

Mot. Seq. # 007 - MD

008 - MD

J.T.M., an Infant, by his Parents and Natural
Guardians, ERICA MCSWEENEY and
TERRENCE MCSWEENEY, and ERICA
MCSWEENEY Individually and TERRENCE
MCSWEENEY Individually,

Plaintiffs,

- against -

SALVATORE PARRINELLO, WILLIAM R.
BRANCACCIO, BARBARA J. CUSUMANO,
ROBERT J. GOTTLIEB, ALEXANDRA
HALITSKY, JOSEPH B. QUINN,
SOUTHAMPTON PEDIATRIC ASSOCIATES,
P.C., SOUTHAMPTON HOSPITAL and
SOUTHAMPTON RADIOLOGY, P.C.,

Defendants.

JORDAN & LEVERRIER, P.C.
Attorney for Plaintiffs
257 Pantigo Street
East Hampton, New York 11937

KERLEY, WALSH, MATERA &
CINQUEMANI, P.C.
Attorney for Defendants Cusumano,
Gottlieb, Halitsky, Quinn, and
Southampton Pediatric Associates, P.C.
2174 Jackson Avenue
Seaford, New York 11783

BARTLETT, MCDONOUGH &
MONAGHAN, LLP
Attorney for Defendant Southampton Hospital
170 Old Country Road, 4th Floor
Mineola, New York 11501

FUMUSO, KELLY, SWART, FARRELL,
POLIN & CHRISTESEN, LLP
Attorney for Defendants Brancaccio, Parrinello,
and Southampton Radiology, P.C.
110 Marcus Blvd., Suite 500
Hauppauge, New York 11788

Upon the following papers numbered 1 to 220 read on these motions for summary judgment; Notice of Motion/
Order to Show Cause and supporting papers 1 - 107; 108 - 183; Notice of Cross Motion and supporting papers ; Answering

McSweeney v Parrinello
Index No. 11-23997
Page 2

Affidavits and supporting papers 184 - 196; Replying Affidavits and supporting papers 197 - 198; 199 - 201; Other 202 - 220; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motion by defendant Southampton Hospital and the motion by defendants Salvatore Parrinello, M.D., William Brancaccio, M.D., and Southampton Radiology, P.C. are consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendant Southampton Hospital for summary judgment in its favor is denied; and it is further

ORDERED that the motion by defendants Salvatore Parrinello, M.D., William Brancaccio, M.D., and Southampton Radiology, P.C. for summary judgment in their favor is denied.

This is an action to recover damages allegedly sustained by infant plaintiff J.T.M., and his parents, Terrence McSweeney and Erica McSweeney, as a result of medical malpractice allegedly committed by defendants Southampton Hospital, Southampton Radiology, P.C., Salvatore Parrinello, M.D., William Brancaccio, M.D., Southampton Pediatric Associates, P.C., Barbara Cusumano, M.D., Robert Gottlieb, M.D., Alexandra Halitsky, M.D., and Joseph Quinn, M.D.. The medical malpractice claims alleged against Southampton Hospital, Dr. Parrinello, Dr. Brancaccio, and Southampton Radiology, arises from a CT-scan conducted on September 12, 2008. Plaintiffs allege that Southampton Hospital, Dr. Parrinello, Dr. Brancaccio, and Southampton Radiology, were negligent in, among other things, failing to diagnose infant plaintiff's macrocephaly, hydrocephalus, and arachnoid cyst; failing to take or recommend additional studies; failing to timely inform infant plaintiff's physicians as to the radiological findings; and failing to make and keep accurate records. By order of this Court dated October 10, 2012, this action was consolidated with an action entitled *Jack T. McSweeney, an infant, by his Parents and Natural Guardians, Erica McSweeney and Terrance McSweeney, and Erica McSweeney, Individually, and Terrance McSweeney, Individually v Southampton Radiology, P.C.*, assigned index number 6360/2012.

In his radiology report dated September 14, 2008, Dr. Parrinello states that the purpose of the September 12, 2008 CT-scan was to evaluate J.T.M. for hydrocephalus. Dr. Parrinello found "[m]ild prominence of the extra-axial spaces and ventricles," which "may be seen in the setting of benign external hydrocephalus." He also notes "no extra-axial collection," and "[n]o mass effect, midline shift, or intracranial hemorrhage." Dr. Parrinello recommends "[c]orrelation with head circumference." The report is "electronically signed" by Dr. Brancaccio.

