

**McCann v Hundert**

2024 NY Slip Op 34751(U)

October 31, 2024

Supreme Court, Queens County

Docket Number: Index No. 714617/2019

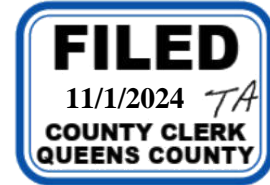
Judge: Tracy Catapano-Fox

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS



-----X  
KATHLEEN McCANN and BRIAN McCANN,

Index No. 714617/2019

Plaintiffs,

Part MDP

Motion Date: October 9, 2024

-against-

Calendar No. 18

Sequence No. 3

MICHAEL L. HUNDERT, MD, MICHAEL L. HUNDERT, MD, PC, RALPH MASTRANGELO, MD, MICHAEL S. HAN, MD, TERESA M. DEANGELIS, MD A/K/A TRACY DEANGELIS, MD, RAMINDER KAUR PARIHAR, MD, NEUROLOGICAL ASSOCIATES OF LONG ISLAND, P.C., TOUFIC KASSEM SAFA, MD, AAA VASCULAR CARE, PLLC, CRAIG HARVEY SHERMAN, MD, CRAIG H. SHERMAN, MD, PC, DANIEL S. LERNER, MD, ST. FRANCIS HOSPITAL AND CATHOLIC HEALTH SYSTEM OF LONG ISLAND, INC.,

Defendants.

-----X

The following papers numbered EF-192 to EF-263 read on this motion by defendants CRAIG HARVEY SHERMAN, M.D. and CRAIG H. SHERMAN MD P.C. for summary judgment and dismissal of plaintiffs' Complaint pursuant to CPLR §3212.

Papers  
Numbered

Notice of Motion, Affirmation, Exhibits.....EF192-EF211  
Affirmation in Opposition, Exhibits.....EF246-EF251  
Reply Affirmation.....EF263

Upon the foregoing papers, it is ordered that this motion is determined as follows:

Defendants Craig Harvey Sherman, M.D. and Craig H. Sherman MD P.C.'s motion for summary judgment and dismissal of plaintiffs' Complaint pursuant to CPLR §3212 is granted with

respect to plaintiffs' claim for lack of informed consent, but denied as to plaintiffs' claim for medical malpractice.

Plaintiffs commenced this medical malpractice action by filing the Summons and Complaint on August 23, 2019. Issue was joined by defendant Craig H. Sherman MD P.C. via the filing of its Verified Answer on October 7, 2019, followed by the filing of defendant Craig Harvey Sherman, M.D.'s Verified Answer on December 4, 2019.

Defendants argue they are entitled to summary judgment and present the pleadings, plaintiffs' Bills of Particulars, the parties' deposition testimony, and the expert affirmation of Evan R. Mair, M.D. in support of their motion. Defendants argue they have established a prima facie case, as the evidence shows Dr. Sherman did not deviate from accepted standards of care in his treatment of plaintiff Kathleen McCann. They argue Dr. Sherman properly interpreted the imaging, and Dr. Sherman's failure to assert an exact figure of stenosis did not result in plaintiffs' injuries. Defendants also argue the evidence shows plaintiffs cannot maintain a claim for lack of informed consent, as it was not Dr. Sherman's responsibility to obtain Ms. McCann's informed consent for diagnostic imaging, but rather he merely received and interpreted the imaging as a diagnostic radiologist.

Defendants present the expert affirmation of Dr. Evan R. Mair in support of their motion. Dr. Mair affirmed to being a physician licensed in New York and familiar with the accepted standards of care relating to computed tomography and magnetic resonance imaging. Dr. Mair further affirmed to reviewing the parties' deposition testimony and pertinent imaging studies and reports as well as Ms. McCann's medical records in rendering his opinions. Based upon the foregoing, Dr. Mair opined to a reasonable degree of medical certainty that Dr. Sherman did not depart from the standard of care, did not proximately cause or contribute to the claimed injuries, and did not improperly fail to obtain Ms. McCann's informed consent.

Dr. Mair explained that upon Ms. McCann's hospitalization at St. Francis Hospital on February 28, 2017, several imaging studies were performed to investigate her stroke symptoms. Dr. Mair opined to a reasonable degree of medical certainty that Dr. Sherman satisfied the standard of care in his interpretation of the March 1, 2017 neck MRA. Dr. Mair reviewed the images and opined Dr. Sherman's interpretation of the images was correct. Dr. Mair further reasoned that within Ms. McCann's left carotid artery there is a one-centimeter area above the bulb that is stenosed thirty to forty percent, which is considered "slight", a term commonly understood to mean less than fifty percent. Dr. Mair further reasoned that in reporting findings of stenosis on neck MRAs, the standard of care does not require the interpreting radiologist to use an exact figure and it was acceptable for Dr. Sherman to use the term "slight" in his report. Dr. Mair explained even if Dr. Sherman reported an exact number, Ms. McCann's treatment would not have changed and Dr. Safa would still not have performed the endarterectomy.

