

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PETER J. O'DONOGHUE IA Part 13
Justice

JULIUS AJIFOWOBAJE, etc., et al. x Index
Number 15426 2005

- against -

Motion
Date December 5,

2007

ASTRAMED PHYSICIANS, P.C., et al. Motion
Cal. Numbers 2-6

x

Motion Seq. Nos. 6-10

The following papers numbered 1 to 45 read on this motion by defendant Rodney Lawrence, R.P.A. pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross claims; on the motion by defendants Astramed Physicians, P.C. (Astramed) and Kevin L. Lowe, M.D. for summary judgment dismissing the complaint and all cross claims; on the motion by defendant Mercy Medical Center pursuant to CPLR 3212 for summary judgment dismissing the complaint; on the motion by third-party defendant Abdul Mundia, M.D. pursuant to CPLR 3212 for summary judgment dismissing all claims and cross claims; and on the motion by defendant Ahmed Elkoulily, M.D. for leave to file a late summary judgment and upon granting leave pursuant to CPLR 3212 for summary judgment dismissing the complaint.

Papers
Numbered

Notices of Motion - Affidavits - Exhibits.....	1-20
Answering Affidavits - Exhibits.....	21-35
Reply Affidavits.....	36-45

Upon the foregoing papers it is ordered that the motions are determined as follows:

This is a medical malpractice and wrongful death action to recover money damages for injuries arising out of the care and treatment provided to the plaintiff's decedent, Elizabeth Ogunnaya at Astramed and the Mercy Medical Center. The plaintiff alleges

that the defendants negligently and improperly failed to diagnose and treat Thrombotic Thrombocytopenic Purpura (TTP).

In August 2003, the decedent was a patient of Astramed and Dr. Lowe, where defendant Lawrence also worked. The decedent had been a patient at Astramed since 1996. The decedent had a history of possible sickle cell trait and long-term IUD placement. The decedent was treated by the defendant Lawrence at Astramed on March 27, 2002, and requested a physical exam. At the March 27, 2002 examination, her vital signs were normal and she had no complaints. A sliding hiatus hernia was noted and a referral was made. The decedent returned for another physical examination at Astramed on January 14, 2003 and was seen by Dr. Lowe. Dr. Lowe's impression was borderline hypertension and pedal edema and was otherwise unremarkable. Thereafter, the decedent returned to Astramed and was seen by Dr. Lowe on June 5, 2003 as a follow-up to a prior hospitalization at Hempstead General Hospital. The decedent had been admitted to Hempstead General Hospital with complaints of lower abdominal pain. She underwent removal of an IUD and a course of IV antibiotic treatment. The diagnosis upon discharge was endometritis and pelvic inflammatory disease. Dr. Lowe's physical examination revealed the decedent to be afebrile at 98.2 degrees with some mild suprapubic tenderness, but no rebound pain. The decedent had failed to take the antibiotics that were prescribed upon her discharge from Hempstead General Hospital, so Dr. Lowe provided a prescription for additional antibiotics and requested a copy of decedent's chart from Hempstead General Hospital.

The patient next came in for an examination at Astramed on August 6, 2003, complaining of a stomach ache, nausea, and vomiting for two days. She was examined by the defendant Lawrence, her blood pressure was 120/80 and her pulse rate was 64. The defendant Lawrence prescribed Rubinol Forte and Nexium and recommended an abdominal scan.

The diarrhea did not abate and the decedent sought care from Mercy Medical Center on the evening of August 7, 2003, complaining of nausea, vomiting, diarrhea for five days as well as weakness and upper right quadrant pain. In the emergency room she was seen by a physician who noted that her breathing was clear and unlabored, and that she was alert and oriented. At 11:40 P.M. the defendant Dr. Elkoulily, an internist, was called by the emergency room physician regarding the decedent. Dr. Elkoulily was told the history given by the patient and that the lab results showed thrombocytopenia and low platelet count and that her hemoglobin and hematocrit levels were low. From what Dr. Elkoulily was told, he diagnosed the decedent with severe anemia and thrombocytopenia.

Dr. Elkoulily ordered that the patient be admitted and that a blood transfusion be done and a hematologist see the decedent. The decedent was admitted to Mercy Medical Center on August 8, 2003. Dr. Elkoulily further ordered that the decedent be given nothing by mouth except medications and that a repeat complete blood count be done after the blood transfusion and an H-7 blood chemistry be done in the morning.

