Dileo v Central Suffolk Hosp.
2012 NY Slip Op 30414(U)
February 17, 2012
Supreme Court, Suffolk County
Docket Number: 20460/2008
Judge: William B. Rebolini
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Short Form Order

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SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Maria Dileo, as mother and natural guardian of Raymond George Laibhen, an infant,

Plaintiffs,

-against-

Central Suffolk Hospital, now known as Peconic Bay Medical Center, Robert Steckler, M.D. and Urological Associates of L.I., P.C.,

Defendants.

Clerk of the Court

Motion Sequence No.: 002; MD
Motion Date: 9/1/11
Submitted: 12/23/11

Index No.: 20460/2008

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Upon the following papers numbered 1 to 30 read upon this motion for summary judgment: Notice of Motion and supporting papers (002), 1 - 20; Answering Affidavits and supporting papers, 21 - 24; Replying Affidavits and supporting papers, 25 - 30.

The complaint sets forth causes of action for medical malpractice and was commenced by Maria DiLeo as mother and natural guardian of the infant plaintiff, Raymond George Laibhen. On January 3, 1999, the infant plaintiff, who was then five years of age, was a patient at Peconic Bay Medical Center, formerly known as Central Suffolk Hospital, and had been treated in the emergency department. It is alleged that the infant plaintiff suffered the loss of a testicle due to the negligence of the defendants in failing to timely diagnose and perform necessary testing; in failing to properly interpret diagnostic testing and to treat the infant plaintiff's torsion of his testicle; in failing to timely obtain a consultation; in failing to perform manual detorsion of the testicle and in failing to timely perform surgery for torsion of the testicle.

The defendant hospital seeks summary judgment dismissing the complaint as asserted against it on the bases that it cannot be found directly liable to the plaintiffs for medical malpractice; that its employees did not depart from good and accepted standards of medical care and treatment and that there was no proximate cause between the care and treatment rendered by them and the injuries suffered by the infant plaintiff.

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 eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (see, Friends of Animals v. Associated Fur Mfrs.,46 NY2d 1065 [1979]; Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (see, Winegrad v. N.Y.U. Medical Center, 64 NY2d 851 [1985]; Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see, Winegrad v. N.Y.U. Medical Center, 64 NY2d 851 [1985]). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (see, CPLR §3212[b]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (see, Castro v. Liberty Bus Co., 79 AD2d 1014 [2nd Dept., 1981]).

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (see, Holton v. Sprain Brook Manor Nursing Home, 253 AD2d 852 [2nd Dept., 1998], *app denied* 92 NY2d 818 [1999]). To prove a *prima facie* case of medical malpractice, a plaintiff must establish that defendant's negligence was a substantial factor in producing the alleged injury (see, Derdiarian v. Felix Contracting Corp., 51 NY2d 308 [1980]; Prete v. Rafla-Demetrious, 224AD2d 674 [2nd Dept., 1996]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury (see, Fiore v. Galang, 64 NY2d 999 [1985]; Lyons v. McCauley, 252 AD2d 516 [2nd Dept.,

1998], *app denied* 92 NY2d 814 [1998]; Bloom v. City of New York, 202 AD2d 465 [2nd Dept., 1994]).

To rebut a *prima facie* showing of entitlement to an order granting summary judgment by defendants, plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice and containing an opinion that the defendants' acts or omissions were a competent-producing cause of the injuries of the plaintiff (see, Lifshitz v. Beth Israel Med. Ctr.-Kings Highway Div., 7 AD3d 759 [2nd Dept., 2004]; Domaradzki v. Glen Cove OB/GYN Assocs., 242 AD2d 282 [2nd Dept., 1997]). As set forth in Feinberg v. Feit, 23 AD3d 517, 519 (2nd Dept., 2005), "[s]ummary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions (citations omitted). Such credibility issues can only be resolved by a jury."

In support of this motion, the defendant hospital has submitted, *inter alia*, an attorney's affirmation; summons and complaint and answers served by defendant hospital and its various discovery demands; plaintiff's verified bill of particulars; an unsigned but certified copy of the transcript of the examination before trial of Raymond George Laibhen dated October 22, 2008, a copy of the unsigned and uncertified copy of the transcript of Maria DiLeo dated October 22, 2008, the unsigned but certified copies of the transcripts of the examinations before trial of Robert Steckler, M.D. dated November 19, 2008, Afzal Butt dated December 17, 2008, Kimberlee Hanson dated April 20, 2010 and Ranjana Mathur, M.D. dated November 3, 2010; the signed and certified copies of the transcripts of the examinations before trial of Lawrence A. Rubin, P.A. dated May 21, 2009 and Paula J. Barney dated March 5, 2010; uncertified copies of the infant plaintiff's emergency department record from January 3, 1999 and the expert affidavit of Mark S. Silberman, M.D.

