

<b>Bergin v Jackson</b>
2012 NY Slip Op 32169(U)
August 3, 2012
Supreme Court, Suffolk County
Docket Number: 09-7349
Judge: Joseph C. Pastorella
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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 34 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH C. PASTORESSA  
Justice of the Supreme Court

MOTION DATE 5-15-12  
ADJ. DATE 5-23-12  
Mot. Seq. # 006 - MG

EILEEN BERGIN, As the Administratrix of the  
Estate of LAWRENCE BERGIN and EILEEN  
BERGIN, Individually,

Plaintiff,

- against -

DAVID JACKSON, R.P.A., KAREN EYNON,  
M.D., CARL GOODMAN, M.D., CHRISTINE  
KAM, M.D., US RADIOLOGY ON-CALL,  
RANDOLPH PHILLIPS, M.D., PATRICIA  
PICCIANO, R.N., BROOKHAVEN MEMORIAL  
HOSPITAL, DENISE ABSELET, D.O., PORT  
JEFFERSON INTERNAL MEDICINE  
ASSOCIATES, P.C., ALEXANDER  
WEINGARTEN, M.D., PHILLIPS FYMAN,  
M.D., ALEXANDER WEINGARTEN, M.D.,  
P.C., LOUIS MALESARDI, PA-C, PHILLIP N.  
FYMAN, M.D., COMPREHENSIVE PAIN  
MANAGEMENT ASSOCIATES, RICHARD D.  
HINDES, M.D., RICHARD D. HINDES, M.D.,  
P.C., and ORTHOPEDIC ASSOCIATES OF  
LONG ISLAND, LLP, and RICHARD BALTER,  
M.D.,

Defendants.

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Upon the following papers numbered 1 to 32 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (006) 1 - 19; Notice of Cross Motion and supporting papers \_\_\_\_; Answering Affidavits and supporting papers 20-28; 33-34; Replying Affidavits and supporting papers 29-32; Other \_\_\_\_; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that this pre-note motion (006) by the defendants, Christine Kam, M.D. and U.S. Radiology On-Call, pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross claims asserted against them is granted and the complaint and any cross claims asserted against them are dismissed with prejudice.

In this action for medical malpractice, causes of action have been asserted by the plaintiff, Eileen Bergin, as the Administratrix of the Estate of the plaintiff's decedent, Lawrence Bergin, for negligence and lack of informed consent. It is alleged that the plaintiff presented to the emergency department at Brookhaven Memorial Hospital on October 8, 2006, for complaints of pain in his groin and right side, and right thigh since October 5, 2006. CT scans with contrast of the plaintiff's decedent's abdomen and pelvis were ordered by the emergency room physician, Dr. Eynon. The resultant 98 films, sent by Brookhaven Hospital to U.S. Radiology On-Call (USROC), were received by USROC on October 8, 2006, and were interpreted by defendant Christine Kam, M.D. of USROC. Based upon the preliminary interpretation of those films, the plaintiff was diagnosed with abdominal pain of unknown origin. The gravamen of the complaint, as asserted against the moving defendants, Christine Kam, M.D. and USROC, is that they negligently departed from good and accepted standards of radiology care and treatment based upon their alleged failure to properly interpret the CT studies and their failure to diagnose that the plaintiff's decedent had methicillin resistant staphylococcus aureus (MRSA) in his right hip, causing osteomyelitis and sepsis from the spreading of the MRSA infection, and requiring him to undergo a blood transfusion, insertion of and removal of hardware in his hip, and the use of a PICC line.

Christine Kam, M.D. and USROC seek summary judgment dismissing the complaint on the basis that they did not assume a general duty of care to the plaintiff's decedent; that their duty was to accurately interpret the patient's films and not to independently diagnose the patient's medical condition; that Dr. Kam's preliminary interpretation of the films and the interpretation by the Brookhaven radiologist, who issued the final report upon interpretation of the films, came to the same conclusions as she did; and that the diagnosis of MRSA in the plaintiff's decedent's right hip could not have been made from a review of the CT of the pelvis and abdomen. Although the moving defendants seek dismissal of all cross claims asserted against them, they have failed to provide copies of the answers served by their co-defendants setting forth the asserted cross claims.

