

Estate of William P. Beardsley v Smirnov

2011 NY Slip Op 32579(U)

September 28, 2011

Supreme Court, Nassau County

Docket Number: 7382/07

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

ESTATE OF WILLIAM P. BEARDSLEY, by
ANN R. BEARDSLEY, as ADMINISTRATOR,
and ANN R. BEARDSLEY, Individually,

Plaintiffs,

- against -

VICTOR B. SMIRNOV, M.D., GERALD BRODY,
M.D., MICHAEL SLEET, M.D., DONALD PRICE,
M.D., BETTY TRIANTAFILLOU-MONTRONI,
M.D., GERALD IRWIN, M.D., WINTHROP
RADIOLOGY ASSOCIATES and WINTHROP
UNIVERSITY HOSPITAL,

Defendants.

TRIAL / IAS PART 30
NASSAU COUNTY

Index No. 7382/07

Motion Sequence No. 001, 002,
003

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1, 2</u>
Answering Affidavits	<u>3</u>
Replying Affidavits	<u>4, 5</u>
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Respondent's	_____

The underlying medical malpractice and wrongful death action arises after an April 23, 2005 motor vehicle accident resulting in the plaintiff being taken by ambulance to the defendant Winthrop University Hospital, in Nassau County, New York. The plaintiffs allege defendants Victor B. Smirnov, M.D., the attending trauma surgeon who is board certified in general surgery with a sub-specialty in vascular surgery, and Winthrop

University Hospital failed to timely diagnose alleged severe cardiac insult which led to cardiac tamponade and the patient's death. The plaintiff contend Dr. Smirnov and Winthrop University Hospital negligently and carelessly discharged the decedent and negligently and carelessly failed to surgically intervene in a timely fashion. Discovery, including extensive depositions, is complete, and none of these parties contend they need any further disclosure.

The defendant Michael Sleet, M.D. moves pursuant to CPLR 3212 for summary judgment under motion sequence 001. The plaintiffs discontinue with prejudice the underlying medical malpractice and wrongful death action against this defendant in an April 13, 2011 affirmation by plaintiffs' counsel specifically paragraph number 14.

The defendant Dr. Smirnov now moves pursuant to CPLR 3212 for summary judgment under motion sequence 002. Dr. Smirnov submits deposition testimony, medical records and the December 16, 2010 affirmation by Michael Argenziano, M.D., board certified in thoracic surgery. Dr. Argenziano opines the care and treatment rendered by Dr. Smirnov was in accord with good and accepted medical practice, and the plaintiffs' allegations are unfounded and without merit. Dr. Argenziano opines appropriate testing was done from the time of the decedent's admission to Winthrop University Hospital until his discharge on April 24, 2005. Dr. Argenziano found the CT scan findings did not show any evidence of fluid surrounding the decedent's heart, the electrocardiogram findings were normal, and the cardiac enzymes were within normal range. Dr. Argenziano stated there were no findings upon examination nor findings based on the testing which indicated any repeat testing or surgical intervention was warranted. Dr. Argenziano opined Dr. Smirnov

did not deviate from any of the accepted standards of medical care throughout the course of the doctor's contact with the decedent, and none of Dr. Smirnov's actions proximately caused or substantially contributed to the decedent's condition or death.

Winthrop University Hospital cross moves pursuant to CPLR 3212 for summary judgment under motion sequence 003. Winthrop University Hospital points to the other defendants' submissions, including the defense experts' opinions in support of this cross motion.

The plaintiffs oppose both motions. The plaintiffs contend Dr. Argenziano's affirmation does not eliminate material issues of fact. The plaintiffs point out Winthrop University Hospital failed to any supporting expert affirmation, and only refer to a former defendant physician's expert. The plaintiffs contend neither Dr. Smirnov nor Winthrop University Hospital make a *prima facie* showing of entitlement to summary judgment.

This Court carefully reviewed and considered all of the papers submitted with respect to both motions. The Second Department holds:

It is well settled that "[t]he 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" (*Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642)

Cox v. Kingsboro Medical Group, 214 A.D.2d 150, 154-155, 632 N.Y.S.2d 139 [2nd Dept, 1995].

