

Grant v Dharmasena
2021 NY Slip Op 30718(U)
February 25, 2021
Supreme Court, Kings County
Docket Number: 12649/2015
Judge: Bernard J. Graham
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

NATALIE J. GRANT and THOMAS NICOLAZZI,
Co-Administrators of the Estate of FRANK NICOLAZZI,
Deceased,

Index No.: 12649/2015

Plaintiffs,

DECISION/ORDER

-against-

DEWANNAHALAGE SANATH DHARMASENA, M.D.,
MARIE MONTESTAYAG, M.D., ALEXY ISAKOV, M.D.,
NEW YORK COMMUNITY HOSPITAL,
ALAN BERLLY., M.D., HIGHWAY IMAGING
ASSOCIATES, LLP and HIGHWAY RADIOLOGY
ASSOCIATES, LLP,

Hon. Bernard J. Graham
Supreme Court Justice

Defendants.

**Recitation, as required by CPLR 2219(a), of the papers considered on the review of
this motion to: award summary judgment to the defendants, pursuant to CPLR sec. 3212.**

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1-2
Order to Show cause and Affidavits Annexed.....	_____
Answering Affidavits.....	3
Replying Affidavits.....	4
Exhibits.....	_____
Other: (memo).....	_____

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

Defendants, Alan Berlly, M.D., (“Dr. Berlly”), Highway Imaging Associates, LLP (“Highway Imaging”), and Highway Radiology Associates, LLP (“Highway Radiology”) have moved (seq.11), pursuant to CPLR § 3212, for an Order awarding summary judgment and a dismissal of plaintiff’s complaint upon the grounds that they were neither negligent nor departed from accepted medical practice, and that any alleged departure

was not the proximate cause of the alleged injuries of Frank Nicolazzi (“decedent”) and his subsequent death.

Counsel for the plaintiff has opposed defendants’ motion for summary judgment and a dismissal of plaintiff’s complaint upon the grounds that there are material issues of fact with regard to the causes of action that have been pled by the plaintiff, as against these defendants, for negligence, and medical malpractice and whether the departure from good and accepted practice through their alleged acts and omissions was a proximate cause of the decedent’s injuries and subsequent death.

Background:

The within action sounding in medical and nursing malpractice was commenced on behalf of the plaintiff by the filing of a summons and complaint with the Clerk of this Court, on or about June 16, 2017. Thereafter, a Supplemental Summons and Amended Verified Complaint was filed on or about August 1, 2017. Issue was joined by the service of the verified answer of co-defendants Dr. Berlly and Highway Imaging on August 22, 2017 and Highway Radiology on November 3, 2017.

On February 9, 2018, pursuant to an order of Judge Dabiri, two related cases were consolidated under the current index number.

The plaintiff alleges that the defendants failed to properly diagnose and treat decedent’s brain condition during his hospitalization at New York Community Hospital (“Community Hospital”) on January 28, 2015. It is further alleged that the defendants failed to timely refer, order and perform diagnostic tests and studies; allowed the decedent to be discharged without a radiological reading; failed to timely diagnose an early stroke, etc.

A deposition was conducted of the two administrators, Natalie J. Grant and Thomas Nicolazzi. In addition, EBT’s were conducted of defendants Dr. Sanath Dharmasena (“Dr. Dharmasena”), Alexey Isakov, M.D., (“Dr. Isakov”), Vexcelia Samuel, R.N., and Cresenciano A. Leonardo, R.N., on behalf of Community Hospital, Dr. Berlly,

as well as David Rosenthal, M.D. (“Dr. Rosenthal”), on behalf of Highway Radiology/Imaging.

On February 1, 2016, as per stipulation, the action against New York Presbyterian Healthcare System, Inc. was discontinued.

A Note of Issue and Certificate of Readiness was filed on behalf of the plaintiff on or about November 19, 2018.

Facts:

The relevant medical history for the decedent is as follows. The decedent, who was 41 years old, was admitted to Community Hospital on January 28, 2015 at approximately 5:24 P.M., as he was experiencing dizzy spells, intermittent right upper limb numbness and paresthesia. Dr. Dharmasena, the Emergency Room physician, ordered that decedent undergo basic lab work, as well as an EKG, a urinalysis, and a CT scan.