According to the deposition testimony of Erica McSweeney, she accompanied J.T.M., her son, to Southampton Pediatric Associates for his routine check-up at age two months. J.T.M. was seen by Dr. Halitsky, who recommenced a CT-scan to rule out hydrocephalus due to concern of the rate of growth of J.T.M.'s head. A few days after the CT-scan was conducted, Erica's husband, Terrance McSweeney, was informed that J.T.M. did not have hydrocephalus and that there was no need to be concerned.

According to the deposition testimony of Dr. Parrinello, he was part of a medical group that staffed the radiology department at Southampton Hospital. It was the group's procedure that a shareholder of the professional corporation co-sign reports of incoming employees or physicians, such as Dr. Parrinello, who

affiliated with the group, because it takes time to “get on [the] insurance panels.” However, the shareholder did not have to read the report before signing. Dr. Parrinello stated that he reviewed J.T.M.’s radiological study alone for 15 to 20 minutes.

Dr. Parrinello explained that external hydrocephalus is a “benign self-limiting condition where the extra-axial space around the brain [is] prominent,” and includes an excessive collection of localized fluid. Increased prominence of the subarachnoid space causes the increased prominence in the extra-axial spaces. External hydrocephalus can cause macrocephaly, because increased prominence in the extra-axial spaces in the head become larger. On a CT-scan, external hydrocephalus looks like prominent extra-axial spaces around the brain and spinal cord. However, hydrocephalus can have several different imaging features including ballooning of the ventricles and transimpedance of cerebrospinal fluid absorption. An atrophic or abnormal brain may look like external hydrocephalus. Dr. Parrinello testified that if external hydrocephalus is seen on a CT-scan of a two-month old with macrocephaly, he can suggest the diagnosis, but the condition ultimately is diagnosed clinically.

Dr. Parrinello described an arachnoid cyst as a “localized collection of cerebrospinal fluid confined in the arachnoid membrane.” While typically small, an arachnoid cyst can grow and cause mass effect on the brain. On a CT-scan, an arachnoid cyst would typically present as “well circumscribed [cerebrospinal fluid] attenuation, localized collection with an accompanying mass effect, buckling of the cortex, [and] remodeling of the bone.” The presence of an arachnoid cyst is determined by mass effect, or displacement on the cortex of the brain and cortical buckling. An arachnoid cyst cannot be seen on a CT-scan without mass effect, because the density of the cyst is the same as cerebrospinal fluid. Dr. Parrinello stated that it is “highly, highly unlikely” that a two-month old would have a two-centimeter arachnoid cyst that does not produce cortical buckling or mass effect. Dr. Parrinello further testified that he would have stated the presence of an arachnoid cyst in his report if he saw one on the radiological images, as required by good and accepted medical practice.

Dr. Parrinello further testified that the tilt of J.T.M.’s head during the CT-scan was typical and that it did not interfere with his ability to interpret the study. Upon review of the September 12, 2008 CT-scan images, Dr. Parrinello found a suggestion of mild external hydrocephalus, but found no radiological evidence of hydrocephalus or an arachnoid cyst. However, he did see fluid in J.T.M.’s subarachnoid space “deep in the arachnoid membrane where the cerebrospinal fluid is,” and prominence of the extra-axial space in the left medial cranial fossa, right medial cranial fossa, and right frontal region. According to Dr. Parrinello, the subarachnoid space that contains cerebrospinal fluid surrounding J.T.M.’s brain appeared more prominent than one would usually see. Dr. Parrinello stated that his reported impression of “prominence of the extra-axial space” referred to J.T.M.’s subarachnoid space.

Dr. Parrinello further testified that he could not determine whether external hydrocephalus would cause macrocephaly in a two-month old, such as J.T.M., because he is not a pediatrician. Similarly, he never considered recommending a follow-up study, because “the findings on the CT are followed clinically.” Dr. Parrinello vaguely recalled Dr. Cusumano calling him regarding J.T.M.’s study and testified that he repeated what was contained in his report and told Dr. Cusumano to “corollate clinically.” He also told her to measure J.T.M.’s head circumference, “[b]ecause based on the study that I read the prominence of the extra-

axial spaces suggested a diagnosis of benign external hydrocephalus which is followed with head circumference, which is followed clinically which is followed over time.”

Southampton Hospital now moves for summary judgment dismissing the complaint against it on the grounds that it did not depart from good and accepted medical practices in the interpretation of infant plaintiff’s CT-scan. Defendant Hospital submits, in support of the motion, copies of the pleadings; bills of particulars; the order of the Honorable Hector D. LaSalle dated October 10, 2012 consolidating the related actions; the expert affidavits of Dr. Thomas Naidich and Dr. Dan Handelsman; the transcripts of the deposition testimony of Erica McSweeney, Terrance McSweeney, Dr. Parrinello, Barbara Cusumano, Robert Gottlieb, Alexandra Halitsky, and Joseph Quinn; the affidavit of Dr. Brancaccio; the affidavit of Erica McSweeney; and its medical records.

