

<b>Cooney v Medical One N.Y., P.C.</b>
2018 NY Slip Op 31135(U)
June 6, 2018
Supreme Court, New York County
Docket Number: 151009/14
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK, IAS PART 11

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CAROLE COONEY,

INDEX NO. 151009/14

Plaintiffs

-against-

MEDICAL ONE NEW YORK, P.C., ARISDOV  
MEDICAL, P.C., VARUZHAN DOVLATYLAN, M.D.,  
and ROSE MARIE PHILLIP, M.D.,

Defendants.  
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JOAN A. MADDEN, J.:

Plaintiff Carol Cooney (“plaintiff” or “Ms. Cooney”) moves pursuant to CPLR 2221(d) for an order granting leave to reargue the court’s decision and order dated October 26, 2017 (“the original decision”), to the extent it granted the motion for summary judgment by defendant Rose Marie Phillip, M.D. (“Dr Phillip”) dismissing the medical malpractice claim against her and, upon reargument, denying that part of Dr. Phillip’s motion.<sup>1</sup>

Background

This action, which sounds in medical malpractice and lack of informed consent, arises out of the administration of an epidural steroid injection to plaintiff by defendant Dr. Varuzhan Dovlatyan (“Dr. Dovlatyan”) on August 31, 2013, at the offices of defendant Medical One New York, P.C. (“Medical One”). Dr. Dovlatyan and Dr. Phillip are licensed anesthesiologists and co-owners of Medical One and defendant Arisdov Medical, P.C., which are office-based surgical facilities.

Plaintiff alleges that she suffered spinal nerve damage as a result of Dr. Dovlatyan’s

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<sup>1</sup>In the original decision the court also dismissed the claim against Dr. Phillip for lack of informed consent; however, the dismissal of this claim is not at issue on this motion.

improper administration of the injection, and his failure to diagnose the injury and to timely seek emergency medical treatment after the injection. With respect to Dr. Phillip, plaintiff alleges that Dr. Phillip departed from accepted medical practice by failing to diagnose the injury to plaintiff's spinal cord, and by failing to timely take her to the hospital.

Dr. Phillip moved for summary judgment dismissing the complaint against her, arguing that there was no physician-patient relationship between her and the plaintiff, and that in the absence of such a relationship, she owes no legal duty to plaintiff, citing *inter alia*, Sawh v. Schoen, 215 AD2d 291 (1<sup>st</sup> Dept 1995). Dr. Phillip further argued that even if she owed a duty to plaintiff, she cannot be held liable for malpractice as she acted in accordance with accepted standards of medical practice, and there is no evidence that any act or omission by her was a substantial factor in causing plaintiff's injuries.

Plaintiff opposed the motion, arguing, *inter alia*, that, at the very least, the record raises triable issues of fact as to whether Dr. Phillip owed a duty to plaintiff based on evidence that Dr. Phillip took an active role in her care and treatment following the injection and, in particular, in connection with the decision to wait approximately seven hours after the injection was administered to take plaintiff to the hospital. Plaintiff also argued that by waiting seven hours to bring plaintiff to the hospital, Dr. Phillip departed from accepted standards of medical care, and that such departure was a substantial factor in causing or contributing to Ms. Cooney's injuries.<sup>2</sup>

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<sup>2</sup>Alternatively, plaintiff argued that even in the absence of a physician -patient relationship, Dr. Phillip may nonetheless be liable to her under the doctrine of agency by estoppel and a theory vicarious liability, citing, *inter alia*, Hill v. St Claire's Hosp., 67 NY2d 72 (1986). The court rejected this argument, finding that record was devoid of evidence that Dr. Phillip actually exercised control over Dr. Dovlatyan, or that would otherwise provide a basis for plaintiff to reasonably believe that Dr. Phillip exercised such control.

In the original decision the court found that the record raised triable issues of fact as to whether there was a physician-patient relationship between Dr. Phillip and Ms. Cooney based on evidence of that Dr. Dovlatyan consulted with, and/or sought the advice from Dr. Phillip regarding Ms. Cooney's condition and when she should be taken to the hospital. Specifically, the court found that:

the record raises triable issues of fact as to whether there is a physician-patient [relationship] between Dr. Phillip and plaintiff based on evidence of that Dr. Dovlatyan consulted with, and/or sought the advice from, Dr. Phillip regarding Ms. Cooney's condition and when she should be taken to the hospital.<sup>3</sup> In this connection, the record shows that Dr. Dovlatyan called Dr. Phillip, who, as noted above along with Dr. Dovlatyan, is trained as an anesthesiologist, to come to the Medical One office. According to Dr. Dovlatyan, when Dr. Phillip arrived, "[he] explained the situation and asked her opinion." The record also shows that in the recovery room, Dr. Dovlatyan requested that Ms. Cooney move her arms and Dr. Phillip observed that Ms. Cooney's arms were weak. Moreover, while Dr. Phillip testified that she "had no thoughts" as to whether Ms. Cooney should go to the hospital, Dr. Dovlatyan testified that he, along with Dr. Phillip, decided as to when plaintiff should go to the hospital, and that while it was his decision, Dr. Phillip "approved it." Based on these facts, an inference can be drawn that a physician-patient relationship existed between Dr. Phillip and plaintiff.