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 (Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065 [1979]; Sillman v Twentieth Century-Fox Film Corporation, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (Winegrad v N.Y.U. Medical Center, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Winegrad v N.Y.U. Medical Center, *supra*). 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" (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 (Castro v Liberty Bus Co., 79 AD2d 1014 [2d 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 (Dunn v Khan, 62 AD2d 828 [2d Dept 2009]; Holton v Sprain Brook Manor Nursing Home, 253 AD2d 852 [2d Dept 1998], app denied 92 NY2d 818, 685 NYS2d 420). 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, 221 AD2d 674 [2d 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 [2d Dept 1998], app denied 92 NY2d 814; Bloom v City of New York, 202 AD2d 465 [2d Dept 1994]).

In support of this motion (001), the moving defendants have submitted, inter alia, an attorney's affirmation; the affirmation of their expert physician, Howard Luks, M.D; copies of the summons and complaint, supplemental summons and amended complaints, the moving defendants' answer, and plaintiff's verified bill of particulars and amended verified bill of particulars relative to the moving defendants; a copy of an on-call radiology agreement dated October 19, 2005; an uncertified copy of plaintiff's medical record from Brookhaven Hospital; a signed copy of the transcript of the deposition of Christine Tsu Norred, M.D dated May 12, 2011; an uncertified copy of a radiology report; an affidavit by Robert L. Bard, M.D. dated March 5, 2012, along with a radiology report by Dr. Bard, and copy of his curriculum vitae; an uncertified, unauthenticated copy of the US Radiology On-Call professional services agreement; and the out-of-state affidavit of Christine Tsu Norred Gal, M.D, f/k/a Christine Kam, M.D.

At her deposition, Christine Tsu Norred Gal, M.D. testified that Kam is her married name. She completed her training in radiology in 2005 and has since become board certified in radiology. In October 2006, she was employed as a radiologist by USROC, was licensed in New York and in other states, and practiced medicine in California out of her home office. While employed with USROC, she was credentialed at specific hospitals, including Brookhaven Memorial Hospital, which contracted with USROC to provide interpretations of studies. She was a remote interpreter or teleradiologist, and interpreted CT scans, MRI's, plain films, ultrasounds, and some nuclear medicine studies for those hospitals. She testified that a teleradiologist, or remote radiologist, is located remotely from the site of the procedure's origin, and receives electronic images of the diagnostic study. The study is interpreted by the teleradiologist, who then sends a preliminary report electronically conveying the interpretation of the study. She stated that she had a quota to fill consisting of nine studies per hour. Any studies over that quota were compensated by way of a bonus. If she needed additional information about a patient whose study she was reviewing, she could send an instant message to an USROC assistant who would set up a conference call with the patient's physician. After reviewing the plaintiff's studies, she issued a preliminary report, or preliminary study, or a wet read, which is a quick look at a study to determine if there are any acute findings which need to be addressed immediately. It was her understanding that the studies would be interpreted by a radiologist at Brookhaven during normal hours, and a final report would then be issued by the radiologist at Brookhaven.



Dr. Kam testified that on October 8, 2006, through a cable network, she was electronically provided with copies of Lawrence Bergin's CT scan films with intravenous contrast of his abdomen and pelvis, and upon review of those studies, she issued a preliminary report. She testified that intravenous contrast helps delineate the vascular structures and shows enhancement within specific tissues, while oral contrast shows the inner contour of the bowel. There were ninety five images with contrast, which studies were conducted because the plaintiff was having pain. Not having images without contrast did not affect her ability to interpret the studies. The images consisted of soft tissue windows (images that are optimized to demonstrate the soft tissues or visceral organs within a patient) and bone windows (images that are optimized to show the bony structures within a patient). She reviewed both soft tissue and bone window images.

Dr. Kam testified that the images were of acceptable quality to enable her to interpret the study. She submitted her preliminary report by inputting it through the USROC computer system to USROC. In her preliminary report of the abdomen/pelvis CT, she wrote, "No significant acute abnormalities," which she stated meant that there were no acute findings within this patient to be described. There were a few sigmoid and descending colon diverticula (out-pouchings of the colonic wall) with no evidence of diverticulitis or inflammation noted. She noted post-surgical change at the lumbosacral junction. She saw no evidence of an effusion in the right hip when she reviewed the studies. In reviewing images 88 and 89, she noted that it was slightly off center and that the femoral heads were not exactly in the same plane. She stated that the films demonstrated no effusion at the femoral heads and that the right hip was normal in appearance. She described an effusion as fluid distending the capsule of the joint space or capsule. She testified that had she known the plaintiff was complaining of right thigh pain, it would not have changed her interpretation of the findings on these images as the thighs were not included in the study.