Dr. Parrinello, Dr. Brancaccio, and Southampton Radiology also move for summary judgment dismissing the complaint against them on the grounds that they did not depart from good and accepted medical practices in regards to infant plaintiff’s CT-scan. Dr. Parrinello, Dr. Brancaccio, and Southampton Radiology submit, in support of the motion, copies of the pleadings; the bills of particulars; the note of issue; the transcripts of the deposition testimony of Erica McSweeney, Dr. Parrinello, Dr. Cusumano, Dr. Gottlieb, Dr. Halitsky, and Dr. Quinn; the affidavit of Dr. Brancaccio; Southampton Hospital’s medical records for J.T.M.; and the expert affidavit of Dr. Naidich.

In opposition to both motions, plaintiffs argue that issues of fact exist as to whether Southampton Hospital, Dr. Parrinello, Dr. Brancaccio, and Southampton Radiology departed or deviated from good and accepted medical practice in the interpretation and reporting of J.T.M.’s September 12, 2008 CT-scan, and whether such deviation or departure was a proximate cause of his injuries. Plaintiff’s submit, in opposition, various uncertified medical records; the subject radiology report; Southampton Hospital’s supplemental response to discovery; the affirmations of Dr. Adam Silvers and Dr. Dan Handelsman; and the affidavit of Erica McSweeney.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). As the court’s function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, evidence must be viewed in the light most favorable to the nonmoving party (*see Chimbo v Bolivar*, 142 AD3d 944, 37 NYS3d 339 [2d Dept 2016]; *Pearson v Dix McBride, LLC*, 63 AD3d 895, 883 NYS2d 53 [2d Dept 2009]; *Kolivas v Kirchoff*, 14 AD3d 493, 787 NYS2d 392 [2d Dept 2005]; *Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]). A motion for summary judgment should be denied where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of

credibility (see *Chimbo v Bolivar*, *supra*; *Benetatos v Comerford*, 78 AD3d 750, 911 NYS2d 155 [2d Dept 2010]).

As healthcare providers, doctors owe a duty of reasonable care to their patients while rendering medical treatment; a breach of this duty constitutes medical malpractice (see *Dupree v Giugliano*, 20 NY3d 921, 958 NYS2d 312, 314 [2012]; *Scott v Uljanov*, 74 NY2d 673, 675, 543 NYS2d 369 [1989] *Tracy v Vassar Bros. Hosp.*, 130 AD3d 713, 13 NYS3d 226, 288 [2d Dept 2015]). To recover damages for medical malpractice, a plaintiff patient must prove both that his or her healthcare provider deviated or departed from good and accepted standards of medical practice and that such departure proximately caused the plaintiff's injuries (see *Gross v Friedman*, 73 NY2d 721, 535 NYS2d 586 [1988]; *Bongiovanni v Cavagnuolo*, 138 AD3d 12, 24 NYS3d 689 [2d Dept 2016]; *Stukas v Streiter*, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]). To establish a prima facie entitlement to summary judgment in a medical malpractice action, a defendant healthcare provider must prove, through medical records and competent expert affidavits, the absence of any such departure, or, if there was a departure, that the plaintiff was not injured as a result (see *Bongiovanni v Cavagnuolo*, *supra*; *Mitchell v Grace Plaza of Great Neck, Inc.*, 115 AD3d 819, 982 NYS2d 361 [2d Dept 2014]; *Faccio v Golub*, 91 AD3d 817, 938 NYS2d 105 [2d Dept 2012]). The defendant must address and rebut specific allegations of malpractice set forth in the plaintiff's bill of particulars (see *Wall v Flushing Hosp. Med. Ctr.*, 78 AD3d 1043, 912 NYS2d 77 [2d Dept 2010]; *LaVecchia v Bilello*, 76 AD3d 548, 906 NYS2d 326 [2d Dept 2010]; *Grant v Hudson Val. Hosp. Ctr.*, 55 AD3d 874, 866 NYS2d 726 [2d Dept 2008]; *Terranova v Finklea*, 45 AD3d 572, 845 NYS2d 389 [2d Dept 2007]).