The unsigned and uncertified transcripts of the examinations before trial of the infant plaintiff and Maria DiLeo are not accompanied by affidavits pursuant to CPLR §3116 and are, therefore, inadmissible and not considered in this motion (see, Martinez v. 123-16 Liberty Ave. Realty Corp., 47 AD3d 901 [2nd Dept., 2008]; McDonald v. Maus, 38 AD3d 727 [2nd Dept., 2007]; Pina v. Flik Intl. Corp., 25 AD3d 772 [2nd Dept., 2006]). The unsigned but certified copies of the transcript of the examination before trial of Robert Steckler, M.D. dated November 19, 2008, Afzal Butt, M.D. dated December 17, 2008, Louis T. Pastore, M.D. dated December 22, 2009, Kimberlee Hanson dated April 20, 2010 and Ranjana Mathur, M.D. dated November 3, 2010 are considered as adopted as accurate by the moving defendants, are not objected to by the parties (see, Zalot v. Zieba, 81 AD3d 935 [2nd Dept., 2011]) and are thus considered. The moving defendant's application is not supported by a certified copy of the infant plaintiff's emergency room and hospital record considered by the defendant's moving expert in rendering his opinion (see, CPLR §3212; Expert testimony is limited to facts in evidence, Allen v. Uh, 82 AD3d 1025 [2nd Dept., 2011]; Marzuillo v. Isom, 277 AD2d 362 [2nd Dept., 2000]; Stringile v. Rothman, 142 AD2d 637 [2nd Dept., 1988]; O'Shea v. Sarro, 106 AD2d 435 [2nd Dept., 1984]). It is determined that even if all of the moving defendant's submissions were in admissible form, that there are factual issues which preclude the granting of summary judgment to Peconic Bay Medical Center.

Kimberlee Hanson testified to the extent that she has been a registered nurse since 1990. In 1999, she was working at Central Suffolk Hospital emergency department and has no recollection of the infant plaintiff. She read her note entered into the infant plaintiff's hospital record on January 3, 1999 at 15:40, just prior to the infant being taken to the operating room. Dr. Steckler was at the bedside and the infant appeared to be in no distress. Consents were obtained for surgery and she witnessed the mother's signature.

Lawrence Rubin, P.A. testified to the effect that he was working as a physician's assistant in the emergency department at Central Suffolk Hospital (now known as Peconic Bay Medical Center) on January 3, 1999 and that he did not have an independent recollection of Raymond Laibhen. He would have read the nurse's note and determined that the mother stated that the child's testicle had been swollen from about 11:00 a.m., that he was walking with his legs spread, he was not crying while in triage and that his testicles were swollen, reddened and had increased warmth. He examined the child and found the scrotum to be erythematous and edematous. His diagnosis was testicular torsion. He ordered blood work and a sonogram. The sono technician on call was called at 12:45. P.A. Rubin called Dr. Pastore at 12:55. At 13:42 he spoke with Dr. Pastore, and wrote in his note "obtain sono," Dr. Steckler will be called and call back with sono results. Dr. Steckler was called at 13:45. The infant was transported for the sonogram at 13:45. At 14:37, the sono was completed. P.A. Rubin testified that he spoke with Dr. Mitarotondo, the radiologist, at 14:40 and received a verbal report of the sonogram results. Dr. Steckler was in at 14:40 and wrote in his note that the sono (ultrasound) was performed with Doppler, but it was suboptimal and was repeated under his observation. P.A. Rubin testified that he wrote the diagnosis of testicular torsion prior to the child going to the operating room. He stated that this is an emergent situation as detorsion is necessary to save the testicle from dying. The sooner detorsion takes place, the quicker the obstruction of blood flow will be relieved. He did not believe that Central Suffolk had an anesthesiologist present on the premises 24 hours a day. He stated that when an on-call physician is called, usually they wait for about fifteen to twenty minutes to call the physician back if the physician did not respond.

Louis Pastore, M.D. testified to the extent that in January 1999, he was a principal and shareholder in Urological Associates and that he was board certified in urology. He had no independent recollection of Raymond Laibhen. He was on call for January 3, 1999 for the group and could be reached by pager. It was his custom and practice to respond immediately to a page. He could not tell from the record why Dr. Steckler responded to the emergency room call rather than him, but stated that if the patient was between the ages of zero and eighteen, the call was automatically referred to Dr. Steckler, as per their custom and practice.