In her supporting affidavit, Dr. Kam averred, that upon reviewing the requisition form from Brookhaven Memorial Hospital which indicated Mr. Bergin had "pain," she reviewed the ninety-eight films from two series for Mr. Bergin, issued a preliminary report to USROC, and found there were no additional steps or measures she had to take. She continued that Mr. Bergin's films demonstrated no indication of methicillin resistant staphylococcus aureus (MRSA), and that MRSA, even in its earliest stages in the plaintiff's right hip would not be apparent on a CT of the patient's abdomen and pelvis. There was no indicia on the films that Mr. Bergin might have been suffering from an infection or that additional films would be necessary.

Robert L. Bard, M.D., the moving defendants' expert, has submitted an affirmation wherein he stated that he is licensed to practice medicine in New York and is board certified in radiology Parts I and II. He provided a copy of his curriculum vitae. It is Dr. Bard's opinion to a reasonable degree of medical certainty that Dr. Kam and USROC did not deviate from acceptable standards of practice, and that the films were accurately and properly read, assessed, and reported by Dr. Kam. Dr. Bard continued that he reviewed those same films, and that he did not require any additional medical records or films in order to arrive at his conclusions in interpreting the subject films. The CTs of the abdomen and pelvis, with and without contrast, were clear and able to be read by a trained radiologist. He stated that the requisition form provided sufficient information to render an opinion. Dr. Bard set forth his interpretation of the films, which interpretation was consistent with the interpretation by Dr. Kam.

Dr. Bard stated that a teleradiologist's duty to a patient is to accurately interpret the patient's films and that the teleradiologist does not accept or owe a general duty of care towards the care and treatment of a patient.

He continued that it is beyond the duty and scope of a teleradiologist to opine and report as to any observations outside the scope of his or her interpretation of the films. He continued that a teleradiologist does not manage the health care of a patient and does not recommend any treatment, testing, or provide care to a patient.

Dr. Bard stated that Mr. Bergin's CT films did not demonstrate evidence of methicillin resistant staphylococcus aureus (MRSA), and that MRSA, even in its earliest stages in the plaintiff's right hip, would not be apparent on a CT of the abdomen and pelvis. He concluded that there was no indication on the films that Mr. Bergin might have been suffering from an infection or that additional films would be necessary.

Based upon the foregoing, it has been established prima facie that Christine Kam, M.D. and USROC did not depart from the accepted standard of radiological care and treatment in interpreting Mr. Bergin's CT scans of his pelvis and abdomen, and that they did not proximately cause the injuries claimed on behalf of Lawrence Bergin. Movants established that the CT scan films of Mr. Bergin's abdomen and pelvis were correctly read and interpreted, with a preliminary report issued, and that the films gave no indicia that the plaintiff's decedent suffered MRSA in his right hip, or that he had a pathology in his hip.

To rebut a prima facie showing of entitlement to an order granting summary judgment by the defendant, the 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 defendant's 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 [2d Dept 2004]; Domaradzki v Glen Cove OB/GYN Assocs., 242 AD2d 282 [2d Dept 1997]). "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. Such credibility issues can only be resolved by a jury" (Bengston v Wang, 41 AD3d 625 [2d Dept 2007]). Here, the plaintiff has opposed this motion with the affirmation of her expert physician.

The plaintiff has submitted the affirmation of her expert<sup>1</sup> who affirmed that he/she is licensed to practice medicine in New York and became board certified in radiology in 2007, after the cause of action in this matter accrued. Whether a witness qualifies as an expert speaks in terms of skill, knowledge, or experience (Hamilton v Wein, 132 Misc2d 1023 [Sup Ct Kings County 1986]). Here, it is determined that any lack of skill or experience that the plaintiff's expert had at the time this cause of action arose goes to the weight of his opinion as evidence, and not to its admissibility (Erbstein v Savasatit, 274 AD2d 445 [2d Dept 2000]). The plaintiff's expert affirmed that he was aware of the radiological standards of care which existed at the time, and that the standards are the same. However, he did not set forth any of the standards or address the standard for teleradiology and issuance of preliminary reports, except to state that Dr. Kam owed the standard of care and diagnosis, even in a temporally limited capacity. The plaintiff's expert did not define what is meant by a "temporally limited capacity." The plaintiff's expert also set forth that he reviewed the hard copy of the CAT of the abdomen and pelvis without contrast, however, testimony by Dr. Kam, and Lawrence Bergin's medical records, including the consent form for the studies, indicate that the CT of the abdomen and pelvis was with contrast, not without. Although the plaintiff's expert indicates that the Mather Memorial Hospital record was

