

<b>Gorham v Markenson</b>
2013 NY Slip Op 33288(U)
December 13, 2013
Supreme Court, New York County
Docket Number: 800064/10
Judge: Joan B. Lobis
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOBIS  
Justice

PART 6

GORHAM, FLORA

INDEX NO. 800064/10

MOTION DATE 10/29/13

- v -

DAVID MARKENSON, ET AL.

MOTION SEQ. NO. 05

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1, 2, 3, 4

Answering Affidavits — Exhibits \_\_\_\_\_

5, 6

Replying Affidavits \_\_\_\_\_

7

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE  
WITH THE ACCOMPANYING MEMORANDUM DECISION *and*

**ORDER  
FILED**

DEC 19 2013

NEW YORK  
COUNTY CLERK'S OFFICE

DEC 18 2013

Dated: 12/13/13

Joan B. Lobis  
JOAN B. LOBIS J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 6**

-----X  
FLORA GORHAM, as Administratrix of the Estate of  
Carissa St. Victor,

Plaintiff,

Index No. 800064/10

-against-

**Decision and Order**

DAVID MARKENSON, OYA TUGAL, JAMI ERYN  
SHAPIRO, BINDU PUNNOOSE-GEORGE,  
MATTHEW WEISSMAN, NEW YORK MEDICAL  
COLLEGE, and V. Doe MS III,

**FILED**

Defendants.

DEC 19 2013

-----X  
JOAN B. LOBIS, J.S.C.:

**NEW YORK  
COUNTY CLERK'S OFFICE**

This wrongful death action arises out of treatment provided to Carissa St. Victor. Her paternal grandmother, Flora Gorham, sues as administratrix of the decedent's estate. Defendant Matthew Weissman moves for summary judgment pursuant to Rule 3212 of the Civil Practice Law and Rules. For the following reasons, that motion is denied.

Carissa St. Victor, age one, was declared brain dead on September 12, 2008, and was removed from life support. She died two days later on September 14, 2008. An autopsy report indicated that she had died of an acute, subdural hematoma, retinal hemorrhages, and multiple rib fractures. Scars included a right-cheek scar, one inch by 1/4 inch, four small scars on the right anterior side of her neck, and a 1/2 inch horizontal scar on the left anterior side of her neck. The right anterior chest had two 1/4 inch scars; and the right lower chest had a 1/4 inch scar. Healing fractures in different stages were detected on both sides of her ribs. Right-side fractures were detected on the first and third through eighth ribs. Left-side fractures were noted on the first through ninth ribs. The left foot had a 1/4 inch linear healing abrasion. The left parietal scalp had a thin,

subscalpular, one inch in diameter contusion. The left side of the brain had a parietal temporal subdural hematoma, measuring nine by six centimeters up to .3 centimeters thick. On the right side, a two-centimeter, thin, non-adherent, subdural hematoma was also detected. The pathologist determined that Carissa's death was a homicide.

Carissa St. Victor first treated with the Defendant, Dr. Matthew Weissman, on September 5, 2007, one day after her birth at St. John's Riverside Hospital in Yonkers, New York. At that time, Dr. Weissman was the inpatient pediatrician at St. John's. He continued to see Carissa as her pediatrician in his Yonkers office, Valentine Lane Family Practice.

In the course of treating Carissa, Dr. Weissman diagnosed her with sickle cell disease. At her one-month wellness visit, he referred her to a pediatric hematologist at Westchester Medical Center. He continued to see her for general health issues, including wellness visits. Shortly after her two-month visit, in November 2007, for example, he treated Carissa for vomiting and diarrhea. In January 2008, he saw Carissa for her four-month visit. The following month, his office by telephone request, refilled her antibiotic that had been prescribed by her pediatric hematologist. The next day, on February 15, 2008, Dr. Weissman saw Carissa for a fever, runny nose and cough. In March 2008, Carissa's pediatric hematologist notified Dr. Weissman that Carissa's mother, Anthonica St. Victor, was reporting that Carissa may be having some pain in her extremities. At Carissa's six-month visit to Dr. Weissman, in April 2008, however, no apparent pain was indicated.

Dr. Weissman next saw Carissa for her nine-month check-up on July 14, 2008. Ms. St. Victor reported that her daughter had been having loose stools for the past month and shaking

episodes. In addition she was having "pain crises." As a result of the shaking information, Dr. Weissman referred Carissa to a pediatric neurologist. The neurologist reported two days later that in his opinion the shaking represented "infantile shudders."

