

**Muller v South Shore Med. Care, PC**

2012 NY Slip Op 31068(U)

April 16, 2012

Supreme Court, Suffolk County

Docket Number: 08-31917

Judge: Denise F. Molia

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

**COPY**

INDEX No. 08-31917  
CAL No. 11-00645MM

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 39 - SUFFOLK COUNTY

**PRESENT:**

Hon. DENISE F. MOLIA  
Justice of the Supreme Court

MOTION DATE 9-6-11  
ADJ. DATE 12-9-11  
Mot. Seq. # 004 - MD

-----X  
KIM MULLER and ERIC MULLER,  
  
Plaintiffs,

O'BRIEN & O'BRIEN, LLP  
Attorney for Plaintiffs  
168 Smithtown Boulevard  
Nesconset, New York 11767

- against -

ROGAK & GIBBONS, LLP  
Attorney for Defendants South Shore Medical  
Care, Lewandoski, and Schroeder  
50 Charles Lindbergh Boulevard, Suite 320  
Uniondale, New York 11553

SOUTH SHORE MEDICAL CARE, PC, MARC  
A. LEWANDOSKI, MD, CHERYL  
SCHROEDER, PA, NOEL D'SILVA, MD and  
GOOD SAMARITAN HOSPITAL MEDICAL  
CENTER,

SHAUB, AHMUTY, CITRIN & SPRATT, LLP  
Attorney for Defendant D'Silva  
1983 Marcus Avenue  
Lake Success, New York 11042

Defendants.  
-----X

BARTLETT, MCDONOUGH, BASTONE &  
MONAGHAN, LLP  
Attorney for Defendant Good Samaritan  
670 Main Street  
Islip, New York 11751

Upon the following papers numbered 1 to 39 read on this motion summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 18; Notice of Cross Motion and supporting papers     ; Answering Affidavits and supporting papers 19 - 22; 23 - 37; Replying Affidavits and supporting papers 38 - 39; Other     ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

**ORDERED** that this motion by defendant Noel D'Silva, M.D., seeking summary judgment dismissing the complaint is denied.

RST

Plaintiff Kim Muller commenced this action against defendants South Shore Medical Care, P.C., Marc A. Lewandoski, M.D., Cheryl Schroeder, P.A.<sup>1</sup>, Noel D'Silva, M.D., and Good Samaritan Hospital Medical Center<sup>2</sup> to recover damages for medical malpractice. Plaintiff alleges, among other things, that defendants failed to timely diagnose her form of hepatitis and that they failed to inform her that she should permanently discontinue usage of the medication Aldomet. Plaintiff specifically alleges that Dr. D'Silva failed to obtain a proper history, failed to perform or order the necessary liver function tests or refer her to a specialist, and failed to provide an alternative medication to treat her hypertension once there were obvious signs and symptoms of liver dysfunction. Plaintiff's husband, Eric Muller, instituted a derivative claim for loss of services.

The following facts are not in dispute. Plaintiff had been a patient of Dr. Lewandoski and his medical practice, South Shore Medical Center, P.C. ("South Shore"), since 2003. In April 2005, plaintiff was diagnosed with anemia, secondary to her 1999 gastric bypass surgery and menstrual bleeding, hypertension and fatty liver. Dr. Lewandoski prescribed Lotrel to treat her hypertension. Upon referral by Dr. Lewandoski, plaintiff initially presented to Dr. D'Silva, a gastroenterologist, on September 16, 2005, complaining of recurrent nausea and anemia. After an examination of plaintiff, Dr. D'Silva found no positive findings and recommended that plaintiff undergo a colonoscopy and an esophagogastroduodenoscopy ("EGD"). The results of the colonoscopy and EGD were negative, but the EGD showed a small gastric pouch. When plaintiff returned to Dr. Lewandoski on April 18, 2006, she underwent a computer tomography ("CT") scan of her abdomen and pelvis, which revealed that she had a fatty liver, and her liver functions tests ("LFTs") were mildly elevated. On April 27, 2006, plaintiff presented to Dr. D'Silva for elevated LFTs. Although noting that she was obese, Dr. D'Silva determined plaintiff otherwise was fine on examination. Plaintiff was instructed to follow-up in one month's time, at which time her antinuclear antibody ("ANA") panel would be checked to rule out autoimmune hepatitis. Plaintiff's LFTs continued to be elevated at her May 15<sup>th</sup> visit with Dr. D'Silva.