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<sup>1</sup> A signed copy of plaintiff's expert affirmation has been submitted to this court for in camera inspection (Marano v Mercy Hospital, 241 A.D.2d 48 [2d Dept 1998]; McCarty v. Community Hosp. of Glen Cove, 203 A.D.2d 432 [2d Dept 1994]).



also reviewed, only an uncertified copy of the discharge summary for that admission of November 23, 2006 has been submitted. Expert testimony is limited to facts in evidence. (see, Allen v Uh, 82 AD3d 1025 [2d Dept 2011]; Hornbrook v Peak Resorts, Inc. 194 Misc2d 273 [Sup Ct, Tomkins County 2002]; Marzuillo v Isom, 277 AD2d 362 [2d Dept 2000]; Stringile v Rothman, 142 AD2d 637 [2d Dept 1988]; O'Shea v Sarro, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]).

The plaintiff's expert continued that the opinions offered are based on a reasonable degree of medical certainty. It is the expert's opinion that Dr. Kam departed from accepted standards of radiology practice in not seeing, and/or in not recognizing, the significance of the abnormal finding in the study of the decedent's right hip, specifically, the presence of a soft tissue effusion. He stated that there is a collection of fluid at the right hip joint, but that none is seen in the left hip joint, despite the alleged position of the patient in the CAT scanner. He continued that even without knowing of the right thigh pain, Dr. Kam had a duty to see what was on the study, namely the effusion. Based upon the foregoing, it is determined that the plaintiff's expert has failed to raise a factual issue to preclude summary judgment.

The plaintiff's expert's opinion is conclusory and unsupported by the record that there is effusion noted in the right hip (see, Ballek v Aldana-Bernier, 94 AD3d 923 [2d Dept 2012]). The plaintiff's expert did not opine as to the type or amount of fluid seen in the plaintiff's right hip, if fluid is expected to be found in the hip joint, and how this fluid differed in quantity or in any respect when compared to normal joint fluid. He does not indicate in which films he saw the effusion in the right hip. He does not comment on the location of the fluid in the hip, or offer any other medical description of the fluid.

The plaintiff's expert stated that the presence of the complaint of right thigh pain in the Brookhaven Hospital record, and in Dr. Phillip's final report, clearly put Dr. Kam on notice of a potential pathology in the right hip. However, the expert makes a quantum leap and does not indicate, or support with any evidentiary submissions that this hospital record was provided to Dr. Kam with the information concerning right thigh pain, or that she was provided with Dr. Phillip's subsequent final report after she issued her preliminary report. In reviewing the hospital record, it is noted that when the plaintiff's decedent presented to the emergency department at Brookhaven Hospital on October 8, 2006, he offered complaints of right sided groin pain. The clinical impression at the time of the CT scan was that of "abdominal pain." He was also noted to have difficulty with his right leg secondary to pain. The triage note indicated right thigh pain since Thursday. The USROC cover sheet indicates "pain" under the clinical history section. It does not indicate that Dr. Kam was provided with a history of hip, groin, or thigh pain.

The plaintiff's expert continued that the plaintiff's decedent's urine had a positive culture for MRSA on October 8, 2006, as indicated by the Mather Hospital record, which has not been provided to this court. The plaintiff has not provided a copy of the urine culture in support of this statement, thus precluding his testimony relative to this report. The plaintiff's decedent was discharged from Brookhaven Hospital emergency room with instructions to follow up with his private medical doctor. The plaintiff's expert continued that by November 23, 2006, the infection in the right hip joint eroded the joint and that the MRSA had spread throughout his body. However, plaintiff's expert does not state whether or not the plaintiff's decedent had any follow up care with his private medical doctor or other specialists in the interim, or whether he underwent further diagnostic testing concerning his thigh pain. The expert does not state how he determined that there was an infection caused by MRSA in the plaintiff's decedent's right hip. The plaintiff's expert's conclusory opinions, unsupported with

evidentiary submissions, do not raise factual issues to preclude summary judgment from being granted to the moving defendants (see, Kaplan v Hamilton Medical Associates, P.C., 262 AD2d 609 [2d Dept 1999]).