In August 2008, Carissa's mother began leaving Carissa more frequently alone in the care of Ms. St. Victor's boyfriend, Dorrel Foster. She estimated that Mr. Foster cared for Carissa approximately four days per week during normal business hours. On August 7, 2008, Ms. St. Victor called Dr. Weissman to report that Carissa's shaking episodes had become more frequent. Dr. Weissman instructed Ms. St. Victor to take Carissa to the emergency room. The next day, Carissa was seen by her neurologist, who reported to Dr. Weissman that Carissa's EEG results showed "non-specific beta activity." Dr. Weissman also spoke to her hematologist.

One week later, Ms. St. Victor called Dr. Weissman to report that Carissa had been to the emergency room and that she had "benign shudders." In her deposition, Ms. St. Victor testified that she noted three scab marks the length of fingers on each side of her daughter's rib cage. She indicated that in speaking with Dr. Weissman by telephone, she told him that Carissa had three scab marks on each side.

A few days after Ms. St. Victor saw Carissa's scabs, she testified that she noted a fist-sized bruise on the outer side of her daughter's thigh. She reported the bruise by telephone to Dr. Weissman the next day. In addition, at the end of August, Carissa hurt her cheek near her eye while she was being cared for by Mr. Foster. In her deposition testimony, the mother described it as pinkish and swollen. She further related that Mr. Foster had contacted her at work to tell her that

Carissa had bumped into the dresser, and he had treated it with alcohol.

Dr. Weissman next saw Carissa on September 3, 2008, just before her first birthday. She had been feverish for four days with a temperature of 104 degrees, diarrhea, and a cough. The complaint alleges that she was “coughing up blood.” Ms. St. Victor had given Carissa Motrin that morning. At the time of her visit, her fever was 100.6 degrees, and she appeared sleepy but easily arousable. Dr. Weissman testified at his deposition that he did not observe any marks or bruises on Carissa’s skin or any tenderness in the rib area. Ms. St. Victor testified that at the visit Carissa pushed the doctor’s hand away when he touched Carissa’s thigh. Dr. Weissman told Ms. St. Victor to take Carissa to the emergency room, called Westchester Medical Center, and spoke with the pediatric hematologist to advise that Carissa would be arriving.

That same day, Carissa was admitted to the hospital and examined by a resident. The resident documented a well-healed scar on Carissa’s right side of her head next to her right eye, which the medical notes attribute to the child bumping into a dresser. Her ears were red with fluid and she had bulging membranes. She was treated with antibiotics and discharged on the evening of September 5, 2008.

On September 8, 2008, Dr. Weissman saw Carissa for her one-year check-up. She weighed 22 pounds and had a temperature of 98.3 degrees. Ms. St. Victor reported Carissa’s recent admission to Westchester Medical Center, and relayed that Carissa was taking Nystatin and Cephalexin. Carissa had thrown up the day before the visit, and twice the day before that. Dr. Weissman advised Ms. St. Victor to discontinue the Nystatin and return in two days. In the

meantime if anything happened she should bring Carissa back or go to the emergency room.

That same night, Ms. St. Victor and Carissa stayed with Mr. Foster at his residence. The next morning, Ms. St. Victor brought Carissa to the emergency room at Westchester Medical Center. At the time Carissa was admitted, she was in full, cardiopulmonary arrest, unresponsive, with fixed pupils, and no spontaneous movement. The hospital administered cardiopulmonary resuscitation and intubated Carissa. A chest x-ray showed multiple rib fractures, verified by a CT scan showing bilateral rib fractures of "varying age." She also had a subdural hematoma and brain injury. She was transferred to the pediatric intensive care unit, where she remained unconscious until her death five days later.

Days after Carissa's death, her mother was arrested and charged with manslaughter. The following October, Ms. St. Victor was acquitted on that charge but was convicted of the misdemeanor charge of endangering the welfare of a child. Carissa's paternal grandmother, Flora Gorham, obtained letters of administration, and now sues on behalf of Carissa's estate.

The summons and complaint raises four causes of action. The first alleges failure to report child abuse in violation of the Child Protective Services Act of 1973. The second cause of action alleges medical malpractice, claiming in pertinent part that Dr. Weissman failed to diagnose and treat the physical child abuse that resulted in Carissa's death. Particulars include failing to order a chest x-ray, failing to take a history and physical examination, and failing to heed or appreciate the significance of signs and symptoms exhibited by Carissa. A third cause of action alleges the conduct was gross negligence, and a fourth cause of action alleges wrongful death.

