

Williams v Minkowitz Pathology, PC
2018 NY Slip Op 34220(U)
April 10, 2018
Supreme Court, Kings County
Docket Number: Index No. 500002/11
Judge: Gloria M. Dabiri
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At an IAS Term, Part 2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 10th day of April, 2018.

P R E S E N T:

HON. GLORIA M. DABIRI, J.S.C.,

Justice.

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EUGENIA BAILEY WILLIAMS AND KERMIT L. WILLIAMS,

Index No. 500002/11

Plaintiffs,

- against -

MINKOWITZ PATHOLOGY, PC AND GERALD MINKOWITZ, M.D.,

Defendants.

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The following papers numbered 1 to 5 read on this motion:

<u>Numbered</u>	<u>Papers</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	1 - 2
Opposing Affidavits (Affirmations)_____	3 - 4
Reply Affidavits (Affirmations)_____	5

Upon the foregoing papers, defendants Gerald Minkowitz, M.D. and Minkowitz Pathology, P.C. seek an order dismissing the complaint against them pursuant to CPLR 3212.

BACKGROUND

Plaintiff Eugena Bailey-Williams commenced this action by filing a Summons and Complaint on January 3, 2011. Issue was joined by defendants by serving a verified answer on or about February 24, 2011. The parties' depositions

were held between November 2, 2013 to January 20, 2015 with the plaintiffs filing a Note of Issue on January 28, 2016. Ms. Bailey-Williams' complaint alleges that Dr. Gerald Minkowitz ("Dr. Minkowitz") and Minkowitz Pathology P.C. misdiagnosed her with thyroid cancer which resulted in, *inter alia*, an unnecessary thyroidectomy,¹ nerve damage, hypothyroidism, scarring of her neck, damage to her 'singing voice' and loss of services and consortium for her husband, Kermit K. Williams.

On or about July 20, 2010 Ms. Bailey-Williams commenced treatment with, non-party, Dr. Larry J. Shemen, an otolaryngology surgeon, to address thyroid nodules which were detected in a June 24, 2010 ultrasound. Dr. Shemen referred Ms. Bailey-Williams to Dr. Minkowitz, a pathologist, for a thyroid biopsy. On August 27, 2010 Ms. Bailey-Williams presented to Dr. Minkowitz who, upon conducting a physical examination and obtaining Ms. Bailey-Williams' medical history, performed a Fine-Needle Aspiration thyroid biopsy (FNA).² Dr. Minkotwitz obtained two samples, conducted a microscopic review of the samples and detailed his findings in a pathology report. Dr. Minkowitz's two-page report states that his cytological evaluation revealed an abnormal tissue growth known as a as a thyroid neoplasm³. Dr. Minkowitz's report states that the FNA biopsy was "positive for malignant cells." However, the report contained a differential diagnosis of medullary carcinoma⁴ and follicular lesion with hurthle cell⁵ features. Dr. Minkowitz's report recommended that blood tests including CEA⁶ and Calcitonin⁷ be performed to rule out medullary carcinoma. Dr. Minkowitz

¹ A thyroidectomy is removal of the thyroid gland by surgery.

² A FNA biopsy is a procedure used to detect cancer in a thyroid nodule.

³ A thyroid neoplasm is a tumor of the thyroid. It can be benign or malignant.

⁴ Medullary carcinoma of the thyroid is cancer of the thyroid gland that starts in cells that release a hormone called calcitonin. These cells are called "C" cells.

⁵ A hurtle cell is a type of cell in the thyroid that is often associated with benign and malignant tumors.

⁶ A CEA test measures the levels of a protein called carcinoembryonic antigen in the blood. A CEA blood test is used to detect certain forms of cancer.

⁷ Calcitonin is a hormone produced by special cells in the thyroid called C-cells.

reported his findings to Dr. Shemen on or about August 30, 2010. Based on the report, Ms. Bailey-Williams underwent a total thyroidectomy on October 5, 2010. Pathology reports from the removed thyroid revealed follicular adenoma, a benign neoplasm with no signs of thyroid cancer.

THE PARTIES' CONTENTIONS

Dr. Minkowitz contends that he did not depart from the standard of care in his interpretation and reporting of plaintiff's FNA thyroid biopsy. In support of his motion Dr. Minkowitz relies upon his affidavit and the deposition transcripts of the parties. Dr. Minkowitz is licensed to practice medicine in New York and a board certified anatomic and clinical pathologist with a sub-certification in cytopathology. Dr. Minkowitz opines that his review of the FNA samples was appropriately conducted and that his finding of a thyroid neoplasm comports with the standard of pathological care. As Dr. Minkowitz explains thyroid neoplasms are a "heterogenous group of both benign and malignant tumors." Dr. Minkowitz opines that his differential diagnosis of a medullary carcinoma and a follicular lesion⁸ with hurthle cell features was correct as the only way to definitely determine whether Ms. Bailey-Williams had thyroid cancer was to "remove the thyroid and carefully evaluate [for] the presence of thyroid cells invading a blood vessel or the tumor capsule." Dr. Minkowitz contends that his recommendation of additional blood tests to rule out medullary carcinoma was also proper. He emphasizes that the fact that Ms. Bailey-Williams did not ultimately have cancer does not render his diagnosis inaccurate or improper and that the decision to perform a thyroidectomy was ultimately that of Dr. Shemen, Ms. Bailey-Williams' referring physician. Dr. Minkowitz avers that the presentation of a follicular lesion with hurthle cells, as Dr. Sheman testified, would include treatment options of "hemi thyroidectomy" or a "total thyroidectomy."

