

**Cusack v Albany Med. Ctr.**

2012 NY Slip Op 31815(U)

July 12, 2012

Sup Ct, Albany County

Docket Number: 3392-10

Judge: Joseph C. Teresi

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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

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DENISE CUSACK and TIMOTHY CUSACK,  
Individually and as Parents and Natural Guardians of  
ELYSSA CUSACK, an infant,

Plaintiffs,

-against-

ALBANY MEDICAL CENTER, ALBANY MEDICAL  
CENTER HOSPITAL, ALBANY MEDICAL COLLEGE,  
ERIC SPOONER, M.D., and CAPITAL DISTRICT  
PEDIATRIC CARDIOLOGY ASSOCIATES, P.C.,

Defendants.

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**DECISION and ORDER**  
**INDEX NO. 3392-10**  
**RJI NO. 01-10-101623**

Supreme Court Albany County All Purpose Term, June 25, 2012  
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**

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**TERESI, J.:**

After almost a week of inpatient treatment at Albany Medical Center Hospital (hereinafter “AMCH”), fourteen month old Elyssa Cusack (hereinafter “Elyssa”) suffered a stroke on June 16, 2008. Elyssa’s parents, individually and on her behalf, commenced this medical malpractice action seeking to recover damages for the resulting injuries. Issue was joined by each Defendant, discovery is complete and a trial date certain has been set.<sup>1</sup>

Eric Spooner (hereinafter “Dr. Spooner”), his employer Capital District Pediatric Cardiology Associates, P.C. (hereinafter “CDPCA”) and AMCH<sup>2</sup> now move for summary judgment. Plaintiffs oppose the motions. On this record, although Dr. Spooner and CDPCA demonstrated their entitlement to judgment as a matter of law, because Plaintiffs raised a genuine issue of fact, their motion is denied. AMCH, however, is entitled to partial summary judgment.

“As the proponent[s] of summary judgment in a medical malpractice action, [Dr. Spooner, CDPCA and AMCH] bear[] the initial burden of demonstrating that the medical treatment rendered was within acceptable standards of care or that his or her actions did not cause the claimed injuries.” (Helfer v Chapin, \_\_ AD3d \_\_ [3d Dept 2012]). If Defendants make such showing, the burden shifts “to plaintiff to demonstrate a triable question of fact with regard to defendant's departure from accepted medical practice and whether such departure was the proximate cause of plaintiff's injury.” (Derusha v Sellig, 92 AD3d 1193, 1194 [3d Dept 2012];

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<sup>1</sup> Plaintiffs, on consent, discontinued their action against Javier Sanchez, MD and removed him from the caption of this action.

<sup>2</sup> AMCH will hereinafter also refer to Albany Medical Center and Albany Medical College, as these motion papers make no relevant distinction for purposes of this motion between these entities.

Alvarez v Prospect Hosp., 68 NY2d 320 [1996]).

The relevant facts surrounding Elyssa's stroke and the care she received are largely uncontested. Dr. Spooner, a pediatric cardiologist, first examined Elyssa on June 11, 2008. He performed numerous tests, including an echocardiogram, and noted his impression as: "Myocarditis<sup>3</sup> - probably viral... [and] Mild-moderate congestive heart failure." He further commented that while he could treat her symptoms, there was no way to control the viral infection. Elyssa appeared to respond well to Dr. Spooner's care, and by June 12, 2008 he commented that Elyssa was "clinically improved but still in mild [congestive heart failure]." Despite the apparent improvement, his June 12, 2008 echocardiogram "was more or less unchanged." Dr. Spooner continued to treat Elyssa until June 13, 2008, at which time other non-party doctors took over. Neither Dr. Spooner nor any of the other doctors involved in Elyssa's care at AMCH treated her with prophylactic anticoagulation therapy or aspirin to reduce the risk of the stroke Elyssa eventually suffered.

According to Elyssa's mother, Elyssa's stroke symptoms became apparent to her at about 8:00 am on June 16, 2008, when she observed the non-movement of Elyssa's entire right side. That morning the pediatric cardiologist also noted that Elyssa's right arm was "droopy." Such observations were not confirmed by Elyssa's attending physician, whose June 16, 2008 morning exam noted that she "moves all extremities appropriately." By 3:00 pm of June 16, 2008, however, Elyssa's attending physicians examined her and found that her right arm and leg would not move. The physicians immediately ordered a CT scan, which confirmed that Elyssa had suffered a stroke. At the time of the stroke no "clot buster" drug, such as tPA, was administered.

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<sup>3</sup> Myocarditis is an inflammation of the heart muscle.

Instead, Elyssa was started on aspirin and magnesium sulfate.

With their expert considering the above, Dr. Spooner and CDPCA demonstrated their entitlement to judgment as a matter of law. Dr. Spooner and CDPCA's expert reviewed the medical records corresponding with the above treatment, including Dr. Spooner's June 11 and 12, 2008 echocardiograms. This expert agreed with Dr. Spooner's interpretation of the echocardiograms and his ejection fraction calculation. Upon his independent review of the records and the echocardiograms, the expert agreed with Dr. Spooner's myocarditis diagnosis and characterized the finding as typical for acute myocarditis. He states unequivocally that "[p]ediatric patients with acute myocarditis are not routinely placed on prophylactic anti-coagulation therapy... [t]his is not the standard of care." With this detailed and specific expert opinion, based upon a review of the appropriate records and tests, Dr. Spooner demonstrated that his treatment of Elyssa and non prescription of prophylactic anti-coagulation therapy was within acceptable standards of medical care. Thus, Dr. Spooner and CDPCA demonstrated their entitlement to judgment as a matter law.