Plaintiff then returned to Dr. Lewandoski on July 1, 2006, and she informed him that she was contemplating becoming pregnant. As a result of this discussion, Dr. Lewandoski changed her blood pressure medication to Aldomet, 250 milligrams, twice-a-day. On July 18, 2006, Dr. Faizur Chowdhury diagnosed plaintiff with diabetes and Dr. Lewandoski prescribed Byetta to help treat it. On October 31, 2006, plaintiff presented to Dr. Lewandoski's office complaining of nausea, chills, weakness, dark urine, and "yellowish discoloration," and was examined by P.A. Schroeder. After examining plaintiff, P.A. Schroeder immediately referred her to Dr. D'Silva to rule out "acute viral hepatitis versus liver failure." Later that day, when plaintiff sought treatment from Dr. D'Silva for an acute onset of jaundice, she informed him that she was taking Protonix, Metformin, Byetta and Aldomet. Dr. D'Silva diagnosed plaintiff with acute hepatitis. Dr. D'Silva recommended that plaintiff undergo an abdominal sonogram

---

<sup>1</sup>By order of this Court, dated October 3, 2011, the action against Cheryl Schroeder was discontinued.

<sup>2</sup> By order of this Court, dated September 9, 2011, the action against Good Samaritan Hospital was discontinued.

and a hepatitis panel. Plaintiff's hepatitis panel was negative, but her amylase/lipase levels were elevated.

Plaintiff returned to Dr. Lewandoski on November 1, 2006, and he advised her to follow-up with Dr. D'Silva for continued evaluation and treatment. Subsequently, plaintiff underwent an abdominal sonogram at Good Samaritan Hospital Medical Center, which revealed hepatosplenomegaly, an enlarged liver and spleen. Plaintiff still was jaundiced and feeling tired when she returned to Dr. D'Silva on November 2<sup>nd</sup>, and her LFTs were still elevated, but test results were negative for Hepatitis A. As a result of the abdominal sonogram, Dr. D'Silva consulted with Dr. Lewandoski and the plan was to stop all of plaintiff's medications "unless absolutely necessary." When plaintiff saw Dr. Lewandoski on November 4<sup>th</sup> and Dr. D'Silva on November 6<sup>th</sup>, she still was on Aldomet. On November 7, 2006, plaintiff underwent a CT scan of her abdomen, which revealed evidence of periportal edema, inflammation of the liver, and a small 5 millimeter lesion in the right lobe of her liver. On November 10, 2006, plaintiff returned to Dr. D'Silva, and he noted that she had discontinued use of all her medication and that her hepatitis was improving. On November 13<sup>th</sup> and 14<sup>th</sup>, plaintiff presented to Dr. Lewandoski, who noted under current medications that she was taking Aldomet. After plaintiff's November 19<sup>th</sup> visit to Dr. Lewandoski, she was not seen again by him until January 20, 2007, after she had been diagnosed with "drug-induced hepatitis."