Dr. Mair disagreed with plaintiffs' allegation that the neck MRA showed a seventy five percent blockage within Ms. McCann's left internal carotid artery (hereinafter referred to as "ICA"). Dr. Mair affirmed the allegation is "wildly inaccurate" and reasoned Dr. Sherman compared the neck MRA with the contemporaneously performed brain MRI and carotid ultrasound performed earlier in the day and interpreted by Dr. Lerner to have a less than fifty percent stenosis of the left ICA. He also reviewed the images and agreed with Dr. Lerner's interpretation of a slight stenosis of the left ICA. Dr. Mair opined Dr. Sherman satisfied the standard of care by comparing the neck MRA to the brain MRI and carotid ultrasound. He further reasoned the standard of care did not require Dr. Sherman to inquire as to the existence of or obtain and review prior imaging studies for comparison in this "acute" or "emergent" setting, but rather his responsibility was to review and interpret the images presented to him.

Dr. Mair also opined to a reasonable degree of medical certainty that the standard of care did not require Dr. Sherman to recommend additional studies or surgery, as these decisions are within the purview of the treating neurology and vascular surgery clinicians. Dr. Mair reasoned further diagnostic imaging was not indicated, as the MRA as performed was an appropriate and effective diagnostic and investigative tool for suspected stenosis or occlusion of the ICA. Finally, Dr. Mair opined it was not Dr. Sherman's responsibility to obtain Ms. McCann's informed consent because those conversations and forms are handled by clinicians, not diagnostic radiologists. Based upon the foregoing, defendants argue they established a prima facie entitlement to summary judgment.

Plaintiffs oppose the motion, arguing defendants failed to eliminate all triable issues of material fact with respect to whether Dr. Sherman departed from accepted standards of care and proximately caused or contributed to plaintiffs' injuries. They present a memorandum of law and expert affirmation in support of their opposition. Plaintiffs argue there are issues of fact whether Dr. Sherman departed from the standard of care in interpreting Ms. McCann's neck MRA at St. Francis Hospital, and this departure caused her to be discharged without undergoing revascularization of her symptomatic carotid artery stenosis and resulted in a preventable stroke the following year.

Plaintiffs present the affirmation of a medical doctor licensed in New Jersey and board-certified in diagnostic radiology in support of their opposition. Plaintiffs' expert affirmed to reviewing the subject radiology imaging studies, Ms. McCann's subject medical records, the parties' deposition testimony, and motion papers in rendering opinions. The expert opined the findings reflected in Dr. Sherman's interpretation of the MRA examination of the neck are discordant with the actual findings of the CTA examination performed at Flushing Hospital. Upon reviewing the neck MRA at issue in this case, plaintiffs' expert opined within a reasonable degree of medical certainty that the study reflects a moderate degree of left internal carotid artery stenosis, defined as being between fifty and sixty-nine percent. Plaintiffs' expert disagreed with Dr.

Sherman and Dr. Mair's interpretation of the image demonstrating thirty to forty percent or "slight" stenosis. Plaintiffs' expert also opined Dr. Sherman departed from the standard of care by characterizing the stenosis as "slight", as the phrase is ambiguous and not in accordance with the standard of care. Plaintiffs' expert explained the standard of care is to calculate the percentage of stenosis based upon the North American Symptomatic Carotid Endarterectomy Trial, which uses percentage criteria to classify carotid artery stenosis based upon an angiographic calculation. The expert further opined there is no generally accepted classification of stenosis as "slight." Plaintiffs' expert further opined this departure proximately caused the injuries, because Dr. Safa testified he would intervene on symptomatic patients if the stenosis was over 50%. The expert opined Dr. Sherman's failure to quantify the level of stenosis affected Dr. Safa's decision not to perform surgery, and proximately caused plaintiffs' injuries. Based upon the foregoing, plaintiffs argue defendant Dr. Sherman is not entitled to summary judgment and dismissal of plaintiffs' Complaint.

Pursuant to CPLR §3212, a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." (*Smith v. City of New York*, 210 A.D.3d 53, 68 [2d Dept. 2022].) The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. (*Morejon v. New York City Tr. Auth.*, 216 A.D.3d 134, 136 [2d Dept. 2023].) If there is any doubt as to the existence of a triable issue of fact, the motion must be denied. (*Id.*) The failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposition papers. (*Winegrad v. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]; *see also Antonyuk v. Brightwater Towers Condo Homeowners' Assn., Inc.*, 147 A.D.3d 711, 712 [2d Dept. 2017].) In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party. (*Matter of New York City Asbestos Litig.*, 33 N.Y.3d 20, 25 [2019].) Additionally, the court's function in determining a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. (*Reyes v. S. Nicolli & Sons Realty Corp.*, 212 A.D.3d 851, 852-853 [2d Dept. 2023].) Once the moving party has demonstrated a prima facie entitlement to summary judgment, the burden then shifts to the non-moving party to demonstrate the existence of material issues of fact. (*See generally Coscia v. Mosca*, 203 A.D.3d 695 [2d Dept. 2022].)