At around 6:00 A.M. the next morning, Dr. Elkoulily called the defendant Dr. Mundia, a hematologist/oncologist, to see the decedent because of her anemia and thrombocytopenia. Dr. Mundia saw the decedent at around 9:45 A.M. or 10:00 A.M. Dr. Mundia took a history from the decedent and reviewed her lab results. Dr. Mundia testified that he went to the laboratory himself to review the blood smear that had been taken the night before. After reviewing the blood smear, Dr. Mundia testified that it revealed a low platelet count but no schistocytes (fragmented cells) and no leukemia cells. Dr. Mundia testified that because of his review of the blood smear he did not consider the decedent to have TTP. He further stated that he agreed with the assessment and management by Dr. Elkoulily and agreed with the continuation of blood transfusions.

Dr. Elkoulily saw the decedent on August 8, 2003 after her consult with Dr. Mundia. He noted the decedent's low hemoglobin and hematocrit levels, but also noted that her nausea and vomiting were improving. His impression of her at that time was severe anemia, thrombocytopenia and gastritis. His note from that evaluation was to continue the current treatment and to continue with the blood transfusions. He ordered that the patient be on a clear liquid diet and have a complete blood count done the next morning.

The following day, August 9, 2003, the decedent developed severe headaches, nausea and elevated blood pressure with mental confusion and some petechia. She stopped responding to verbal commands. A neurological consult was obtained. CT exams taken of the decedent's chest, abdomen, and pelvis showed normal organs with a small quantity of ascites and small bilateral pleural effusions with bilateral parenchymal infiltrates. A small mediastinal hilar and auxiliary lymph adenopathy was also identified. The patient became hypertensive with blood pressure of 178/122 and subsequently coded. The decedent passed away at 5:20 P.M. The discharge summary indicates the decedent's final diagnosis as severe anemia and thrombocytopenia. The decedent died from TTP.

The plaintiff alleges that the negligent treatment of the decedent dates from 1996 continuing through 2003 at Astramed.

However, any care and treatment rendered prior to January 13, 2003 is barred by the statute of limitations (CPLR 214-a). There is no merit to the argument for the application of the continuous treatment doctrine. Prior to her visit on August 6, 2003, the decedent was only seen by Astramed on routine visits and diagnostics examinations, which were unrelated to her illness that she sought treatment for on August 6, 2003.

The defendants Lawrence, Dr. Lowe., Astramed, Mercy Medical Center, Dr. Mundia, and Dr. Elkoulily move for summary judgment dismissing the complaint. Pursuant to a so-ordered stipulation summary judgment motions had to be made by October 1, 2007. While the motion of Dr. Elkoulily was not timely filed, he sought leave of court to make his motion. Since there was substantial outstanding discovery, good cause exists to make this motion and the court will consider it (see Sclafani v Washington Mut., 36 AD3d 682 [2007]; Herrera v Felice Realty Corp., 22 AD3d 723 [2005]).

The defendant Lawrence submitted the expert affidavit of Mark B. Safford, M.D., a licensed physician who is board certified in internal medicine. Dr. Safford opined to a reasonable degree of medical certainty that the defendant Lawrence's treatment of the decedent conformed to good and accepted standards of medical practice. Dr. Safford stated that the defendant Lawrence properly evaluated and treated the decedent. Dr. Safford opined that giving the plaintiff a referral for an abdominal scan and prescriptions for Nexium and Rubinol Forte did not depart from good and accepted standards of medical practice.

The defendants Dr. Lowe and Astramed submitted the expert affidavit of Paul A. Feffer, M.D. Dr. Feffer opined to a reasonable degree of medical certainty that the treatment of the decedent by Dr. Lowe conformed to good and accepted standards of medical practice. Dr. Feffer stated that Dr. Lowe had last seen the decedent two months prior to her death and there was no correlation between the complaints of her last visit and the onset of TTP that occurred on or about August 7, 2003. The complaints of the decedent were consistent with Dr. Lowe's diagnosis and the diagnosis was appropriate and in accordance with the accepted standards of medical practice.

The defendant Dr. Mundia submitted the expert affirmation of Ivan K. Rothman, M.D., PhD., who is board certified in internal medicine, hematology and oncology. Dr. Rothman opined to a reasonable degree of medical certainty that the defendant Dr. Mundia's treatment of the decedent conformed to good and accepted standards of medical practice. Dr. Rothman found after a

review of the decedent's blood smear that the decedent did not have signs of TTP. He then opined that the course of treatment Dr. Mundia chose was appropriate.

The defendant Dr. Elkoulily submitted the expert affidavit of Howard D. Kolodny, M.D., who is board certified in internal medicine. Dr. Kolodny opined to a reasonable degree of medical certainty that the defendant Dr. Elkoulily did not depart from accepted standards of care during his treatment of the decedent. He further opined that no act or omission on Dr. Elkoulily's part was in any way the proximate cause of the injuries or death of the decedent. Dr. Kolodny stated that based on the information he was told, Dr. Elkoulily properly diagnosed the decedent and properly admitted her to the hospital, ordered a hematology consult and blood transfusion. Furthermore, Dr. Kolodny opined that it was appropriate for Dr. Elkoulily, an internist, to rely on the diagnosis made by the hematologist, Dr. Mundia.