Dr. D'Silva continued to treat plaintiff during the months of November, December and January in 2006. During those months, plaintiff's LFTs remained elevated and she remained jaundiced. On November 15<sup>th</sup>, Dr. D'Silva diagnosed plaintiff with acute hepatitis and cholestasis. On plaintiff's November 28<sup>th</sup> visit to Dr. D'Silva, he noted that she was taking Aldomet and Metformin, and diagnosed her as suffering from acute hepatitis, unknown etiology, with the possibility of Epstein Bar Virus. On plaintiff's visits to Dr. D'Silva on December 5<sup>th</sup> and 6<sup>th</sup>, she still was jaundiced and her LFTs had worsened. Dr. D'Silva recommended that plaintiff obtain a liver biopsy to rule out autoimmune hepatitis. The liver biopsy concluded that plaintiff suffered from acute and chronic inflammation, active hepatocytic necrosis, and portal bridging. As a result of the liver biopsy, Dr. D'Silva recommended that plaintiff obtain a second opinion from Dr. Min, a hepatologist at the Bodenhiemer Group at New York University Medical Center ("NYU"). On December 14, 2006, plaintiff was admitted into NYU. As a result of a liver biopsy performed at NYU, Dr. Min diagnosed plaintiff with drug-induced hepatitis, secondary to Aldomet. Plaintiff's use of Aldomet was permanently discontinued, although she continued to take Metformin. Plaintiff was discharged from NYU on December 22, 2006.

On January 4, 2007, plaintiff returned to Dr. D'Silva. After conducting an examination and consulting with Dr. Min, Dr. D'Silva decided against giving plaintiff steroids and, instead, recommended that she obtain an evaluation from NYU's transplant center. NYU's transplant center indicated that plaintiff did not require any further treatment. On January 24, 2007, Dr. D'Silva noted that plaintiff's LFTs were taking a downward trend. On February 1, 2007, Dr. Min indicated that plaintiff was "okay," and that her jaundice was "much improved," and Dr. D'Silva informed her that she could return to work. On March 1<sup>st</sup> and 15<sup>th</sup>, Dr. D'Silva noted that plaintiff's LFTs were improved and that her overall "drug induced hepatitis" was improving. On April 25, 2007, Dr. D'Silva noted that plaintiff's LFTs had returned to normal, and that her status was post drug-induced hepatitis. He restarted her on iron supplements for her anemia, and scheduled her for an EGD and repeat lab work. The EGD,

performed on June 29, 2007, revealed a small gastric pouch and a normal anastomosis. On August 22, 2007, plaintiff was asymptomatic and her status was “anemia post drug-induced hepatitis.” On October 25, 2007, plaintiff’s last date of treatment with Dr. D’Silva, her LFTs were normal.

Dr. D’Silva now moves for summary judgment in his favor, arguing that he did not deviate from good and acceptable medical standards in rendering medical care to plaintiff, and that his medical treatment of plaintiff was not the proximate cause of plaintiff’s alleged injuries. Dr. D’Silva, in support of his motion, submits copies of the pleadings, the parties’ deposition transcripts, uncertified copies of plaintiff’s medical records, and the affidavit of his expert, Sanford Goldberg, M.D. Dr. D’Silva also submits a copy of a medical journal kept by plaintiff. Plaintiff opposes the motion on the bases that there are triable issue of fact as to which physician informed her to stop her medications, and as to when those instructions were given. Plaintiff, in opposition to the motion, submits the affidavit of her expert, Maxwell Chait, M.D. Defendants South Shore and Dr. Lewandoski (hereinafter referred to collectively as “South Shore Medical”) also oppose the motion on the ground that there are triable issues of fact as to who, if anyone, authorized plaintiff to recommence taking her medications. South Shore Medical, in opposition to the motion, submits copies of the pleadings, uncertified copies of plaintiff’s medical records, and the deposition transcripts of Dr. Lewandoski and plaintiff.