The Second Department stated:

[H]ospitals are "shielded from liability when its employees follow the orders of [a private attending physician] unless the latter's orders are so clearly contraindicated by normal practice that ordinary prudence requires inquiry into their correctness" (*Filippone v. St. Vincent's Hosp. & Med. Ctr. of N.Y.*,

[* 4]

253 A.D.2d 616, 618, 677 N.Y.S.2d 340; *see Toth v. Community Hosp. at Glen Cove*, 22 N.Y.2d 255, 265, n. 3, 292 N.Y.S.2d 440, 239 N.E.2d 368; *Muniz v. Katlowitz*, 49 A.D.3d at 513, 856 N.Y.S.2d 120; *Soto v. Andaz*, 8 A.D.3d 470, 471-472, 779 N.Y.S.2d 104)
Sela v. Katz, 78 A.D.3d 681, 683, 911 N.Y.S.2d 112 [2nd Dept, 2010].

Here, Dr. Smirnov met this burden by showing Dr. Argenziano's expert opinion eliminated any material issues of fact. Dr. Smirnov presented evidence in admissible form which shows the actions of this doctor throughout the course of his treatment of the decedent did not deviate from accepted standards of medical care. Winthrop University Hospital met its burden by showing the hospital employees followed the orders of the attending physician. Winthrop University Hospital demonstrated evidence in admissible form that Dr. Smirnov was the attending surgeon directing the medical care and treatment provided to the decedent.

The burden then shifted to the plaintiffs to demonstrate the existence of a genuine triable issue of fact requiring resolution by a trier of fact (*see generally Leale v. New York City Health & Hospitals Corp.*, 222 A.D.2d 414, 634 N.Y.S.2d 536 [2nd Dept, 1995]). The Second Department holds: “[E]xpert opinions that are conclusory or unsupported by the record are insufficient to raise triable issues of fact” (*Schrader v Sunnyside Corp.*, 297 AD2d 369, 371 [2002]; *see Fhima v Maimonides Med. Ctr.*, 269 AD2d 559 [2000])” (*Micciola v Sacchi*, 36 A.D.3d 869, 828 N.Y.S.2d 572 [2nd Dept, 2007]). The Second Department also holds:

“ ‘While it is true that a medical expert need not be a specialist in a particular field in order to testify regarding accepted practices in that field . . . the witness nonetheless should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the

opinion rendered is reliable' ” (*Behar v Coren*, 21 AD3d 1045, 1046-1047 [2005], quoting *Postlethwaite v United Health Servs. Hosps.*, 5 AD3d 892, 895 [2004]). Thus, where a physician opines outside his or her area of specialization, a foundation must be laid tending to support the reliability of the opinion rendered (see *Geffner v North Shore Univ. Hosp.*, 57 AD3d 839, 841 [2008]; *Bjorke v Rubenstein*, 53 AD3d 519, 520 [2008]; *Glazer v Choong-Hee Lee*, 51 AD3d 970, 971 [2008]; *Mustello v Berg*, 44 AD3d 1018, 1019 [2007]; *Behar v Coren*, 21 AD3d at 1046-1047; *Nangano v Mount Sinai Hosp.*, 305 AD2d 473, 474 [2003]). In the circumstances of this case, as the plaintiffs' expert failed to lay the requisite foundation for his asserted familiarity with pediatric developmental disabilities, his affidavit was of no probative value

Shectman v Wilson, 68 A.D.3d 848, 849-850, 890 N.Y.S.2d 117 [2nd Dept, 2009].

In opposition, the plaintiffs fail to meet their burden (see *Shapiro v. Gurwin Jewish Geriatric Nursing & Rehabilitation Center*, 84 A.D.3d 1348, 923 N.Y.S.2d 894 [2nd Dept, 2011]). The plaintiff's expert Emogene Bedrosian, M.D., board certified in emergency medicine indicates, in an April 13, 2011 affirmation, the decedent was not evaluated for cardiac contusion nor cardiac trauma sustained in the accident while he was at Winthrop University Hospital under Dr. Smirnov's care, but Dr. Bedrosian later changes that initial statement. Dr. Bedrosian subsequently opines, in the same affirmed report, Dr. Smirnov was negligent by failing to further evaluate the decedent's cardiac contusion and cardiac trauma through eshocardiogram and transesophageal eshocardiogram prior to discharge from Winthrop University Hospital, and Dr. Smirnov failed to continue monitoring the cardiac contusion and cardiac trauma. It is speculative whether Dr. Bedrosian believes Dr. Smirnov did not evaluate the decedent for cardiac contusion and cardiac trauma, should have done further evaluation of cardiac contusion and cardiac trauma or should have done continued monitoring cardiac contusion and cardiac trauma. It is also speculative regarding

what Dr. Bedrosian believes Dr. Smirnov should have done in this regard, and how any further evaluation would have changed the ultimate outcome or how long any additional monitoring should have continued beyond the time the decedent was at Winthrop University Hospital. Dr. Argenziano's indication that the radiology studies did not show any fluid surrounding the decedent's heart, the electrocardiogram findings were normal, the cardiac enzymes testing were within normal range, there was no evidence of myocardial injury and the decedent was hemodynamically stable at discharge on April 24, 2005.

Dr. Bedrosian opines Dr. Smirnov was negligent in failing to further evaluate the reasons for the downward trend in the decedent's decreasing heart rate prior to discharge from Winthrop University Hospital. Dr. Bedrosian observes the decedent's heart rate went from a high of 72 to a low of 44, yet the hospital chart of Winthrop University Hospital shows there is no foundation for that statement by Dr. Bedrosian. Dr. Bedrosian does not explain how tests in the diagnosis of cardiac contusion and cardiac trauma would have assisted where a litany of tests already conducted would not have assisted in such a diagnosis. Dr. Bedrosian does not indicate how any such tests would have provided any information beyond those tests already conducted and how conducting such tests would have altered the care and treatment and rendered to the decedent or the ultimate outcome (*see Diaz v New York Downtown Hosp.*, 99 N.Y.2d 542, 754 N.Y.S.2d 195 [2002]).

Dr. Bedrosian states Dr. Smirnov was negligent because he failed to seek pulmonary and cardiac specialist consults for the decedent prior to discharge from Winthrop University Hospital. This allegation is not set forth in the verified complaint nor the verified bill of

particulars (*see Abalola v Flower Hosp.*, 44 A.D.3d 522, 843 N.Y.S.2d 615 [1st Dept, 2007]). Ruth Spector, M.D., board certified in internal medicine and anesthesiology, examined the decedent while he was at Winthrop University Hospital between April 23 and 24, 2005. Dr. Spector indicated, in an April 24, 2005 note the decedent's blood pressure and breathing were normal, the basis chemistries were within normal limits and the cardiac enzyme testing did not reveal any significant muscle damage. Dr. Bedrosian does not acknowledge Dr. Spector watched over the decedent nor does Dr. Bedrosian explain why the suggested consults were required, and how any such consult would have altered the care and treatment rendered to the decedent.

The plaintiffs allege the defendants were negligent by failing to provide discharge instructions detailing signs and symptoms regarding cardiac contusion and cardiac trauma, and failing to limit full activity and provide for a timely followup with Dr. Smirnov or other medical specialist. It is unclear whether the plaintiffs allege this departure against Dr. Smirnov notwithstanding that this alleged deviation is not set forth in the verified complaint nor the verified bill of particulars, so it is a new theory of liability (*see Abalola v Flower Hosp.*, 44 A.D.3d *supra*). Moreover, Dr. Bedrosian does not indicate there is any evidence the decedent was unaware of the signs and symptoms, and how this circumstance caused a change in the ultimate outcome or provided any delay in further care and treatment of the decedent. Also, Dr. Bedrosian does not mention how the April 23, 2005 motor vehicle accident caused any of the decedent's injuries while provide analysis of the alleged departures by Dr. Smirnov.

The Court determines the defendants established their *prima facie* entitlement to judgment as a matter of law by submitting, inter alia, an expert physician affirmations asserting Dr. Smirnov did not deviate from the relevant standard of care, and the hospital employees followed the orders of a private attending physician. There was no showing that those orders contraindicated by normal practice that ordinary prudence requires inquiry into their correctness. There is no showing of any vicarious liability by Winthrop University Hospital (*see generally La Bay v White Plains Hosp.*, 97 A.D.2d 432, 467 N.Y.S.2d 400 [2nd Dept, 1983]). This Court determines the plaintiffs' expert and other submissions fail to raise a triable issue of fact (*see Heller v. Weinberg*, 77 A.D.3d 622, 909 N.Y.S.2d 477 [2nd Dept, 2010]).

Accordingly, the motion sequence 001 is denied as moot, motion sequence 002 and motion sequence 003 are granted.

So ordered.

Dated: **September 28, 2011**

ENTER:



J. S. C.

NON FINAL DISPOSITION

ENTERED
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