After making this prima facie showing, the burden shifts to the plaintiff patient to submit evidentiary facts or materials that raise a triable issue as to whether a deviation or departure occurred and whether this departure was a competent cause of plaintiff's injuries (see *Williams v Bayley Seton Hosp.*, 112 AD3d 917, 977 NYS2d 395 [2d Dept 2013]; *Makinen v Torelli*, 106 AD3d 782, 965 NYS2d 529 [2d Dept 2013]; *Stukas v Streiter*, *supra*). The plaintiff need only raise a triable issue as to the elements on which the defendant met the prima facie burden (see *Barrocales v New York Methodist Hosp.*, 122 AD3d 648, 996 NYS2d 155 [2d Dept 2014]; *Gillespie v New York Hosp. Queens*, 96 AD3d 901, 947 NYS2d 148 [2d Dept 2012]; *Stukas v Streiter*, *supra*). "General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat defendant physician's summary judgment motion" (*Alvarez v Prospect Hosp.*, *supra*, at 325; see *Brinkley v Nassau Health Care Corp.*, 130 AD3d 1287, 993 NYS2d 73 [2d Dept 2014]; *Kramer v Rosenthal*, 224 AD2d 392, 637 NYS2d 772 [2d Dept 1996]). Summary judgment is inappropriate in a medical malpractice action where the parties present conflicting opinions by medical experts (see *Leto v Feld*, 131 AD3d 590, 15 NYS3d 208 [2d Dept 2015]; *Gressman v Stephen-Johnson*, 122 AD3d 904, 998 NYS2d 104 [2d Dept 2014]; *Moray v City of Yonkers*, 95 AD3d 968, 944 NYS2d 210 [2d Dept 2012]).

Southampton Hospital, Dr. Parrinello, Dr. Brancaccio, and Southampton Radiology established a prima facie case of entitlement to summary judgment by demonstrating the absence of a deviation or departure from good and accepted standards of medical practice in the medical treatment they rendered to infant plaintiff (see *Bongiovanni v Cavagnuolo*, *supra*; *Mitchell v Grace Plaza of Great Neck, Inc.*, *supra*; *Faccio v Golub*, *supra*; *Dockery v Sprecher*, 68 AD3d 1043, 891 NYS2d 465 [2d Dept 2009]). In his affidavit, Dr. Naidich states that he reviewed the pleadings, the bill of particulars, radiology records of

Southampton Hospital, the deposition testimony of Dr. Parrinello and Dr. Cusumano, and the affidavit of Dr. Brancaccio. He opines within a reasonable degree of medical and radiological certainty that the medical treatment provided to plaintiff in regards to the allegations surrounding radiological testing and interpretation at all times was in accordance with the accepted standards of care. Dr. Naidich also concludes that the radiology services were not the proximate cause of infant plaintiff's alleged injuries.

Dr. Naidich opines that the radiological studies requested by Dr. Cusumano were performed in a timely manner by hospital staff and that Dr. Parrinello timely reviewed and reported upon the images of J.T.M.'s brain. In addition, a copy of Dr. Parrinello's report was timely provided to Dr. Cusumano via facsimile on September 14, 2008, which documented all appropriate data regarding the radiological study. Dr. Naidich also opines that the medical records clearly identify the patient and his history, as well as the results of the study. Dr. Naidich further states that the radiological studies performed were of diagnostic quality and that the asymmetric body positioning of J.T.M. is common in pediatric studies and within accepted standards.

In addition, Dr. Naidich opines that Dr. Parrinello's impressions of the September 12, 2008 CT-scan were accurate. As J.T.M.'s head was tilted within the scanner, the serial axial images show asymmetry of the intracranial structures. In addition, there are no changes or signs visible or suggestive of an arachnoid cyst. Dr. Naidich explains that arachnoid cysts, which do not communicate with the ventricular system, are "relatively common benign and asymptomatic lesions occurring in association with the arachnoid matters of the nervous system, both within the intracranial compartment (most common) as well as within the spinal canal. They contain cerebrospinal fluid and show the density of normal spinal fluid." Arachnoid cysts are characterized by sharp, nonenhancing borders on CT-scans, which were not present in J.T.M.'s case. Dr. Naidich states that the CT-scan did not show "any mass effect displacing adjacent structures within the intracranial compartment or remodeling of the bony structures of the cranium which could also be indicative of a cystic abnormality." Dr. Naidich opines that there was insufficient evidence to diagnose an arachnoid cyst or to recommend surgery at the time of the CT-scan.