To make a prima facie showing of entitlement to summary judgment in an action to recover damages for medical malpractice, a physician must establish through medical records and competent expert affidavits that the defendant did not deviate or depart from accepted medical practice in defendant’s treatment of the patient and that defendant was not the proximate cause of plaintiff’s injuries (*see Castro v New York City Health & Hosps. Corp.*, 74 AD3d 1005, 903 NYS2d 152 [2d Dept 2010]; *Deutsch v Chaglassian*, 71 AD3d 718, 896 NYS2d 431 [2d Dept 2010]; *Plato v Guneratne*, 54 AD3d 741, 863 NYS2d 726 [2d Dept 2008]; *Jones v Ricciardelli*, 40 AD3d 935, 836 NYS2d 879 [2d Dept 2007]; *Mendez v City of New York*, 295 AD2d 487, 744 NYS2d 847 [2d Dept 2002]). A physician owes a duty of reasonable care to his patients and will generally be insulated from liability where there is evidence that he conformed to the acceptable standard of care and practice (*see Spensieri v Lasky*, 94 NY2d 231, 701 NYS2d 689 [1999]; *Barrett v Hudson Valley Cardiovascular Assoc., P.C.*, 91 AD3d 691, 936 NYS2d 304 [2d Dept 2012]; *Geffner v North Shore Univ. Hosp.*, 57 AD3d 839, 871 NYS2d 617 [2d Dept 2008]). A doctor is not a guarantor of a correct diagnosis or a successful treatment, nor is a doctor liable for a mere error in judgment if he or she has considered the patient’s best interest after careful evaluation (*see Nestorowich v Ricotta*, 97 NY2d 393, 740 NYS2d 668 [2002]; *Oelsner v State of New York*, 66 NY2d 636, 495 NYS2d 359 [1985]; *Bernard v Block*, 176 AD2d 843, 575 NYS2d 506 [2d Dept 1991]). Where the defendant has met that burden, the plaintiff, in opposition, must submit a physician’s affidavit of merit attesting to a departure or deviation from acceptable medical practice and attesting to the fact that the departure or deviation was a competent cause of the injuries sustained by the plaintiff (*see Stukas v Streiter*, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]; *Arkin v Resnick*, 68 AD3d 692, 890 NYS2d 95 [2d Dept 2009]; *Rebozo v Wilen*, 41 AD3d 457, 838 NYS2d 121 [2d Dept 2007]; *Johnson v Queens-Long Is. Group*, 23 AD3d 525, 806 NYS2d 614 [2d Dept 2005]; *Dellacone v Dorf*, 5 AD3d 625, 774 NYS2d 776 [2d Dept 2005]; *Domaradzki v Glen Cove Ob/Gyn Assoc.*, 242 AD2d 282, 660 NYS2d 739 [2d Dept 1997]). However, general allegations of medical malpractice, merely conclusory in nature and unsupported by competent evidence establishing the essential elements of the claim, are insufficient to defeat a motion for summary judgment (*see Arkin v Resnick, supra*;

*Dolan v Halpern*, 73 AD3d 1117, 902 NYS2d 585 [2d Dept 2010]; *Holbrook v United Hosp. Med. Ctr.*, 248 AD2d 358, 669 NYS2d 631 [2d Dept 1998]).

Here, Dr. D'Silva has established, prima facie, his entitlement to judgment as a matter of law by submitting an affidavit from Dr. Sanford Goldberg, a board certified internist and gastroenterologist, which demonstrated, prima facie, that he did not deviate or depart from acceptable standards of medical care in his treatment of plaintiff, and that his treatment was not a proximate cause of plaintiff's injuries (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Muniz v Mount Sinai Hosp. of Queens*, 91 AD3d 612 [2d Dept 2012]; *Ellis v Eng*, 70 AD3d 887, 895 NYS2d 462 [2d Dept 2010]; *Adjetey v New York City Health & Hosps. Corp.*, 63 AD3d 865, 881 NYS2d 472 [2d Dept 2009]; *Myers v Ferrara*, 56 AD3d 78, 864 NYS2d 517 [2d Dept 2008]). Dr. Goldberg states that in his opinion, within a reasonable degree of medical certainty, that Dr. D'Silva, at all times, acted within the appropriate standard of care in providing medical care and treatment to plaintiff, and that no act or omission on Dr. D'Silva's behalf contributed or proximately caused plaintiff's injuries. Dr. Goldberg states that Dr. D'Silva was not managing plaintiff's hypertension and that he did not prescribe Aldomet to treat her hypertension. Dr. Goldberg opines that Dr. D'Silva timely and appropriately stopped all of plaintiff's medication after she presented to him with jaundice, appropriately recommended that she have blood work drawn regularly, and undergo CT scanning and a liver biopsy, and referred her to the appropriate specialists. Dr. Goldberg further states that Dr. D'Silva did not restart plaintiff on Aldomet; that as soon as he noticed that her LFTs were worsening, he recommended she have a liver biopsy, and that upon receipt of the biopsy results and consultation with a pathologist, Dr. D'Silva instructed plaintiff once again to stop all medications. Dr. Goldberg concludes that Dr. D'Silva's recommendations that plaintiff obtain a liver biopsy to exclude all other causes of hepatitis, which resulted in her diagnosis of drug-induced hepatitis, and that he stopped all of her medication were appropriate, and were within accepted standards of medical care.