Following completion of disclosure in this action and Plaintiff's filing of the note of issue, Defendant Weissman now moves for summary judgment. In claiming that there are no genuine issues of material fact and that he is entitled to summary judgment as a matter of law, he has attached an affirmation by his attorney, record items, including his deposition transcript as well as that of Carissa's mother, Ms. St. Victor, along with medical records, and submits a defense expert opinion. He argues that he had no duty to report child abuse when he had no reasonable cause to suspect it.

Dr. Weissman's expert opinion is provided by Carole Jenny, M.D. Dr. Jenny is a Rhode Island-licensed pediatrician. Following her review of the record, including the medical records and depositions, she opines that Dr. Weissman did not depart from accepted standards of practice. She cites Dr. Weissman's testimony that he conducted full assessments of Carissa and argues that his records corroborate that full assessments were performed at each visit. Dr. Jenny claims that regarding Carissa's fractures there were "no objective findings" during Dr. Weissman's examinations, subjective complaints by the mother to Dr. Weissman nor any physical indication by Carissa that would indicate there was a possible injury to Carissa's ribs. Defendant's expert relates that Dr. Weissman did not document any observance of bruising or indications of pain or discomfort. She opines that a chest x-ray was not indicated at any of Carissa's office visits and that the scabs described by Ms. St. Victor on Carissa's back were not a sign of trauma. Addressing the mother's description of bruises on Carissa's thigh and temple, Dr. Jenny claims that Ms. St. Victor "did not inform Dr. Weissman of these observations." Defendant's expert underscores that Carissa's mother describes markings on Carissa's back as scabs and notes that there is "no documentation of bruising" in Carissa's records. "Given these findings," Dr. Jenny opines there was no reason for Dr. Weissman



to suspect injury or abuse. The Defendant's expert opines that Carissa's growth and development documented in her medical records "is not consistent with an infant that is abused." In the concluding paragraph of her affidavit, Dr. Jenny opines that "in the absence of any objective findings, signs or symptoms of child abuse," the Defendant did not have the opportunity or means to prevent Carissa's injuries and death.

Plaintiff contends that Dr. Weissman has failed to establish a prima facie case entitling him to summary judgment. She notes that he relies on his own testimony and office records. In her opposition, Plaintiff cites factual evidence from Carissa's mother's deposition and Carissa's medical records disputing and including additional facts from the record before this Court that were not in the Defendant's moving papers. For example, Plaintiff's papers for the first time point out that the record includes Carissa's mother's testimony of her calls to Dr. Weissman to report that Carissa's shaking had grown more frequent. They further show that contrary to defense expert Dr. Jenny's claim that Ms. St. Victor never informed Dr. Weissman of Carissa's thigh and temple injuries, Ms. St. Victor testified in her deposition regarding each of these incidents and her contacting Dr. Weissman.

Plaintiff further offers her own medical expert opinion. Dr. Howard Schwartz is a New York-licensed internist. He affirms that in his opinion Dr. Weissman departed from accepted practice and that the departure was causative. Dr. Schwartz opines that signs of externally-inflicted injury were evident, but not documented, at Carissa's examinations on September 3 and 8, 2008. He opines that it would not have been possible for Dr. Weissman to have failed to have noticed Carissa's head injury when he saw her on September 3, 2008. He notes that this injury along with

previously reported scabs on Carissa's back and Carissa's bruise on her thigh should have triggered further medical action. Were that done, pre-existing injuries such as the subdural hematoma and rib fractures would have led to Carissa's removal to protective custody and further investigation and reporting by the authorities. Had Dr. Weissman paid attention to what Carissa's mother was telling him, documented that and intervened, Dr. Schwartz opines that her life would have been saved. Plaintiff's expert further opines that Dr. Weissman missed another chance to save Carissa when he saw her again on September 8, 2008, but failed to document any findings consistent with trauma or refer her for imaging studies.

In reply, Defendant Weissman contends that Plaintiff Gorham fails to raise issues of fact. He argues that Plaintiff's expert opinion is speculative, and asks this Court to view claims that symptoms of Carissa's abuse were present but undocumented with "skepticism." And he asks this Court to reject them as "unsupported by the proof." He claims that Carissa's mother's deposition testimony is not competent, and he impugns her credibility. Assuming her lack of credibility, he rejects her testimony as not "corroborated." Dr. Weissman points to other healthcare providers who failed to document Carissa's head injury, but concedes for the first time in his reply that the resident at Westchester Medical Center who saw Carissa later the same day that Dr. Weissman examined her on September 3, 2008, documented that injury. That documentation, Dr. Weissman avers, however, is "irrelevant." Dr. Weissman criticizes Dr. Schwartz's opinion as hindsight. He speculates that Carissa's rib fractures may have been sustained soon after his July 14, 2008, examination. Lastly he claims there were no objective signs or symptoms to alert him, and nothing reported by Carissa's mother raised any suspicions of abuse.