In moving for summary judgment in a medical malpractice action, the defendant must establish a prima facie case that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby, and the plaintiff in opposition must submit evidentiary facts or materials to demonstrate the existence of a triable issue of fact. (*Stukas v. Streiter*, 83 A.D.3d 18, 24 [2d Dept. 2011].) In presenting opposition to raise a triable issue of fact, the plaintiff is required to provide an affidavit of merit by a medical expert, and the failure to submit an affidavit

by a medical expert competent to attest to the meritorious nature of the plaintiff's claims requires dismissal of the Complaint. (*Id.* at 28.) Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. (*Buch v. Tenner*, 204 A.D.3d 635, 638 [2d Dept. 2022].) In general, a hospital may be vicariously liable for the negligence or malpractice of its employees acting within the scope of employment under the doctrine of *respondeat superior*. (See *Valerio v. Liberty Behavioral Mgt. Corp.*, 188 A.D.3d 948 [2d Dept. 2020].)

To establish a cause of action to recover damages based upon lack of informed consent, a plaintiff must prove “(1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury.” (*Gilmore v. Mihail*, 174 A.D.3d 686, 688 [2d Dept. 2019].)

Defendants Dr. Sherman and Craig H. Sherman MD P.C. established a prima facie entitlement to summary judgment through their production of the documentary evidence, including the medical records and expert affirmation of Dr. Mair. Defendants demonstrated through Dr. Mair's affirmation that Dr. Sherman did not depart from accepted standards of care, did not proximately cause or contribute to plaintiffs' injuries, and did not improperly fail to obtain Ms. McCann's informed consent. Defendants demonstrated Dr. Sherman acted within the standard of care in his interpretation of the neck MRA which was consistent with the brain MRI and carotid ultrasound findings. Dr. Mair reviewed the images and agreed with Dr. Sherman's findings as appropriate and within the standard of care. Dr. Mair also explained Dr. Sherman's use of the word “slight” to describe the stenosis was within the standard of care, as it is commonly understood to mean less than fifty percent stenosis. They further demonstrated Dr. Sherman did not have an obligation to review the imaging from Flushing Hospital and properly relied upon the images taken at St. Francis Hospital. They also demonstrated Dr. Sherman properly characterized portions of Ms. McCann's March 1, 2017 MRA as normal based upon Dr. Mair's opinions. Defendants also demonstrate it was not Dr. Sherman's responsibility to obtain Ms. McCann's informed consent for the diagnostic imaging, but rather his responsibility was merely to receive and interpret the imaging. Based upon the foregoing, defendants established a prima facie entitlement to summary judgment.

Plaintiffs failed to raise triable issues of material fact with respect to their claim for lack of informed consent, as they failed to present evidence Dr. Sherman performed a procedure without providing Ms. McCann with the risks, benefits and alternatives, as he merely reviewed and interpreted imaging. As plaintiff failed to sufficiently oppose that portion of defendants' motion,

plaintiffs' cause of action for lack of informed consent is dismissed.

However, plaintiffs raised triable issues of material fact with respect to the medical malpractice claims against defendant Dr. Sherman and whether he departed from accepted standards of care and proximately caused or contributed to plaintiffs' injuries. Specifically, plaintiffs raised triable issues of fact regarding whether Dr. Sherman departed from accepted standards of care by using the word "slight" in his report and by interpreting the image to demonstrate thirty to forty percent stenosis, and whether these departures proximately caused plaintiffs' injuries. Plaintiffs' expert sufficiently rebutted Dr. Mair's opinions by articulating the standard of care and how defendant Dr. Sherman departed from the standard of care in interpreting the imaging. While Dr. Mair opined "slight" is commonly understood to mean less than fifty percent stenosis, plaintiffs' expert explained it is an ambiguous term and the standard of care required Dr. Sherman to calculate a numerical percentage for the report. Additionally, while Dr. Sherman and Dr. Mair interpreted the image to depict thirty to forty percent stenosis, plaintiffs' expert reviewed the same image and interpreted it to depict fifty to sixty-nine percent stenosis. As there are conflicting expert opinions presented by defendants and plaintiffs, there are material issues of fact necessitating a jury determination. (*See Mehtvin v. Ravi*, 180 A.D.3d 661, 664 [2d Dept. 2020][holding that summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions, as issues of credibility are properly left to a jury for its resolution].) It is noted plaintiffs' expert failed to address the remaining alleged departures against defendants and therefore they are dismissed. (*See 114 Woodbury Realty, LLC v. 10 Bethpage Rd., LLC*, 178 A.D.3d 757 [2d Dept. 2019].)

Accordingly, defendants Craig Harvey Sherman, M.D. and Craig H. Sherman MD P.C.'s motion for summary judgment and dismissal of plaintiffs' Complaint pursuant to CPLR §3212 is granted with respect to plaintiffs' claim for lack of informed consent, but denied as to plaintiffs' claim for medical malpractice. The parties shall appear for a pretrial conference on Wednesday, November 20, 2024 at 9:30am in Courtroom 48.

This constitutes the decision and Order of the Court.

Dated: October 31, 2024



Hon. Tracy Catapano-Fox, J.S.C.