Afzal Butt, M.D. testified to the extent that he is licensed to practice medicine in New York, Iowa, and North Carolina. His license in New York was suspended due to a "misfortunate inciden[t] involving Medicaid, Medicare." He stated he is board certified in internal medicine. He was an employee at Central Suffolk Hospital in 1999, but is no longer working there. He had no independent recollection of caring for the infant plaintiff in the emergency department on January 3, 1999 where he was employed as the emergency room attending physician. As attending physician,

he supervised the physician's assistant as required. He noted that the physician's assistant, Larry Rubin, indicated that the child's condition was emergent or life threatening. He agreed that this was an emergency. The diagnosis of torsion of the testicle was made upon examination of the child and pursuant to sonogram findings. Dr. Butt testified that he had no involvement with the care of the child other than countersigning the record. It was not his custom and practice to examine a patient before countersigning the note of a physician's assistant, or to discuss what the P.A. had written. But he then testified that he examined the child, but did not write a note. He continued that once Dr. Steckler arrived, Dr. Steckler took over the case. He did not know if there was an anesthesiologist in the hospital at the time the child was determined to require surgery. He further testified that the infant's father had torsion of the testicle twice. Dr. Butt testified that it was the custom and practice to wait fifteen minutes before calling a physician a second time after having called concerning a patient.

Dr. Robert Steckler testified to the extent that he is currently licensed to practice medicine in Pennsylvania, New Jersey and Florida, that he was licensed to practice medicine in New York in 1999, and that he is board certified in urology. He was an employee of Urological Associates and had privileges at Central Suffolk Hospital in January 1999. Prior to January 3, 1999, he treated children with testicular torsion. He had no recollection of the infant plaintiff, Raymond Laibhen. He stated that the hospital record does not indicate what time he was called, but it indicates the time he responded, which was 13:45 and that he saw the child at 14:42. He did not recall if he had been told that the child might have a testicular torsion, and stated that the record indicated that diagnosis in the discharge diagnosis by the physician's assistant in the emergency department. Based upon the hospital record, Dr. Steckler testified that the child had an acute scrotum, characterized by a red, swollen, hard testicle, but that the record did not indicate testicular torsion.

Dr. Steckler testified that upon his arrival to the emergency room, he took a history and conducted a physical examination which revealed that the left scrotum was enlarged with an area of ecchymosis superiorly, that it was approximately three cm. and firm/hard and that he was unable to distinguish the epididymis. The right scrotum was normal. He stated that there is no blood work consistent with testicular torsion. The sonogram film/report, which he reviewed, indicated that there was inhomogeneous echotexture consistent with hypoechoic areas which he stated was suggestive of testicular torsion. He indicated that his note stated left testicular torsion with infarction most likely, although Henoch Scholein purpura (a vasculitic disorder that causes purpura), which he noted on the scrotum, was possible. Dr. Steckler testified that the ultrasound performed with Doppler was "sub-optimal and repeated under my observation" as it did not show what he needed to see. He felt an emergent exploration was necessary and notified the operating room at 15:20. He did not know if this was the first time the hospital was notified of the need to use the operating room. He performed the surgery, a left scrotal exploration and left orchiectomy, and right scrotal orchiopexy for left testicular torsion with infarction. The testicle was torsed two and one-half times.

Dr. Steckler also opined that it would not be the custom and practice to attempt a detorsion prior to surgery if the patient was so uncomfortable that he did not permit that type of an exam. He added that time is of the essence with testicular torsion, so that one might proceed to the operating

room rather than delay by performing an ultrasound. He continued that the child was in the operating room within one half hour of his finishing his note at 15:32 and anesthesia was commenced at 16:30. He stated that the salvageability of a testicle is determined not just by the time, but also by how many rotations are involved. He continued that the more rotations there are makes more complete the cessation of (arterial) blood flow and the quicker there will be infarction. He agreed that there is greater than 80% success rate of saving the testicle if surgical correction occurs within 6 hours of the onset of symptoms. He continued that viability is assessed grossly and that a frozen section is not necessary.