Finally, Dr. Naidich states that, based upon his review of the radiological images, there was no indication for the hospital or radiologists to follow up with J.T.M. Dr. Parrinello appropriately made recommendations to Dr. Cusumano, including "specific correlation with head circumference due to the diagnosis of benign external hydrocephalus" and clinical surveillance to follow J.T.M.'s benign external hydrocephalus. In addition, he states it was not warranted for Dr. Parrinello to recommend consultation with a specialist or additional studies based on his findings. Dr. Naidich also explains that it was not the role of the radiologist to order consultations with a specialist. According to Dr. Naidich, hospital staff completed only the study ordered pursuant to the patient's treating physician, and it was J.T.M.'s general practitioners' duty to determine the etiology of and decide to act upon his signs, symptoms, and complaints, including consultation with a specialist, further testing, and surgical intervention. He states "a head circumference measurement around the widest part of the head" is conducted in a clinical setting with a tape measure, and is not measured radiographically. Dr. Naidich also states that radiologists do not diagnose macrocephaly. Therefore, he asserts that Southampton Hospital, Dr. Parrinello, Dr. Brancaccio, and Southampton Radiology did not delay the opportunity for proper diagnosis.

McSweeney v Parrinello
Index No. 11-23997
Page 7

In his affidavit, Dr. Brancaccio states that the September 12, 2008 CT-scan film was reviewed and interpreted by Dr. Parrinello. He explains that his signature also appears on the report, because it was the procedure to have a member of the professional corporation sign the reports of incoming employees. Dr. Brancaccio also states that he did not participate clinically in the CT-scan study or read, review, interpret, or report on the CT-scan (*see Harrington v Neurological Inst. of Columbia Presbyt. Med. Ctr.*, 254 AD2d 129, 679 NYS2d 17 [1st Dept 1998]; *Tranchina v Davison*, 253 AD2d 872, 678 NYS2d 355 [2d Dept 1998]; *Meggison v Rose*, 121 AD2d 608, 503 NYS2d 641 [2d Dept 1986]; *Lucas v Long Is. Physicians Assoc.*, 103 AD2d 841, 478 NYS2d 357 [2d Dept 1984]).

Southampton Hospital, Dr. Parrinello, Dr. Brancaccio, and Southampton Radiology having met their initial burden on the motion, the burden shifts to plaintiffs to raise a triable issue of fact (*see Williams v Bayley Seton Hosp.*, *supra*; *Makinen v Torelli*, *supra*; *Stukas v Streiter*, *supra*). In his affirmation, Dr. Silvers states that he reviewed the September 12, 2008 CT-scan images; Dr. Parrinello's report; a patient questionnaire from Southampton Hospital; the March 11, 2010 brain magnetic resonance imaging ("MRI") examination conducted at Stony Brook University Hospital; the June 15, 2010 and December 11, 2010 brain MRI examinations conducted at New York University Medical Center; Dr. Parrinello's deposition testimony; and Dr. Brancaccio's affidavit. Dr. Silvers opines within a reasonable degree of medical certainty that defendants departed from good and accepted standards of radiological practice by failing to detect, suspect, or report radiological evidence of an "extra-axial collection." Dr. Silvers also concludes that the departure was a substantial factor in causing a delay in diagnosing and treating the arachnoid cyst, which was later discovered after causing significant and permanent brain damage to J.T.M.

Dr. Silvers explains that hydrocephaly, or "water on the brain," is a "potentially dangerous condition wherein excessive amounts of cerebrospinal fluid build-up inside the cavities within the brain known as ventricles, creating undue pressure which may damage brain tissue." External hydrocephaly is a condition where there is macrocephaly, but very little or no unusual fluid build-up in the ventricles. Instead, there is excessive subarachnoid space (between the dura matter under the skull and brain tissue), which is filled with cerebrospinal fluid. Dr. Silvers states that there was evidence of an arachnoid cyst in J.T.M.'s right medial cranial fossa on the September 12, 2008 CT-scan. Dr. Silvers disagrees with Dr. Parrinello's explanation that "streak artifact" created a disparity in color on the CT-scan images. Dr. Silvers also disagrees with Dr. Naidich in that there was a "discernible collection of fluid, characterized by a relatively circumscribed area surrounded by brain matter within the fossa—which is indicative of an arachnoid cyst." Finally, regardless of the explanations offered by Dr. Parrinello and Dr. Brancaccio, Dr. Silvers opines that Dr. Brancaccio's electronic signature on the CT-scan report indicates that he participated in the interpretation and reporting of the study. Dr. Silvers' opinions are sufficient to raise triable issues of fact (*see Alvarez v Prospect Hosp.*, *supra*).

Accordingly, the motions by defendants for summary judgment are denied.

Dated: April 26, 2018



HON. JOSEPH C. PASTORELLA, J.S.C.