As a result of the affirmations from the medical experts who opined that the defendants acted within good and accepted standards of medical practice in their care and treatment of the plaintiff, the defendants met their burden of establishing, prima facie, their entitlement to summary judgment as a matter of law on the issue of medical malpractice (see Reyz v Khelemsky, 10 AD3d 714 [2004]; Fhima v Maimonides Med. Ctr., 269 AD2d 559 [2000]). Additionally, the defendants demonstrated, prima facie, that they obtained the decedent's informed consent (Stancavage v Mirman, 309 AD2d 918 [2003]; Dunlop v Sivaraman, 272 AD2d 570 [2000]).

The defendant Mercy Medical Center argues that because the negligence is only alleged against attending physicians, there is no claim of negligence against it and the complaint must be dismissed. While Drs. Mundia and Elkoulily are both attending physicians and not employed by Mercy Medical Center, the decedent entered the hospital through the emergency room and sought treatment from the hospital rather than from a particular physician and Mercy Medical Center can thus be held vicariously liable for their actions (see Johnson v Jamaica Hosp. Med. Ctr., 21 AD3d 881 [2005]). However, if the claims against Drs. Mundia and Elkoulily are dismissed, the complaint against Mercy Medical Center must be dismissed.

Plaintiffs, in opposition to the motion, are required to submit evidentiary facts or materials to rebut the prima facie showing by the defendants so as to demonstrate the existence of a triable issue of fact (Alvarez v Prospect Hosp., 68 NY2d 320 [1986]). In response to a defendant who has come forward with expert medical evidence that it did not depart from

good and accepted medical practice, a plaintiff is required to submit an expert medical opinion to demonstrate the merit of the action (Simms v N. Shore Univ. Hosp., 192 AD2d 700 [1993]). In opposition, the plaintiff submitted two affirmations from medical experts redacted pursuant to CPLR 3101(d) and offered to provide an unredacted copy of each affirmation to the court for in camera review. However, these affirmations were deficient because they were devoid of listing the expert's credentials. The affirmations only stated that the experts were licensed in New York and what they are board certified in. There was no listing of their background, medical school training, residency, internship, fellowship, or what, if any, current positions they have. Thus, no proper foundation was laid for the reliability of the experts' opinions (see Hassell v New York Univ. Med. Ctr., 48 AD3d 632 [2008]; Mustello v Berg, 44 AD3d 1018 [2007]; Behar v Coren, 21 AD3d 1045 [2005]).

In any event, the affirmations were not sufficient to raise a triable issue of fact. While one of plaintiff's experts opined that the failure of the defendant Lawrence to order a complete blood count was a departure that led to the death of the decedent, this is a conclusory statement that is unsupported by the evidence. In fact, when a complete blood count was done at the Mercy Medical Center the next day, it did not lead to a diagnosis of TTP. Furthermore, the expert's opinion that the defendant Lawrence failed to get a complete and accurate medical history from the decedent is not supported by the facts. The plaintiff's affirmations did not discuss any departure of care by the defendant Dr. Lowe, as the decedent was seen by the defendant Lawrence. One of the plaintiff's experts comments that the blood smear reviewed by Dr. Mundia showed symptoms of TTP. However, the blood smear relied upon by plaintiff's expert was not the blood smear reviewed by Dr. Mundia. Thus, the statements in the affirmation that Dr. Mundia failed to properly diagnose the decedent is not supported by facts. Moreover, the affirmation of the plaintiff's expert failed to contest the statement by Dr. Rothman that the plasmapheresis process used to treat TTP takes time to commence and it then takes days to weeks to see a turn around, and thus, there was not enough time to prevent the death of the decedent, even if TTP was properly diagnosed. Finally, the affirmation submitted by the plaintiff concerning the care given by Dr. Elkoulily was conclusory and not supported by the evidence. The expert does not specify how the alleged departures of Dr. Elkoulily were the proximate cause of the decedent's injuries. These conclusory opinions which do not properly rebut the affidavits of the defendants' experts do not raise a triable issue of fact sufficient to defeat the summary judgment motions of any of the moving

defendants (see Mosezhnik v Berenstein, 33 AD3d 895 [2006]; Sheridan v Bieniewicz, 7 AD3d 508 [2004]).

Accordingly, the motion by the defendant Elkoulily for leave to file a late summary judgment motion is granted. The motions for summary judgment by the defendants are granted and the complaint against those defendants are severed and dismissed.

Dated: April 24, 2008

J.S.C.