Ranjana Mathur, M.D. testified to the extent that in 1997 she was director of pathology at Central Suffolk Hospital. Her responsibilities included creating protocols for the pathology department. She described a frozen section as being a test for rapid diagnosis which she stated is a general term. In 1999, the test was available if a surgeon requested it and/or wanted a report interpreted. She issued a pathology report for tissue collected on January 3, 1999 from the infant plaintiff during surgery. During a pathology inspection of the tissue, she looked for infarction or microscopic death of the cells in the testes. She used the term "hemorrhagic areas" in her report and testified that it meant that various spots of the testes (testicular interstitium and the seminiferous tissue) were dead and were replaced by just the area of hemorrhage. Sections of the tissue showed hemorrhagic necrosis in which the testicular parenchyma was replaced by hemorrhagic areas, which meant it was all dead. Hemorrhagic necrosis of more than 70-80% of the testicular parenchyma was found upon her pathology examination. She indicated in her report that the changes are consistent with more than six to eight hours of ischemia from the time the process began in the patient, where the blood supply to that particular area was compromised, but continued that ischemia does not mean that there was necrosis. Back in 1999, the pathologist would not have been automatically notified if emergency surgery were conducted on a Sunday.

Defendant's expert, Mark S. Silberman, M.D., avers that he is licensed to practice medicine in New York State and that he is board certified in emergency medicine, critical care medicine, pulmonary medicine and internal medicine. He set forth the material and records reviewed, including the Peconic Bay Medical Center hospital record, and stated, within a reasonable degree of medical certainty, that the hospital staff at Peconic Bay Medical Center on January 3, 1999, was at all times within the "confines of good and accepted medical practice." He set forth the infant plaintiff's history, noting that the infant's mother noticed her son's testes were swollen and that he had been walking funny since about 11:00 a.m. on January 3, 1999, so she took him to Central Suffolk Hospital (Peconic Bay Medical Center). He was seen by the triage nurse at 12:20 p.m., at which time it was noted that the infant's scrotum was warm and swollen. At 12:45 p.m., when the infant was seen by the physician's assistant, urinalysis, blood work and emergency testicular sonogram were ordered and it was determined that the child's condition was emergent. A preliminary diagnosis of possible testicular torsion was made and, at 12:55 p.m., a call was placed to the on-call urologist, Dr. Pastore. A follow-up call was made to Dr. Pastore at 1:15 p.m. At 1:42 p.m., Dr. Pastore called the emergency room and advised that Dr. Steckler should be called. Dr. Steckler responded by phone at 1:45 p.m. and arrived at the child's bedside at 2:42 p.m.

Dr. Silberman opines that one role of the emergency room staff is to determine the necessity of consultation with a specialist and, in this matter, within twenty five minutes of the child's presentation to the emergency room it was determined that a urologist would be needed to evaluate him. Dr. Silberman continued that once it has been determined that a specialist should be consulted concerning a patient, the emergency room staff is responsible to monitor the patient's vital signs, keep the patient comfortable and complete any previous orders, which he stated was done. Dr. Silberman opines that it would not be appropriate to attempt any surgical procedures on a patient while in the emergency room as it should take place in an operating room in a sterile environment, that it is not possible to affirmatively determine how many times a testicle has rotated and whether such rotation is clockwise or counterclockwise unless there is surgical intervention. He continued that a request for an operating room for a surgical procedure must be made by the surgeon who conducts the operation and that once Dr. Steckler requested an operating room for the exploratory surgery, the hospital staff responsible for preparing the operating room for use was summoned and there was no delay with respect to the time in which the operating room was prepared for use.

Dr. Silberman also opined that in 1999 it was entirely appropriate and within the standards of medical practice to use a doppler sonogram to examine a patient's testicle, as was done. He concluded that the Peconic Bay Medical Center staff appropriately cared for the infant during his time in the emergency room, that they acted appropriately and timely in the preparation of the operating room and that no staff deviated from good and accepted standards of practice on behalf of the infant plaintiff and that there is no evidence that any injuries claimed by the infant plaintiff were causally related to the treatment rendered at the hospital.

Based upon the foregoing, it is determined that Peconic Bay Medical Center has not established *prima facie* entitlement to summary judgment dismissing the complaint. At no time does Dr. Silberman set forth the appropriate standard of care involving torsion of the testicle, which standard he states the hospital staff did not depart from. Although he stated that there was no delay in calling the urologist, in obtaining a sonogram, and in preparing the operating room, he did not state the amount of time that was appropriate in each instance and how the hospital comported with the same. Nor does he support his opinion that none of the injuries claimed by the infant plaintiff were not causally related to any care and treatment, or lack thereof, by the hospital staff except in a conclusory manner.