However, in opposition, plaintiff, by submitting the affidavit of her expert, has raised triable issues of fact as to whether Dr. D'Silva departed from good and accepted medical practice and whether such departures were a proximate cause of her injuries (see *Young v Struhl*, 87 AD3d 1006, 932 NYS2d [2d Dept 2011]; *Howard v Kennedy*, 60 AD3d 905, 875 NYS2d [2d Dept 2009]; *Boutin v Bay Shore Family Health Ctr.*, 59 AD3d 368, 872 NYS2d 523 [2d Dept 2009]; *Borawski v Huang*, 34 AD3d 409, 824 NYS2d 362 [2d Dept 2006]). Although Dr. Lewandoski was plaintiff's primary care physician, and he prescribed Aldomet to treat her hypertension, plaintiff's expert, Dr. Maxwell Chait, a board certified internist and gastroenterologist, states that it is his opinion, within a reasonable degree of medical certainty, that the care and treatment rendered to plaintiff by Dr. D'Silva was not in accordance with good and accepted medical practice, and that the acts or omissions by Dr. D'Silva were contraindicated, and a proximate cause of plaintiff's injuries. Dr. Chait states that Dr. D'Silva diagnosed plaintiff with acute hepatitis after she presented to him with acute onset jaundice. Dr. Chait states that despite the fact that plaintiff was taking Aldomet, Dr. D'Silva did not ascertain when she initially was prescribed Aldomet or what dosage she was taking, that he never considered any other differential diagnosis other than acute hepatitis, and that he never considered that Aldomet may have been the cause of her jaundice. Dr. Chait opines that Dr. D'Silva deviated from accepted medical standards of care in his treatment of plaintiff by failing, among other things, to seek a second opinion; to timely refer her to a specialist or for a liver biopsy; and by allowing plaintiff's continued

Muller v South Shore Medical  
Index No. 08-31917  
Page 6

use of Aldomet despite abnormal LFT readings, and her development of jaundice and hepatic failure; and that such departure contributed to her injuries. Summary judgment is inappropriate in a medical malpractice action where the parties present conflicting opinions by medical experts (*see Colao v St. Vincent's Med. Ctr.*, 65 AD3d 660, 885 NYS2d 306 [2d Dept 2009]; *Adjetey v New York City Health & Hosps. Corp.*, *supra*; *Barbuto v Winthrop Univ. Hosp.*, 305 AD2d 623, 760 NYS2d 199 [2d Dept 2003]; *see also Espinal v Jamaica Hosp. Med. Ctr.*, 71 AD3d 723, 896 NYS2d 429 [2d Dept 2010]). Accordingly, Dr. Noel D'Silva's motion for summary judgment is denied.

Dated: 4-16-2012

**Hon. Denise F. Molis**  
\_\_\_\_\_  
J.S.C.

       FINAL DISPOSITION      X   NON-FINAL DISPOSITION