Original Decision at 11-12.

The court, however, granted summary judgment to Dr. Phillip, based on its finding that plaintiff did not controvert Dr. Phillip's prima facie showing that any delay flowing from Dr.

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<sup>3</sup>The court notes that contrary to plaintiff's argument, evidence of Ms. Cooney's non-medical interactions with Dr. Phillip do not provide a basis for inferring a physician-patient relationship. See e.g. *Garofalo v. State*, 17 AD3d 1109 (4<sup>th</sup> Dept), *lv denied* 5 NY3d 707 (2005)(rejecting plaintiff's argument that a physician-patient relationship was created when a resident at the clinic directed that a letter be sent to claimant, scheduling her for an appointment on a nonemergency basis).

Phillip's consultation as to when to bring plaintiff to the hospital was not a substantial factor in causing or exacerbating plaintiff's injuries. Dr. Phillip's showing with respect to the lack of causation was based on the opinion of her expert, Dr. Christopher Ghribo, that any delay in bringing plaintiff to the hospital did not result in injuries to plaintiff since the MRI taken at the hospital showed that no surgical intervention was warranted, and that steroids were administered by Dr. Dovlatyan at Medical One before plaintiff was taken to the hospital. Thus, he opined that "it is without question that remaining at the Office of Medical One from the time the epidural steroid was given until plaintiff was brought to [the hospital] did not deprive the plaintiff of any type of medical intervention that would have affected her ultimate outcome" (Ghribo Aff. ¶ 23).

In opposition, plaintiff submitted the affidavit of Dr Alexander Weingarten who opined, with respect to causation, that "[h]ad intervention been taken hours earlier, the extent of damages to [plaintiff] could have been minimized" (Id ¶ 47). In support of this opinion, he noted that at the hospital, an MRI of the cervical spine was performed which found, *inter alia*, "an acute hematoma on the right side of the spinal cord at C2-T1<sup>4</sup>, with 'predominantly hypointense'<sup>5</sup> fluid collection... the same fluid that appeared predominantly isointense<sup>6</sup> on T1 weighted images. A small amount of fluid 'probably the medication injected at the time of the procedure' - appeared hypointense on T1 weighted images.... There was also some enlargement on the right side of the spinal cord at the C2-T1 level" (Id ¶ 46). He then concluded that had plaintiff "been taken to the hospital sooner and received care earlier, the findings on the MRI would not have been as

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<sup>4</sup>C2 is the second neck/cervical vertebra and T1 is first chest/thoracic vertebra.

<sup>5</sup> Hypointense describes an abnormality that is dark on the MRI.

<sup>6</sup> Isointense refers to an abnormality that has the same intensity to a referenced structure.

extensive and her recovery would have been hastened” (Id ¶ 47). He also stated that on November 9, 2013, an EMG/nerve conduction study<sup>7</sup> was done, which found severe cervical root injury affecting C7-T1 roots, ‘with more severed C8-T1 involvement suspected. Prognosis for recovery is relatively poor given the degree axonal injury evinced” (Id ¶ 48). Notably, however, Weingarten failed to explain what measures could have been taken to limit plaintiff’s injuries if she were brought to the hospital sooner.

Thus, in the original decision, the court found that Dr. Weingarten’s opinion as to causation was insufficient to raise an issue of fact in this regard. Specifically, the court wrote:

[W]hile plaintiff’s expert opines that Dr. Phillip deviated from accepted practices of medical care when she failed to administer emergency care to plaintiff for seven hours after the injection, the court notes that the record shows that any consultation that Dr. Phillip had with Dr. Dovlaytan regarding plaintiff’s condition occurred well after the injection, and based on the record, approximately one and a half hours before plaintiff was taken to the hospital. As for causation, plaintiff’s expert fails to adequately establish that any delay arising from any advice given by Dr. Phillip as to when to bring plaintiff to the hospital was a proximate cause of plaintiff’s injuries or their exacerbation. While plaintiff’s expert relies on the MRI results to support his opinion that plaintiff’s injuries would not have been as extensive and her recovery would have been hastened if there had not been a seven hour delay in her emergency care at the hospital, the expert fails to specify a nexus between plaintiff’s injuries and any delay flowing from Dr. Phillip’s alleged consultation, which according to the record occurred approximately one and a half hours before plaintiff was taken to the hospital.

Original Decision at 14-15.

#### Plaintiff’s Motion

Plaintiff now moves for reargument, asserting that the court erred in finding that the

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<sup>7</sup>A EMG/nerve conduction study is an electrical test of the nerves and muscles, intended to localize where the symptoms are coming from.