In considering a motion for summary judgment this Court reviews the record in the light most favorable to the non-moving party. E.g., Dallas-Stephenson v. Waisman, 39 A.D.3d 303, 308 (1st Dep't 2007). The movant must support the motion by affidavit, a copy of the pleadings, and other available proof, including depositions and admissions. C.P.L.R. Rule 3212(b). The affidavit must recite all material facts and show, where defendant is the movant, that the cause of action has no merit. Id. This Court may grant the motion if, upon all the papers and proof submitted, it is established that the Court is warranted as a matter of law in directing judgment. Id. It must be denied where facts are shown "sufficient to require a trial of any issue of fact." Id. This Court does not weigh disputed issues of material facts. See, e.g., Matter of Dwyer's Estate, 93 A.D.2d 355 (1st Dep't 1983). It is well-established that summary judgment proceedings are for issue spotting, not issue determination. See, e.g., Suffolk County Dep't of Soc. Servs. v. James M., 83 N.Y.2d 178, 182 (1994).

In a medical malpractice case, to establish entitlement to summary judgment, a physician must demonstrate that he did not depart from accepted standards of practice or that, even if he did, he did not proximately cause injury to the patient. Roques v. Noble, 73 A.D.3d 204, 206 (1st Dep't 2010). In claiming treatment did not depart from accepted standards, the movant must provide an expert opinion that is detailed, specific and factual in nature. E.g., Joyner-Pack v. Sykes, 54 A.D.3d 727, 729 (2d Dep't 2008). Expert opinion must be based on the facts in the record or those personally known to the expert. Roques, 73 A.D.3d at 195. The expert cannot make conclusions by assuming material facts not supported by record evidence. Id. Defense expert opinion should specify "in what way" a patient's treatment was proper and "elucidate the standard

of care.” Ocasio-Gary v. Lawrence Hosp., 69 A.D.3d 403, 404 (1st Dep’t 2010). A defendant’s expert opinion must “explain ‘what defendant did and why.’” Id. (quoting Wasserman v. Carella, 307 A.D.2d 225, 226 (1st Dep’t 2003)). Conclusory medical affirmations fail to establish prima facie entitlement to summary judgment. 73 A.D.3d at 195. Expert opinion that fails to address a plaintiff’s essential factual allegations fails to establish prima facie entitlement to summary judgment as a matter of law. Id. If a defendant establishes a prima facie case, only then must a plaintiff rebut that showing by submitting an affidavit from a medical doctor attesting that the defendant departed from accepted medical practice and that the departure proximately caused the alleged injuries. Id. at 207.

This Court is not persuaded that Defendant Weissman has established a prima facie case of entitlement to summary judgment. The record before this Court shows that the parties through sworn testimony dispute what was told to Dr. Weissman about Carissa’s physical condition. While it is uncontroverted that Dr. Weissman did not document Carissa’s scabs, thigh bruise or head injury, Carissa’s mother specifically testified that she reported the scabs and bruise to Defendant Weissman and that Carissa’s head injury was visible on September 3, 2008, when he examined Carissa. The record further shows that the injury was documented by another facility later the same day. It is improper for Defendant’s expert, Dr. Jenny, to disregard disputed testimony and rely on the Defendant’s version of the facts in this case to form her opinion that he did not depart. See Roques, 73 A.D.3d at 195. Nor is it appropriate for Defendant to omit material facts from the affirmation relating the events of the case to claim that he has established a prima facie case. See C.P.L.R. Rule 3212(b). This Court will not credit Dr. Weissman’s testimony over the Plaintiff’s witness testimony to resolve this dispute. See Matter of Dwyer’s Estate, 93 A.D.2d at 355. What

Dr. Weissman knew of Carissa's condition and when remains a disputed issue of material fact for the trier of fact, not this Court. Dr. Jenny's expert opinion in asserting that Dr. Weissman did not depart "in the absence of any objective findings, signs or symptoms of child abuse" begs the question whether there were signs or symptoms of abuse at the time that Dr. Weissman treated Carissa that he failed to document. That remains for the jury to determine at trial. Accordingly, it is

ORDERED that Defendant Weissman's motion for summary judgment is denied; and  
it is further

ORDERED that the parties appear for a pretrial conference on February 4, 2014, at  
9:30 am.

Dated: December 13, 2013

ENTER:

  
\_\_\_\_\_  
JOAN B. LOBIS, J.S.C.

**FILED**

DEC 19 2013

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