The plaintiff's expert is a physician licensed to practice medicine in New York and is board certified in emergency medicine. The expert opined within a reasonable degree of medical certainty, that all the defendants departed from good and accepted medical practice in the treatment of the infant plaintiff on January 3, 1999, and that such departures caused injury to the child, including a substantial lessening of the likelihood of a favorable outcome. The plaintiff's expert stated that testicular torsion is a condition where the spermatic cord twists, cutting off blood flow to the affected testicle, and is an emergency condition. Any male child presenting with an acute scrotum must be presumed to be suffering from testicular torsion.

The plaintiff's expert set forth the pertinent history and stated that the record indicates that the sonogram ordered at 12:45 by P.A. Rubin was not completed until 2:37 p.m., or one hour and fifty-two minutes after it was ordered. The plaintiff's expert avers that the applicable standard was for sonographers to be available on one-half hour notice on the weekend. P.A. Rubin spoke with the hospital radiologist, Dr. Mitarotondo at 2:40 p.m., and it was reported that there was no demonstrable flow to the testicle, consistent with torsion. The typed report of the sonogram indicates "lack of demonstrable flow speaks for torsion." The plaintiff's expert continued that the delay in performing the sonogram and reporting its result were departures from good and accepted medical practice and that it should have only taken about 15 minutes to perform the sonogram, for a total of 45 minutes from the time the sonogram was requested, giving 30 minutes for the sonographer to arrive, which is the applicable standard of care. The plaintiff's expert therefore stated that the sonogram, requested at 12:45, should have been in hand in the emergency room by 1:45 p.m., by which time the on-call urologist should have arrived and the operating room made ready by directive of either the emergency room physician or on-call urologists.

The plaintiff's expert continued that the page by the P.A. for Dr. Pastore should have been a stat or emergency page, given that testicular torsion can result in the loss of a testicle and that it is always considered a medical emergency. It was a further departure from good and accepted standards of care for the hospital emergency room P.A. not to have called Dr. Pastore a third time within 15 minutes of the second page, or to call another urologist after not having heard from Dr. Pastore immediately following the second page. A total of 57 minutes elapsed from the initial page for Dr. Pastore until he spoke with the P.A. A total of one hour and fifty two minutes elapsed from the initial page for Dr. Pastore until Dr. Steckler to arrived at the hospital. The delays caused by the failure to make a third call to the on-call urologist and the failure to make a stat page were departures from good and accepted medical practice. The plaintiff's expert further stated that it was also a departure by Dr. Pastore to delay in responding to the pages, especially after the second page. The plaintiff's expert continued that, contrary to Dr. Silberman's opinion, the emergency department's role was not limited to assessing complaints and determining whether there were emergent issues and then requesting appropriate consultations from specialists. The hospital failed in its responsibility to timely perform the sonogram ordered by the P.A. and to have sonography staff available on thirty minutes notice, in violation of hospital policy. He added that the hospital failed to timely follow up the pager request to the on-call radiologist and did not making a stat call, thus causing delays in the infant's care and treatment in an emergent situation. He additionally added that the hospital's role, once the specialist was notified, was not just to keep the patient comfortable and monitor vital signs, as such treatment was not treating the emergent condition of testicular torsion.

The plaintiff's expert continued that Dr. Steckler did not arrive to see the patient until 2:42 p.m. and although he was well aware of the diagnosis of torsion by the P.A. and radiologist, he opted for a second sonogram in that the original sonogram was suboptimal, thus delaying completion of the sonogram until 2:37 p.m. Dr. Steckler did not request an operating room until 3:20 and could have requested the operating room when notified earlier by the P.A. at 1:45 p.m. that the infant had a torsion of the testicle. The plaintiff's expert stated that once the emergency department learned from the radiologist that there was a torsion of the testicle, there was a need for an emergency

surgery. Thereafter, there was a delay by the hospital in readying the operating room, further delaying the infant's surgery. The infant patient did not enter the operating room until approximately 4:30 p.m. The plaintiff's expert averred that the time delays in treating the five and one-half year old plaintiff constituted departures from good and accepted medical practice by the hospital's emergency department staff and the on-call neurologists employed by Urological Associates.

Based upon the foregoing, it is determined that the plaintiff has raised factual issues which preclude summary judgment dismissing the complaint on the issue of whether the employees of the defendant hospital departed from good and accepted standards of care. In the reply, the defendant's expert has proffered new arguments in his affidavit not set forth in his original supporting affidavit and the same are not considered.

Accordingly, it is

ORDERED that this motion (002) by the defendants Peconic Bay Medical Center s/h/a Central Suffolk Hospital n/k/a Peconic Bay Medical Center, for an order granting summary judgment dismissing the complaint is denied.

Dated: February 17, 2012

HON. WILLIAM B. REBOLINI, J.S.C.

______ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION