

SCAP

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. KENNETH A. DAVIS,

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

SHEILA BROWN, as Administrator of the Estate
of RENFORD D. BROWN, Deceased, and SHEILA
BROWN, Individually,

Plaintiff,

SUBMISSION DATE: 11/2/07

INDEX No.: 10209/05

-against-

NEW ISLAND HOSPITAL, WSNCHS NORTH, INC.,
KARL UNKENHOLZ, M.D., MATHEW CHENGOT, M.D.,
MANSOOR JELVEH, M.D., JAKOB DIEI, M.D.,
JAKOB DIEI, M.D. also known as JACK DIEI, M.D.,
And TEDDY LEE, D.O.,

MOTION SEQUENCE # 1

Defendants.

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....	X
Answering Papers.....	XX
Reply.....	X
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	

This motion by defendants Karl Unkenholz and Teddy Lee, D.O.,
for an order pursuant to CPLR 3212 granting them summary judgment
dismissing the complaint against them is denied.

In this action, the plaintiff seeks to recover for medical
malpractice and the wrongful death of her husband, the decedent
Renford D. Brown, based on the defendants' alleged failure to
diagnose and treat his dissecting aortic aneurysm while he was in
the emergency room at New Island Hospital on July 14th and 15th,

2003. The plaintiff alleges that defendants were negligent in failing to take a proper history, failing to perform a proper physical examination and in failing to heed the decedent's complaints, symptoms and the significance of his prior medical history. The plaintiff further alleges that the defendants were negligent in that they failed to order and/or perform certain diagnostic tests including CT scans, MRI's and/or a transesophageal echocardiography. The plaintiff additionally alleges that the defendants' failure to perform these tests and diagnose and treat her decedent's dissecting aortic aneurysm while he was a patient at New Island Hospital proximately caused his death on July 16, 2003.

Emergency room physicians defendants Drs. Unkenholz and Lee seek summary judgment dismissing the complaint against them. They maintain that they did not commit any of the acts and/or omissions which may have caused the decedent's death and that the actions and/or omissions of the decedent's consulting cardiologist defendant Dr. Chengot constituted an intervening superseding cause which severed any nexus between their actions or omissions and the decedent's death.

The pertinent facts are as follows:

The decedent was seen at New Island Hospital's emergency room at approximately 10:19 PM on July 14, 2003, complaining of chest pain and vomiting. Dr. Unkenholz, an emergency room physician, saw the decedent at approximately 10:30 PM. He physically examined the decedent and ordered blood work, a chest x-ray and an

electrocardiogram (EKG), as well as a cardiac consult. Dr. Unkenholz testified at his examination-before-trial that he read the decedent's portable chest x-ray in the emergency room as "negative." Dr. Unkenholz's shift ended at 7 AM on July 15, 2003, at which time he departed the hospital and left the decedent under the care of the emergency room physician defendant Dr. Lee and Dr. Chengot.

The radiologist, defendant Dr. Diel read the decedent's portable x-ray as indicating "prominence of the superior mediastinum, which may be secondary to the portable technique of the film" and he recommended further evaluation with a PA and lateral film when the patient was clinically stable. However, he did not read the decedent's x-ray until July 15th, and so Dr. Unkenholz never saw Dr. Diel's report. In fact, at his examination-before-trial, Dr. Diel testified that his report may not have been available until July 16, 2003.

Defendant Dr. Chengot saw the decedent at approximately 8:00 AM on July 15, 2003. Dr. Chengot also reviewed the x-ray which had been ordered by Dr. Unkenholz and he also found it to be within normal limits for a portable x-ray. Dr. Chengot performed a physical examination and ordered further blood work, a further EKG and an echocardiogram, as well as the following medications: Aspirin, Toprol, Levenex and Norvasc. At his examination-before-trial, Dr. Chengot testified that he reviewed all of the decedent's diagnostic tests and concluded that he had

not suffered a heart attack nor had he suffered damage to his heart. He further testified that he reviewed the electrocardiogram (EKG) and echocardiogram and found them to both be within normal limits. He testified that he did not consider ordering a CT scan, MRI, transesophageal echocardiogram or further x-rays for the decedent because, again, he did not believe that the patient had suffered damage to his heart or a heart attack.

The decedent's EKG was independently reviewed by radiologist defendant Dr. Mansoor Jelveh, M.D., who also determined that it was within normal limits.

At his examination-before-trial, Dr. Chengot testified that he reviewed all of the decedent's test results. He further testified that before discharging the decedent at approximately 11:50 AM on July 15, 2003, he discussed the situation with Dr. Lee. Dr. Chengot testified that he did so because he was not at the hospital and Dr. Lee called him to discuss the decedent's discharge. He testified that Dr. Lee told him that he thought that the decedent could be discharged since things were stable. More specifically, he testified that Dr. Lee told him that the decedent was pain-free; ruled out for myocardial infarction; that the echocardiogram only showed mild pericarditis; and, that the decedent would be treated with anti-inflammatory medications and followed as an out-patient. Dr. Chengot testified that because he was not present at the hospital, he relied on Dr. Lee as an experienced emergency room physician in approving the decedent's discharge.

The decedent was rushed to Brunswick Hospital the next day on July 16, 2003, at approximately 6:00 AM. He died at approximately 8:30 AM. An autopsy found the cause of death to be a dissecting aortic aneurysm.

In seeking summary judgment dismissing the complaint against them, Drs. Unkenholz and Lee maintain that they appropriately deferred to Dr. Chengot for the assessment and treatment of the decedent's condition whose acts and/or omissions constituted an intervening superseding cause of the decedent's death.

"On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." Sheppard-Mobley v King, 10 AD3d 70, 74 (2d Dept. 2004), aff'd. as mod., 4 NY3d 627 (2005), citing Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." Sheppard-Mobley v King, supra, at p. 74; Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra. Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. Alvarez v Prospect Hosp., supra, at p. 324. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference see,

Demishick v Community Housing Management Corp., 34 AD3d 518 (2d Dept. 2006), citing Secof v Greens Condominium, 158 AD2d 591 (2d Dept. 1990).

The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted practice and evidence that such departure was a proximate cause of injury or damages. Ramsay v Good Samaritan Hosp., 24 AD3d 645 (2d Dept. 21005); see also, DiMitri v Monsouri, 302 AD2d 420, 421 (2d Dept. 2003); Holbrook v United Hospital Medical Center, 248 AD2d 358, 359 (2d Dept. 1998). "In a medical malpractice action, the party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by showing the absence of a triable issue of fact as to whether the defendant physician was negligent." Taylor v Nyack Hospital, 18 AD3d 537 (2d Dept. 2005) citing Alvarez v Prospect Hospital, 68 NY2d 320, 324 (1986). Thus, a moving defendant doctor or hospital has "the initial burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby." William v Sahay, 12 AD3d 366, 368 (2d Dept. 2004), citing Winegrad v New York University Medical Center, supra; see also, Thompson v Orner, supra. Once a defendant establishes his entitlement to summary judgment, "in a medical malpractice action, 'a plaintiff must submit a physician's affidavit of merit attesting to a departure from accepted practice and containing the attesting doctor's opinion that the defendant's omissions or departures were

a competent producing cause of the injury.' " Mosezhnik v Berenstein, 33 AD3d 895, 896-897 (2d Dept. 2006), quoting Domaradzki v Glen Cove Ob/Gyn Assocs., 242 AD2d 282 (2nd Dept. 1997). " '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 the patient'." Wasserman v Staten Island Radiological Associates, 2 AD3d 713, 714 (2nd Dept. 2003), quoting Chulla v DiStefano, 242 AD2d 657, 658 (2nd Dept. 1997), lv to app dismiss., 91 NY2d 921 (1998); Markley v Albany Med. Ctr. Hosp., 163 AD2d 639, 640 (3rd Dept. 1990); see also, Mosezhnik v Berenstein, supra. A defendant "as an initial wrongdoer, cannot escape liability merely by showing that the subsequent treating physician to whom plaintiff was referred was also negligent." Datiz by Datiz v Shoob, 71 NY2d 867 (1988).

In support of their motion, defendants Drs. Unkenholz and Lee have submitted the affidavit of Dr. Gregory Mazarin, a physician board certified in emergency medicine and licensed to practice medicine in the state of New York. Having reviewed the Verified Bills of Particulars, the records of New Island Hospital, the autopsy report from the office of the Medical Examiner, and the deposition transcripts of the plaintiff and defendants, he opines "within a reasonable degree of medical certainty, that defendants Karl Unkenholz, M.D. and Teddy Lee, D.O. at all times acted appropriately and within the acceptable medical standards pertaining to emergency medicine in their care and treatment of

decedent. . . ." More specifically, Dr. Mazarin concludes that Dr. Unkenholz properly examined the decedent; ordered appropriate tests as well as a cardiac consult; and, comported with all medical standards applicable to the emergency room in interpreting the decedent's portable chest x-ray. Dr. Mazarin opines that Dr. Lee also properly evaluated the decedent and deferred to Dr. Chengot regarding his care, including his tests and his discharge. In conclusion, he opines that "[a]fter examining the patient and reviewing the applicable test results, [it was] Dr. Chengot [who] determined that the patient could be discharged from New Island Hospital on July 15, 2003. As such, any act or omission of either Dr. Unkenholz, or Dr. Lee was not proximately related to the patient's death."

While counsel maintains that Dr. Lee deferred to Dr. Chengot to manage the decedent's care including his discharge, Dr. Chengot testified at his examination-before-trial that it was only after conferring with Dr. Lee regarding the decedent's status and relying on what Dr. Lee told him that he approved the decedent's discharge. Defendant Dr. Lee has failed to establish his entitlement to summary judgment. See, Mandel v New York County Public Adm'r., 29 AD3d 869 (2nd Dept. 2006) (While mere referral does not render referring doctor liable for negligence of treating physician, "joint liability may be imposed where the referring physician was involved in decisions regarding diagnosis and treatment to such an extent as to make them his or her own negligent acts); see also,

Datiz by Datiz v Shoob, supra; Walker v Zdanowitz, 265 AD2d 404 (2nd Dept. 1999).

Moreover, despite efforts by counsel to procure his appearance, Dr. Lee has not yet appeared for a deposition. In fact, glaringly absent is an affirmation by Dr. Lee in support of this motion. Dr. Lee's testimony may certainly constitute exclusive knowledge of pertinent facts surrounding the decedent's discharge from the hospital and Dr. Lee's possible role in it. Under these circumstances, Dr. Lee's motion for summary judgment must be denied. CPLR 3212(f); see, Cruz v Otis El. Co., 238 AD2d 540 (2nd Dept. 1997).

Dr. Unkenholz has established his entitlement to summary judgment dismissing the complaint against him. See, Kleinert v Begum, 144 AD2d 645 (2nd Dept. 1988). The burden therefore shifts to the plaintiff to establish the existence of a material issue of fact.

The plaintiff has submitted affidavits of a board certified radiologist and a board certified internist/emergency medicine physician.

The plaintiff's expert radiologist attests that he reviewed the decedent's x-ray film and agrees with Dr. Diel. They both found that there was a "prominence of the superior mediastinum." More specifically, he opines with a reasonable degree of medical certainty that as recommended by Dr. Diel, routine PA and Lateral x-rays should have been conducted prior to the decedent's discharge

and that, at a minimum, the prominence of the superior mediastinum should have led to a chest CT scan with contrast for further evaluation. He concludes that Dr. Unkenholz departed from good and accepted standards of medical care in incorrectly reading the decedent's x-ray: He opines that if it had been read correctly, the proper course of treatment would have been provided and the decedent's death could have been avoided.