With the burden shifted, Plaintiffs raised a triable issue of material fact with their own expert's opinion. Plaintiffs' expert appropriately reviewed Elyssa's medical records and Dr. Spooner's June 11 and 12, 2008 echocardiograms. Like Dr. Spooner, Plaintiffs' expert agrees that Elyssa was suffering from myocarditis. Contrary to Dr. Spooner's diagnosis, however, Plaintiffs' expert's review of the echocardiograms lead to his conclusion that Elyssa's myocarditis was moderate to severe. This finding was based upon his qualitative review of the echocardiograms to determine that Elyssa's contractility was significantly compromised. He also discounted the reliability of Dr. Spooner's shortening and ejection fraction calculations in

determining the severity of Elyssa's myocarditis, due to specifically enumerated factors. Additionally, Plaintiffs' expert noted that there was no contraindication for anti-coagulation therapy or aspirin and that the risks associated with such treatment were limited in this hospital setting. Due to the convergence of the above factors, Plaintiffs' expert opined that Dr. Spooner's analysis of Elyssa's heart dysfunction and his failure to prescribe prophylactic anti-coagulation therapy deviated from the applicable standard of care. This showing raises a triable issue of fact, notwithstanding Dr. Spooner's characterization of this expert's analysis.

Accordingly, Dr. Spooner and CDPCA's motion for summary judgment is denied. AMCH, on their motion, similarly failed to resolve all material issues of fact relative to Elyssa's cardiac diagnosis and the determination not to prescribe anti-coagulation therapy or aspirin.<sup>4</sup>

AMCH did establish, however, its entitlement to summary judgment dismissing Plaintiffs' claim that its deviation from the standard of care in diagnosing and treating Elyssa's stroke caused Elyssa's injuries. AMCH supported its motion with three expert opinions. Each reviewed the pertinent medical records and depositions relative to Elyssa's June 16, 2008 stroke treatment. The experts recognized the conflicting evidence relative to stroke onset, but concluded that Elyssa's injuries were neither caused by, nor could have been helped by, the stroke treatment she received. They all agreed that a clot buster drug, tPA, is not appropriate to treat a child of Elyssa's age who suffers a stroke while sleeping. The serious risks, hemorrhagic conversion, associated with using such medication in this scenario are just too great. Moreover,

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<sup>4</sup> AMCH's reply papers raised, for the first time on their motion, that it is entitled to summary judgment on this portion of Plaintiffs' claim on a lack of duty thesis. Such argument, however, is not considered because it impermissibly introduces an entirely new legal theory upon which it seeks relief. (Schissler v Athens Assoc., 19 AD3d 979 [3d Dept 2005]; Crawmer v Mills, 239 AD2d 844 [3d Dept 1997]).

because Elyssa suffered such a large stroke, tPA would not have been used even in an adult and “sequelae were predetermined.” Neither performing a CT scan nor administering aspirin and magnesium sulfate upon Elyssa’s waking would have lessened Elyssa’s injuries. As one of AMCH’s experts succinctly summed up, “once the stroke occurred there was no care or treatment... which would change the outcome.” With this expert proof, AMCH demonstrated that their stroke treatment actions did not cause Elyssa’s injuries and thereby shifted the burden of proof to Plaintiffs to raise a triable issue of fact.

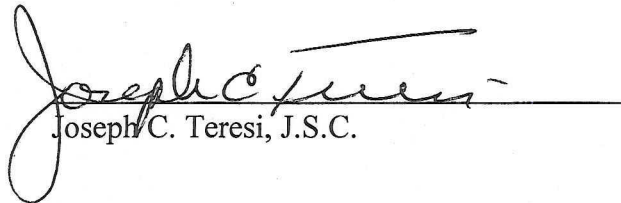
On this record, Plaintiffs did not do so. Plaintiffs’ expert addressed neither stroke diagnosis nor treatment; and Plaintiffs’ counsel voluntarily discontinued these claims.

Accordingly, AMCH’s motion for summary judgment dismissing Plaintiffs’ stroke diagnosis and treatment claims is granted.

This Decision and Order is being returned to the attorneys for Plaintiffs. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: July 12, 2012  
Albany, New York

  
Joseph C. Teresi, J.S.C.

**P A P E R S C O N S I D E R E D :**

1. Notice of Motion, dated May 18, 2012; Affidavit of Edwin Tobin, dated May 18, 2012; Physician's Affidavit - Redacted, dated May 15, 2012; Physician's Affidavit - Redacted, dated May 16, 2012; Physician's Affidavit - Redacted, dated May 18, 2012, with attached Exhibits "A" - "F"
2. Notice of Motion, dated May 22, 2012; Affidavit of Cathleen Clark, dated May 22, 2012, with attached Exhibits "A" - "K"
3. Affirmation of Meghan Keenholts, dated June 18, 2012, with attached Exhibits "A" - "E"; Affidavit - Redacted, dated June 15, 2012;
4. Affidavit of Edwin Tobin, dated June 22, 2012, with attached Exhibits "A" - "B"
5. Affidavit of Cathleen Clark, dated June 25, 2012, with attached Exhibit "A"