⁸ Dr. Minkowitz explains that a follicular lesion is not necessarily a diagnosis of malignancy but of a potential cancer as such lesions may be benign or malignant.

Plaintiffs, in opposition, asserts that issues of fact preclude granting Dr. Minkowitz summary judgment. In support of their opposition, the plaintiffs provide the affirmation of Dr. David Y. Zhang, a physician licensed to practice medicine in the State of New York and the Director of Molecular Pathology at Mount Sinai Medical Center. Dr. Zhang avers that based upon his review of Ms. Bailey-Williams medical records, the parties deposition transcripts, Dr. Minkowitz's report and the pathology slides from Ms. Bailey-Williams' FNA biopsy, Dr. Minkowitz's "positive for malignant cells" diagnosis constitutes a misdiagnosis. Dr. Zhang opines that though the cells Dr. Minkowitz examined were "suspicious, the diagnosis of 'positive for malignant cells' is an overstatement." Dr. Minkowitz avers that had Dr. Minkowitz's report been limited to the diagnosis of follicular lesions Ms. Bailey-Williams would have had more treatment options available to her such as a partial thyroidectomy or a lobectomy⁹.

The defendants, in reply, assert that Dr. Yang overemphasizes the "positive for malignant cells" findings on the report and deemphasizes the differential diagnosis that was ultimately reached. The defendants point to Dr. Shemen's deposition testimony in which he established that a total thyroidectomy was the best treatment for Ms. Bailey-Williams in view of her family history of thyroid cancer, her pre-existing complaints of hoarseness and the fact that a follicular adenoma could develop into follicular carcinoma in the future. As such the defendants argue there is no proximate causal relationship between Dr. Minkowitz's biopsy results and Ms. Bailey-Williams alleged injuries.

ANALYSIS

A defendant seeking summary judgment in a medical malpractice action bears the initial burden of establishing, *prima facie*, either that there was no

⁹ A thyroid lobectomy is where one nodule of the thyroid is removed.

departure from the applicable standard of care, or that any alleged departure did not proximately cause the plaintiff's injuries. In opposition, the plaintiff must demonstrate the existence of a triable issue of fact as to the elements with respect to which the defendant has met its initial burden (*see DeLaurentis v Orange Regional Med. Ctr.-Horton Campus*, 117 AD3d 774, 775 [2014]; *Rivers v Birnbaum*, 102 AD3d 43 [2012]).

Here, Dr. Minkowitz established his *prima facie* entitlement to judgment as a matter of law by submitting evidence demonstrating that he did not depart from the applicable standard of care in performing plaintiff's FNA thyroid biopsy, in reviewing the biopsy samples, and in the findings he reported to Dr. Shemen. Dr. Minkowitz affirms that a differential diagnosis of medullary carcinoma¹⁰ and follicular lesion with hurthle cell features was within the accepted standard of care as follicular lesions that are benign or malignant appear identical in a cytological presentation and that the only way to definitively determine if lesions are malignant is to perform a thyroidectomy and evaluate the presence of thyroid cells. Dr. Minkowitz opines that his recommendation of additional blood tests including CEA and calcitonin to rule out medullary carcinoma were within the standard of care and that the decision to perform a thyroidectomy was ultimately that of the referring physician, co-defendant, Dr. Shemen.

A defendant moving for summary judgment in a medical malpractice action must make a *prima facie* showing of entitlement to judgment as a matter of law by showing "that in treating the plaintiff there was no departure from good and accepted medical practice *or* that any departure was not the proximate cause of the injuries alleged." *Roques v Noble*, 73 AD3d 204, 206 [*Roques v. Noble*, 73 A.D.3d 204, 206, 899 N.Y.S.2d 193 (1st Dept 2010)]. To satisfy the burden, a

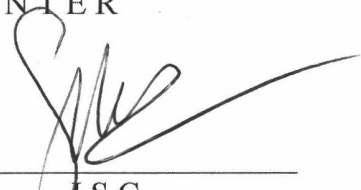
¹⁰ Medullary carcinoma of the thyroid is cancer of the thyroid gland that starts in cells that release a hormone called calcitonin. These cells are called "C" cells.

defendant in a medical malpractice action must present expert opinion testimony that is supported by the facts in the record and addresses the essential allegations in the bill of particulars (*Id.*). If the movant makes a *prima facie* showing in a medical malpractice action, the plaintiff's failure to offer expert testimony will result in an order granting summary judgment [*DeCintio v. Lawrence Hosp.*, 299 AD2d 165, 165-66 (1st Dept 2002)].

In opposition, the plaintiffs provide the affirmation of Dr. Yang who rebuts the defendant's *prima facie* showing with respect to the elements of departure and proximate cause. Dr. Yang opines that Dr. Minkowitz departed from the accepted standard of care when he reported a finding of "positive malignant cells." Dr. Yang avers that his review of Ms. Bailey-Williams FNA biopsy samples did not reveal any malignant cells. Dr. Yang opines that Dr. Minkowitz' differential diagnosis, absent the "positive malignant cells" finding, would have allowed the plaintiff to undergo less drastic treatment as opposed to a partial thyroidectomy and a lobectomy. Thus, Dr. Yang raises triable issues of fact as to whether Dr. Minkowitz's finding of "positive malignant cells" was inaccurate and as to whether, the standard of care required that the plaintiff undergo a total thyroidectomy absent such a finding. Accordingly, it is

ORDERED that defendant's motion for summary judgment is denied.

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