The plaintiff's expert internist/emergency medicine physician attests that he reviewed the decedent's hospital records, the autopsy report, the examination-before-trial transcripts and the Verified Bills of Particulars. Similar to the expert radiologist, he opines that:

"in a patient such as Mr. Brown with unexplained severe chest pain, possible pericardial effusion, and a history of hypertension, generally accepted custom and practice dictates that upon the findings of superior mediastinal prominence/widening, further diagnostic studies, including, but not limited to CAT scan should be conducted prior to discharge of a patient. These tests could have led to diagnosis of the plaintiff's underlying condition, admission to the hospital, further testing and successful treatment."

The internist/emergency medicine physician further opines that:

"defendant Karl Unkenholz further failed to appreciate the patient's history of poorly controlled hypertension, the evaluation of electrocardiogram and cardiac enzymes with abnormal chest x-ray and ECHO and to exclude an aortic dissection which must be included in the differential diagnosis for Mr. Brown's unexplained pain. The failure to appreciate the foregoing were further deviations and should have led to further testing prior to

discharge."

As for Dr. Lee, the internist/emergency medicine physician opines that he:

"failed to communicate with the defendant Dr. Chengot, in telephone conversation that occurred prior to discharge or at any time, the patient's history of poorly controlled hypertension, the evaluation of electrocardiogram and cardiac enzymes with abnormal chest x-ray and ECHO and the failure to exclude an aortic dissection which must be included in the differential diagnosis for the patient's unexplained pain."

He opines that:

"this failure to appreciate the foregoing were further deviations from accepted practice and should have led to further testing prior to discharge."

The internist/emergency medicine physician concludes that Dr. Lee, too, failed to appreciate "the decedent's findings of a normal Electrocardiogram, Echocardiogram findings of some pericardial fluid, and unexplained severe chest pain." He opines that "these findings also required exclusion of the diagnosis of aortic dissection prior to discharge."

As for Dr. Chengot's role in the care of the decedent which the moving defendants allege superceded their roles, the internist/emergency medicine physician opines that:

"A Cardiac consult does not cut off the emergency room physicians' responsibility for the care and treatment of the plaintiff's decedent. Both defendants Dr. Unkenholz and Dr. Lee had a duty, responsibility and obligation, under accepted practice, to the patient to include aortic dissection in the

differential diagnosis for this patient with severe chest pain, hypertension, and possible widened mediastinum prior to discharge."

He notes that "[a]dditional testing with a PA and Lateral view x-rays and a CAT scan were never performed."

Plaintiff's expert's assertion that services by a cardiac doctor does not in an of itself sever the relationship between the patient and his other doctors completely fails to recognize the firmly embedded legal principal that limits a doctor's duties to his or her functions which are relied on by the patient. Wasserman v Staten Island Radiological Associates, supra; Chulla v DiStefano, supra; Markley v Albany Med. Ctr. Hosp., supra; see also, Mosezhnik v Berenstein, supra. Similarly, the plaintiff's internist/ emergency medicine physician's conclusion that Dr. Unkenholz failed to "appreciate the patient's history of poorly controlled hypertension, the evaluation of the electrocardiogram (which was read as normal by co-defendant, Dr. Jelveh), and cardiac enzymes with abnormal chest x-ray and echo" also fails to take into account Dr. Unkenholz's deferral to cardiologist Dr. Chengot. See Wasserman v Staten Island Radiological Associates, supra; see also, Lambadarios v Kobren, supra. Moreover, these conclusions find no support in the record. In fact , at the time of his initial consultation with the patient, Dr. Unkenholz noted the patient's history of hypertension, ordered the EKG or electrocardiogram, ordered the blood testing which included cardiac enzymes, ordered the patient's portable chest x-ray, ordered an echocardiogram for

the patient and most importantly, referred the patient to a cardiologist, Dr. Chengot.

Nevertheless, the plaintiff has established an issue of fact as to whether the defendant Dr. Unkenholz misread the decedent 's x-ray as well as the possible effect that that misreading may have had. Dr. Unkenholz's motion must accordingly be denied. See, Datiz by Datiz v Shoob, supra; Mandel v New York County Public Adm'r.; supra.

This decision constitutes the order of the court.

Dated: JAN 04 2008



KENNETH A. DAVIS J.S.C.

ENTERED

JAN 08 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE