

Guctas v Pessolano

2012 NY Slip Op 32549(U)

October 1, 2012

Sup Ct, Richmond County

Docket Number: 100425/06

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No.:100425/06
Motion No.:005, 006**

**MELISA ELIF GUCTAS, an infant under the age of
fourteen, by her mother and natural guardian,
ESRA GUCTAS, and
ESRA GUCTAS and YIGIT GUCTAS, Individually,**

Plaintiffs

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

**JOANNA C. PESSOLANO, M.D.,
JANE M. PONTERIO, M.D.,
CHRISTINE STICCO, M.D., and
ST. VINCENT CATHOLIC MEDICAL CENTERS—
ST. VINCENT’S HOSPITAL STATEN ISLAND,**

Defendants.

The following items were considered in the review of the following motion and cross-motion for summary judgment.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Memorandum of Law in Support of Motion	2
Notice of Cross-Motion and Affidavits Annexed	3
Affirmation in Opposition	4
Memorandum of Law in Opposition	5
Replying Affidavits	6, 7
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion and Cross-Motion is as follows:

The defendant, Christine Sticco, M.D. (“Dr. Sticco”) moves for summary judgment dismissing the plaintiffs’ complaint. The defendants, Jane M. Ponterio, M.D. (“Dr. Ponterio”) and Joanna C. Pessolano, M.D. (“Dr. Pessolano”) cross-move for summary judgment dismissing the plaintiffs’ complaint. Dr. Sticco’s motion and Drs. Ponterio and Pessolano’s cross-motion are granted.

Facts

This is an action for alleged medical malpractice committed during the caesarian section (“c-section”) delivery of Melisa Guctas on June 7, 2005. Esra Guctas, Melisa Guctas’s mother presented to St. Vincent’s Hospital Staten Island on June 6, 2005 after her membranes ruptured spontaneously. Dr. Ponterio saw Mrs. Guctas at 10:15 p.m. and she was admitted for observation and monitoring. At 8:00 a.m. on June 7, 2005 Dr. Pessolano assumed coverage of Mrs. Guctas. At 8:06 a.m. Dr. Sticco, a second year obstetrics and gynecology resident, reviewed the fetal heart monitor strips and discontinued the use of pitocin. At 9:50 a.m. an epidural was placed, followed by the insertion of an internal scalp electrode at 10:33 a.m. Within the hour an amnio infusion was done at 11:35 a.m., and by 11:55 a.m. Dr. Pessolano called for a c-section based upon her impression that the fetus was not tolerating labor well. A consent for “anesthesia and delivery or c/section w/ regional or general anesthesia” was executed by Mrs. Guctas’ husband and co-plaintiff, Yigit.

It is uncontested that Dr. Sticco performed the c-section incision under the supervision of Drs. Pessolano and Dr. Ponterio. Subsequently, it was determined that there was a laceration on the infant’s face requiring a plastic surgeon consult and repair.

The minor child and her parents commenced this action to recover for the damages allegedly caused by the defendants’ malpractice. Drs. Sticco, Ponterio and Pessolano move for summary judgment dismissing the plaintiffs’ complaint. The plaintiffs discontinued their action against St. Vincent Catholic Medical Centers— St. Vincent’s Hospital Staten Island.

Discussion

A motion for summary judgment must be denied if there are “facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues

of fact. “Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion”.¹ Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.² As is relevant, summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law.³ On a motion for summary judgment, the function of the court is issue finding, and not issue determination.⁴ In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.⁵

“On a motion for summary judgment, a defendant doctor has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby. . . In opposition, the plaintiff must submit a physician’s affidavit attesting to the defendant’s departure from accepted practice, which departure was a competent producing cause of the injury . . . General allegations that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat summary judgment . . .”⁶

¹ *Marine Midland Bank, N.A., v. Dino, et al.*, 168 AD2d 610 [2d Dept 1990].

² *American Home Assurance Co., v. Amerford International Corp.*, 200 AD2d 472 [1st Dept 1994].

³ *Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1978]; *Herrin v. Airborne Freight Corp.*, 301 AD2d 500 [2d Dept 2003].

⁴ *Weiner v. Ga-Ro Die Cutting*, 104 AD2d 331 [2d Dept 1984]. *Aff’d* 65 NY2d 732 [1985].

⁵ *Glennon v. Mayo*, 148 AD2d 580 [2d Dept 1989].

⁶ *Rebozo v. Wilen*, 41 AD3d 457, [2d Dept 2007].

Dr. Sticco's Motion for Summary Judgment

Dr. Sticco has established that she was a second year resident at St. Vincent's Hospital Staten Island when she performed the c-section in question. The testimony of both Drs. Pessolano and Ponterio confirm that Dr. Sticco performed the incision under their supervision. A hospital, and its employees, will not be held liable for the acts of privately attending physicians where it is clear that the employee was following the directions of the private attending physician.⁷ Consequently, Dr. Sticco demonstrated, as a matter of law, that she was acting within her scope as a resident at the hospital and is entitled to summary judgment in her favor.

Therefore, the burden shifts to the plaintiff to come forward with some evidence demonstrating that Dr. Sticco contradicted the attending physicians' directives. The record is devoid of such a statement. In fact, the plaintiffs recognized that the hospital had no liability when they discontinued their action against it. Therefore, the plaintiffs' claims for medical malpractice against Dr. Sticco, a second year resident, must be dismissed.

Furthermore, the plaintiffs' claims of lack of informed consent against Dr. Sticco must also be dismissed for the same reasons. The record clearly indicates that Dr. Sticco was acting under the direct supervision of Drs. Pessolano and Ponterio, and that Dr. Ponterio's signature appears on the signed surgical consent form. Therefore, summary judgment dismissing the plaintiffs' complaint as against Dr. Sticco is granted in its entirety.

Drs. Pessolano and Ponterio's Cross-Motion for Summary Judgment

In support of their cross-motion for summary judgment Drs. Pessolano and Ponterio submit the expert affirmation of Dr. Ralph Ruggiero. It is Dr. Ruggiero's opinion that the doctors did not deviate from the standard of care in their management of this labor and delivery.

⁷ See, *Toth v. Community Hosp. at Glen Cove*, 22 NY2d 255 [1986]; see also, *Filippone v. St. Vincent's Hosp.*, 253 AD2d 616 [1st Dep't. 1998].

Dr. Ruggiero states that the laceration which occurred is a known complication of a c-section and was not due to the lack of proper care. The plaintiffs stated in their bill of particulars that the incision to Mrs. Guctas was , “. . . too heavy, too deep and too long for the conditions then there existing . . .” and that the scalpel used on her was utilized in a manner “. . . which was inconsistent and contraindicated for the conditions then there existing; in utilizing a scalpel blade which was too large, too thick and too wide for the delivery of the infant plaintiff . . .”

Dr. Ruggiero maintains that the complication in question here “. . . has nothing to do with the length of the uterine incision or the use of excessive force. Even a carefully done incision can result in a laceration if the fetus is up against the uterine wall.” Furthermore, Dr. Ruggiero states that the c-section was performed with a typical scalpel and that those allegations, “. . . have no merit from the standpoint of hospital-based care.”

Here, the movants have come forward with a signed consent form permitting the c-section to take place, and have produced an expert affirmation which maintains that a laceration of this type is a known complication of this procedure. The mere presence of an injury alone does not mean there was negligence.⁸

Furthermore, the Appellate Division, Second Department in *Abbott v. New Rochelle Hospital Medical Center* examined when the use of the doctrine of *res ipsa loquitur* is appropriate in medical malpractice actions. In that case the Second Department summarized the state of the law as follows:

In a medical malpractice case, the doctrine may be applicable where “an inference exonerating the physician is improbable as a matter of fact” (*Pipers v Rosenow*, 39 AD2d 240, 245; *see, Schoch v Dougherty*, 122 AD2d 467, 469, *lv denied* 69 NY2d 605). Thus, where an unexplained injury occurred in an area remote from the operative site while the patient was anesthetized, the doctrine of *res*

⁸ *Landau v. Rappaport*, 306 AD2d 446 [2d Dep’t. 2003].

ipsa loquitur has been applied (*see, Mack v Hall Hosp.*, 121 AD2d 431, 433; *Fogal v Genesee Hosp.*, *supra.*; *Pipers v Rosenow*, *supra.*). Additionally, where a foreign object is left in the body of a patient after an operative procedure is completed, a charge with respect to res ipsa loquitur would be warranted (*see, Pipers v Rosenow, & supra.*).

Furthermore, the movants provided a signed consent to conduct the c-section at issue in this case. Consequently, the moving defendants have demonstrated a prima facie entitlement to summary judgment in their favor.

To oppose the defendants motion and cross-motion the plaintiffs submit the expert affirmation of Dr. Dougl's R. Phillips. Also, the plaintiffs for the first time in their opposition papers allege that Drs. Pessolano and Ponterio failed to adequately supervise Dr. Sticco, the second year resident. To support this allegation, the plaintiffs suggest that the line in their bill of particulars which states that Drs. Pessolano and Ponterio were negligent “. . . in failing to properly monitor and follow the infant plaintiff's treatment” really means that “. . . the attending physicians failed to properly monitor and supervise the labor and delivery and the residents [sic] involvement.” At the eve of trial, and months after the filing of the note of issue, the plaintiffs suggest that this court allow the bill of particulars to be amended to “. . . read monitor and/or supervise.” The court will not permit the plaintiffs to amend their bill of particulars at this juncture.⁹ This court does not find that the language contained in the bill of particulars gives the defendants notice that there is a failure to supervise cause of action.

In opposing the defendants' motion and cross-motion the plaintiff's expert, Dr. Phillips, states that the facial laceration was preventable. He avers that the laceration could have been prevented if the attending physicians directed the resident to utilize clamps “. . . to lift the uterus from the fetus.” It is Dr. Phillips contention that the technique which uses clamps is the standard of care in both hospitals and private practice. Dr. Phillips fails to provide any reasoning for these conclusory opinions. Additionally, Dr. Phillips' affirmation fails to reveal what, if any, specialty

⁹ *Morris v. Queens Long Island Medical Group, P.C.*, 49 AD3d 827 [2d Dep't. 2008].

he may practice. Consequently, the plaintiffs fail to raise an issue of fact.¹⁰

Furthermore, no triable issue of fact exists with respect to the cause of action for lack of informed consent. New York uses an objective test to determine whether a patient would have consented to treatment. Therefore, the relevant test is whether the reasonable and prudent person would have consented to the procedure if adequately informed.¹¹ Furthermore, the plaintiffs' expert offers no support for the informed consent cause of action. Consequently, summary judgment dismissing the plaintiffs' cause of action for lack informed consent is granted.¹²

Accordingly, it is hereby:

ORDERED, that the motion and cross-motion summary judgment made by Christine Sticco, M.D., Joanna C. Pessolano, M.D., and Jane M. Ponterio, M.D. are granted and the complaint is dismissed, and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly;

ENTER,

DATED: October 1, 2012

Joseph J. Maltese
Justice of the Supreme Court

¹⁰ *See, Browder v. New York City Health and Hosp. Corp.*, 37 AD3d 375 [1st Dep't. 2007].

¹¹ *See, Dooley v. Skodnek*, 138 AD2d 102 [2d Dep't. 1988].

¹² *Rodriguez v. New York City Health and Hosp. Corp.*, 50 AD3d 464 [1st Dep't. 2008].