Dr. Rosenthal reviewed the head CT without contrast¹. Dr. Rosenthal noted that while there was not acute hemorrhage or infarction, there was a questionable hypodense focus in the left parietal region. The doctor recommended a follow-up with an MRI of the brain. Dr. Berlly also reviewed the CT scan and issued a similar report to that of Dr. Rosenthal. Dr. Berlly stated that an MRI would be useful to determine whether there was a true lesion of abnormal density (see Dr. Berlly EBT, annexed to Plaintiff’s Opposition as Exhibit “D”, p. 50). Thereafter, Dr. Dharmasena discharged the decedent from the hospital that same evening (January 28th at approximately 10:01 P.M.), pursuant to the advice of Dr. Isakov², (see Dr. Dharmasena EBT, annexed to Plaintiff’s Opposition as Exhibit “E”, p. 147) prescribed Mezcaline and advised the decedent to follow-up with Dr. Isakov.

Three days later (January 31), the decedent was brought to Community Hospital after he was found “confused and lethargic on the street” (see EBT of Dr. Dharmasena,

¹ Dr. Rosenthal and Dr. Berlly were partners of Highway Radiology and pursuant to a contract with Community Hospital performed diagnostic radiology services (see Dr. Berlly EBT, annexed to Plaintiff’s Opposition as Exhibit “D”, p. 7-8).

² Dr. Isakov was the on-call attending physician at Community Hospital.

annexed to Plaintiff's Opposition as Exhibit "E", p. 39-40 and Triage notes of January 31st). Upon admission, Dr. Dharmasena noted that the decedent was lethargic, dehydrated and suffering from hyperglycemia, as well as from acute diabetic ketoacidosis without coma, diabetic mellitus, leukocytosis, and sepsis syndrome. The decedent was admitted to the ICU to treat the acute diabetic ketoacidosis. A CT scan of the decedent's head indicated that he had sustained a stroke to the left side of his brain. The following day, the decedent was noted to have an altered mental state. The decedent then underwent a head CT without contrast and the findings indicated that the hypodensity in the parietal lobe had progressed to include other areas and now included the left temporal, left frontal and parietal lobes.

There were multiple CT scans of the head taken between February 1 and February 3, 2015, the results of which demonstrated an evolving left MCA infarct.

On February 4th, the decedent was transferred to Methodist Hospital where he passed away the following day.

Parties' Contentions:

Here, the Court is presented with the issue as to whether a question of fact exists with respect to the alleged negligence of Dr. Berlly, Highway Imaging, and Highway Radiology, and if they deviated from the standard of medical care in the diagnosis of the decedent's stroke.

In support of the motion for summary judgment by defendant Dr. Berlly, Highway Imaging, and Highway Radiology, counsel offers the affirmation of Adam Silvers, M.D. ("Dr. Silvers"), who opines that Dr. Berlly did not depart from good and accepted medical practice, and none of his alleged acts or omissions caused or contributed to the decedent's death.

Plaintiff, by her attorneys, opposes the defendants' motion for summary judgment, arguing that the defendants committed specific acts of malpractice in the treatment of the decedent, such as failing to timely and properly communicate radiological findings to the

ordering physician, which plaintiff claims caused and/or contributed to the failure to diagnose ischemia to the decedent's brain, which led to a stroke that resulted in his death.

Discussion:

A defendant moving for summary judgment in a case sounding in medical malpractice “must make a prima facie showing either that there was no departure from accepted medical practice, or that any departure was not a proximate cause of the plaintiff's injuries.” Guctas v Pessolano, 132 AD3d 632, 633 [2d Dept 2015], quoting Matos v Khan, 119 AD3d 909, 910 [2d Dept 2014].