“physician-patient relationship did not come into existence until approximately 5:00 pm, i.e. approximately one and a half hours before plaintiff was finally taken to the hospital.” Plaintiff further argues that if the court “determined that sufficient evidence existed to allow the trier of fact to conclude the a physician-patient relationship existed between Dr. Phillip and plaintiff at 5:00 pm, there is no reason to conclude that it did not exist sooner.” Moreover, with respect to the existence of a physician-plaintiff relationship, plaintiff argues that because she was in and out of consciousness between the time the record shows that Dr. Phillip came to the office where the procedure was performed (i.e. 11:30 am), it is appropriate to afford here additional leeway for providing proof the physician-patient relationship pursuant to Noseworthy v. City of New York, 298 NY 76 (1948).

Dr. Phillip opposes the motion, asserting that plaintiff misconstrued the original decision which found an issue of fact as to the existence of a physician-patient relationship, and granted summary judgment based on the absence of causation between any malpractice committed by Dr. Phillip and plaintiff’s alleged injuries.

A motion for reargument is addressed to the discretion of the court, and is intended to give a party an opportunity to demonstrate that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law. Foley v Roche, 68 AD2d 558, 567 (1st Dept 1979). However, “[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided.” William P. Pahl Equipment Corp. v. Kassis, 182 AD2d 22, appeal denied in part dismissed in part 80 NY2d 1005 (1992).

Under this standard, the court grants reargument and, upon reargument, deletes characterizations of the timing of Dr. Phillip’s consultations as occurring approximately one and

a half hours before plaintiff went to the hospital, but adheres to the original decision granting summary judgment in favor of Dr. Phillip. As a preliminary matter, contrary to plaintiff's position, the original decision found that the record raised an issue of fact as to the whether there was a physician-patient relationship between Dr. Phillip and plaintiff and did not limit that relationship to the events occurring after 5:00 pm. Instead, the court found that evidence that Dr. Dovlatyan consulted with and/or sought advice from Dr. Phillip regarding plaintiff's condition and whether plaintiff should be brought to the hospital gave rise to issues of fact as the existence of a physician-patient relationship between Dr. Phillip and plaintiff. Thus, contrary to plaintiff's argument, the absence of a physician-patient relationship, or any time limit on such relationship, was not the basis for the court's dismissal of the malpractice claim against Dr. Phillip.

Instead, the malpractice claim was dismissed as against Dr. Phillip based on plaintiff's failure to controvert Dr. Phillip's showing that any departure by Dr. Phillip was not a substantial factor in causing plaintiff's injuries. See Dallas-Stephenson v Waisman, 39 AD3d at 307 (1st Dept 2007)(to withstand a summary judgment motion in which evidence is provided a to the lack of proximate cause, a plaintiff's expert "must demonstrate 'the requisite nexus between the malpractice allegedly committed' and the harm suffered"). In this regard, with respect to the lack of causation, the court found that plaintiff's expert failed to explain how the injuries shown on the MRI were caused or exacerbated by any alleged departure by Dr. Phillip, including her consultation as to when to take plaintiff to the hospital. As stated above, the original decision noted that "[w]hile plaintiff's expert relies on the MRI results to support his opinion that plaintiff's injuries would not have been as extensive and her recovery would have been hastened if there had not been a seven hour delay in her emergency care at the hospital, the expert fails to

specify a nexus between plaintiff's injuries and any delay flowing from Dr. Phillip's alleged consultation..." In other words, plaintiff's expert failed to substantiate his opinion as to the harm caused by the purported delay in taking plaintiff to the hospital with any explanation as to how the result would have been different had plaintiff been brought to the hospital sooner, including what additional treatment would have been given to plaintiff that would have reduced or eliminated her injuries.

That said, however, as indicated above, upon reconsideration, the statements in the original decision that any consultation Dr. Phillip had with Dr. Dovlaytan occurred approximately one and a half hours before plaintiff was taken to the hospital,<sup>8</sup> are deleted as the record is unclear in this regard. Moreover, insofar as the original decision implied that the basis for finding a lack of causation was the one and a half hour period between Dr. Phillip's consultation and plaintiff's arrival at the hospital, the court clarifies that this characterization of the timing of the Dr. Phillip's consultation was not necessary to the court's determination that plaintiff failed to controvert Dr. Phillip's showing of lack of causation.

Accordingly, the motion for reargument is granted and, upon reargument, the court deletes that part of the decision stating that any consultation that Dr. Phillip had with Dr. Dovlaytan regarding plaintiff's condition occurred approximately one and a half hours before plaintiff was taken to the hospital; however, the court adheres to its decision granting Dr. Phillip summary judgment.

### Conclusion

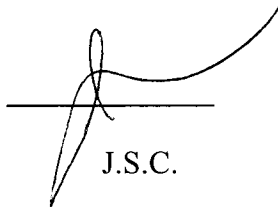
In view above, it is

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<sup>8</sup>See Original Decision at 14-15.

ORDERED that plaintiff's motion for reargument is granted and, upon reargument, the court deletes that part of the decision stating that any consultation that Dr. Phillip had with Dr. Dovlaytan regarding plaintiff's condition occurred approximately one and a half hours before plaintiff was taken to the hospital and adheres to the original decision granting Dr. Phillip's motion for summary judgment.

DATED: June 6, 2018



J.S.C.

**HON. JOAN A. MADDEN  
J.S.C.**