Nor does the plaintiff's expert differentiate between the care and treatment provided to the plaintiff's decedent by the different defendants. It is additionally noted that the Brookhaven Memorial Hospital After Care Contact sheet indicates that the plaintiff's decedent was advised of his positive urine culture and that a prescription was called into his pharmacy. He was again advised to follow up with his private medical doctor. The plaintiff's expert affirmation contains only bare conclusory allegations that the defendant departed from the standard of care, without presenting evidence that this alleged breach was the proximate cause of the plaintiff's decedent's injuries (Arias v Flushing Hospital Medical Center, 300 AD2d 610 [2d Dept 2002]). He does not state what care and treatment was thereafter provided with regard to the decedent's complaints of right thigh pain. Such speculation does not establish a causal link between Dr. Kam's alleged negligence and the plaintiff's injuries (see, Horth v Mansur, 243 AD2d 1041 [3d Dept 1997]). Under settled precedents, the plaintiff's evidentiary showing falls far short of establishing a triable issue of fact (see Fimmerman v Bernstein, 107 AD2d 795 [2d Dept 1985]; Fileccia v Massapequa General Hospital, 99 AD2d 796 [2d Dept 1984] ).

The plaintiff provided a copy of the ACR Practice Guideline for Communication of Diagnostic Imaging Findings. This guideline set forth that the preliminary report "precedes the final report. It may be rendered for the purpose of directing immediate patient management or to meet the needs of a particular practice environment. It very likely will contain limited information or incomplete information. It should not be expected to contain all the information subsequently found in the final report." The guideline also provides that the final report "is the definitive documentation of the results of an imaging examination or procedure." The plaintiff's expert does not state that the final report demonstrated effusion in the plaintiff's decedent's right hip or that it in any way deviated from the preliminary report issued by Dr. Kam. Although the plaintiff's expert opined that the finding of effusion in the hip required clinical correlation, he does not opine that it was Dr. Kam's obligation to perform clinical correlation.

It is determined that the defendant Dr. Kam did not assume a general duty of care to schedule or urge further testing, or to diagnose the plaintiff's decedent's medical condition. Although physicians owe a general duty of care to their patients, that duty may be limited to those medical functions undertaken by the physician and relied on by a patient (see, Mosezhnik v Berenstein, 33 AD3d 895 [2d Dept 2006]; Chulla v DiStefano, 242 AD2d 657 [2d Dept 1997]). Here, the defendant radiologist, Dr. Kam, had the limited role of interpreting CT films and documenting the findings in a preliminary report, which findings were subsequently confirmed and agreed to by Dr. Phillip in his final report. Here, the plaintiff has not demonstrated that the failure to accurately communicate the CT interpretation was the proximate cause of a delayed diagnosis or damages. Dr. Kam's responsibility or duty to the plaintiff ended when the duty of care was transferred after the preliminary report was made, and when the final report was issued by Dr. Phillip, along with the care and treatment by the health care providers at Brookhaven Hospital emergency room, and by those subsequent treating physicians upon the plaintiff's decedent's discharge therefrom (see, Parrilla v Buccellato, 2012 NY Slip Op 3820 [2d Dept 2012]; Arias v Flushing Hospital Medical Center, 300 AD2d 610 [2d Dept 2002]; Dombroski v Samiritan Hospital, 47 AD3d 80 [3d Dept 2007]).

Accordingly, this motion by defendant Christine Kam, M.D. and USROC is granted and the complaint and any cross claims asserted against them are dismissed.



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Defendant Alexander Weingarten, M.D. has submitted an attorney's affirmation in limited opposition to motion (006) wherein he seeks an order preserving his CPLR Article 16 rights. Since a summary judgment motion is the procedural equivalent of a trial, it follows therefrom that any defendant intending to obtain the limited liability benefits of CPLR Article 16 must adduce proof on point in admissible form. However, in support of preservation of the benefits afforded by Article 16, defendant Weingarten has not submitted an affirmation from his expert setting forth those alleged departures by Dr. Kam and USROC upon which he bases entitlement to preservation of Article 16 benefits. Accordingly, no basis to preserve any limited liability benefits pursuant to Article 16 has been demonstrated as a matter of law by Dr. Weingarten, and any cross claim asserted by him against the moving defendants in this motion (006) is dismissed with prejudice.

Dated: August 3, 2012

  
 HON. JOSEPH C. PASTORESSA, J.S.C.

\_\_\_\_\_ FINAL DISPOSITION   X   NON-FINAL DISPOSITION

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