This Court finds that the defendants have presented evidence sufficient to meet this burden, including an expert affirmation. Defendants' expert, Dr. Silvers, opines that Dr. Berlly timely and appropriately interpreted the CT scan of the decedent's head on January 28, 2015, which indicated a questionable hypodense focus in the left parietal region. Dr. Silvers asserts that, based on the results of the CT scan, Dr. Berlly and Dr. Rosenthal's recommendation of a follow-up MRI of the brain was appropriate. Dr. Silvers explains that when a CT demonstrates a questionable hypodense focus in the left parietal region, a follow-up exam with an MRI of the brain is a standard recommendation for further evaluation and is all that is required as per the standard of care. Dr. Silvers argues that Dr. Berlly and Dr. Rosenthal's reliance on the advice and expertise of other physicians, such as the Emergency Department physicians, was proper and in accordance with the standard of care. In addition, Dr. Silvers opines that it was proper for Dr. Berlly and Dr. Rosenthal to limit their treatment to the reading and interpreting of the CT scan and recommendation for a follow-up MRI, and that such a recommendation fulfilled their obligations under the standard of care, as it is the Emergency Room physicians' responsibility to decide whether to proceed with the recommendation or not, and if so, when to perform the testing. Dr. Silvers explains that radiologists read the films with limited information on the patient. Based on Dr. Silvers' examination of the films, he opines that the questionable area of lucency seen in the CT scan on January 28, 2015 was a pre-existing area of prior ischemic change, and that it does not suggest an acute CVA in

the middle cerebral area. Dr. Silvers asserts that the films from the CT scan on January 28th do not illustrate any sign of potential CVA in the middle cerebral area.

Once the movant has made a prima facie showing, the plaintiff must submit evidence in opposition to rebut the movant's prima facie showing. Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Poter v Adams, 104 AD3d 925 [2d Dept 2013]; Stukas v Streiter, 83 AD3d 18 [2d Dept 2011]. The plaintiff must "lay bare her proof and produce evidence, in admissible form, sufficient to raise a triable issue of fact as to the essential elements of a medical malpractice claim, to wit, (1) a deviation or departure from accepted medical practice, [and/or] (2) evidence that such a departure was a proximate cause of injury." Sheridan v Bieniewicz, 7 AD3d 508, 509 [2d Dept 2004]; Gargiulo v Geiss, 40 AD3d 811-812 [2d Dept 2007]. In order to prevail on a claim for medical malpractice, "expert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause." Nicholas v Stammer, 49 AD3d 832-833 [2008].

In opposing the defendants' motion, plaintiff's expert has pointed to several possible departures by Dr. Berlly. Plaintiff's expert disagrees with Dr. Silvers' opinion that the questionable hypodense area noted on the CT scan of January 28, 2015 was a pre-existing ischemic injury, as well as the opinion that there was no relationship between the hypodense area noted on the January 28th CT scan and the evidence of a large ischemic stroke on the February 1st CT scan. Rather, plaintiff's expert asserts that Dr. Berlly did depart from accepted radiological practice by failing to timely, properly, and correctly communicate proper findings on the January 28th CT scan to the ordering physician, thereby failing to prevent the large ischemic stroke that led to the decedent's death. Plaintiff's expert asserts that Dr. Berlly knew the decedent had a history of paresthesia, and as such, the finding of even questionable hypodensity required Dr. Berlly to include the possibility of ischemia in his impression and to communicate to the ordering physician that his findings included possible ischemia. Plaintiff's expert notes that one of the clinical indications for the January 28th CT scan was right upper limb numbness, which Dr. Silvers did not address. Plaintiff's expert states that Dr. Berlly testified in his

deposition that right upper limb numbness would be consistent with a lesion on the left side of the brain. (See EBT of Dr. Berlly, annexed to Plaintiff's Opposition as Exhibit "D"). In addition, plaintiff's expert claims Dr. Silvers does not address that at the time of the January 28th CT scan, the decedent's history included dizziness and paresthesia (which plaintiff claims was a new finding). Plaintiff's expert alleges that Dr. Berlly admitted in his deposition that a hypodensity on the type of CT performed could be an indication of an early infarct, and that an early infarct implies death of cells from ischemia (lack of oxygen). Plaintiff's expert claims that Dr. Berlly testified that if there was a hypodense area that would indicate an abnormal area of attenuation, Dr. Berlly would include early infarct as part of his differential diagnosis. With respect to Dr. Silvers' opinion that the questionable area of lucency in the left parietal lobe does not suggest an acute CVA in the middle cerebral area, plaintiff's expert asserts that the middle CVA occurred not just in the middle cerebral area but in the left middle cerebral artery, and that the region of distribution of the left middle cerebral artery includes the region known as the left parietal lobe. Plaintiff's expert argues that the failure of Dr. Berlly to include ischemia or the possibility of ischemic injury in the CT report was a departure from the standard of care, as ischemia inside a person's brain is a life-threatening condition that must be dealt with on an emergency basis. Plaintiff's expert states that according to Dr. Dharmasena's deposition testimony, Dr. Berlly advised him that "there was no acute pathology other than some sinusitis." (See EBT of Dr. Dharmasena, annexed to Plaintiff's Opposition as Exhibit "E").

In addition, plaintiff asserts that Dr. Berlly was a partner in defendant Highway Radiology³, which contracted with the Hospital to provide diagnostic radiology services. As such, plaintiff claims that Highway Radiology is responsible and liable for the negligence of any of its partners, including Dr. Berlly.

It is well settled that where parties to a medical malpractice action offer conflicting expert opinions on the issue of malpractice and causation, issues of credibility require

³ Dr. Berlly stated in his deposition that he was a partner in Highway Radiology, and he ended his partnership "sometime around 2016" and "physically left" in November of 2015. (See EBT of Dr. Berlly, annexed to Plaintiff's Opposition as Exhibit "D").

resolution by the factfinder (see Loaiza v Lam, 107 AD3d 951, 953 [2013]; Omane v Sambaziotis, 150 AD3d 1126, 1129 [2d Dept. 2017]; Dandrea v Hertz, 23 AD3d 332, 333 [2005]). Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical opinions (see Elmes v Yelon, 140 AD3d 1009, 1011 [2d Dept. 2016], Feinberg v Feit, 23 AD3d 517, 519 [2d Dept. 2005]; Shields v Baktidy, 11 AD3d 671, 672 [2d Dept. 2014]). As such, the defendants' motion for summary judgment dismissing plaintiff's medical malpractice claim is denied.

In reaching that determination, the Court considered the argument of defendants' counsel by their expert that the January 28th CT scan did not indicate any signs of an acute CVA in the middle cerebral area, and that Dr. Berlly's correct interpretation of the CT scan as well as the recommendation for a follow-up with an MRI, was all that was required for his treatment to be in accordance with the standard of care. This argument was refuted by plaintiff through her expert, who asserts that there are issues of fact as to whether: (1) the ischemia to the left parietal lobe was acute (as plaintiff claims) or pre-existing (as defendants claim); (2) the area on the January 28th CT scan was in fact a hypodense area or merely a questionably hypodense area; and (3) the alleged hypodensity in the left parietal lobe progressed to the more extensive hypodensity shown in later CT scans.

In addressing an argument made in defendant's reply with respect to Dr. Rosenthal, the assertion that counsel for Dr. Berlly, Highway Radiology and Highway Imaging is also "moving for Dr. Rosenthal's acts on behalf of Highway Radiology" is the first instance in defendant's papers in which there is any discussion of moving to dismiss any claims against Dr. Rosenthal. As the Court has found there is a question of fact as to the negligence of Highway Radiology, of which Dr. Rosenthal was a partner, that request is denied.

Conclusion:

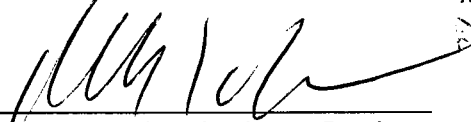
While the defendants have met their burden for establishing a prima facie case for summary judgment, the plaintiff, in opposition, has met their burden to offer admissible

evidence raising a question of fact as to whether the defendants departed from good and accepted medical practice in the diagnosis and treatment of the decedent. The issue of credibility regarding conflicting expert testimony must be submitted to the trier of fact. Accordingly, the motion by the defendants for summary judgment and a dismissal of plaintiffs' complaint, pursuant to CPLR §3212, is denied.

This shall constitute the decision and order of this Court.

Dated: February 25, 2021
Brooklyn, NY

ENTER



Hon. Bernard J. Graham, Justice
Supreme Court, Kings County

HON. BERNARD J. GRAHAM

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