SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: HON. MARVIN E. SEGAL,
Justice

TRIAL/IAS PART 4
NASSAU COUNTY

MARY SLONE and ROBERT SLONE,

INDEX NO. 9160/00

Plaintiffs,

MOTION DATE: 1/31/03

-against-

MOTION NO. 002

PETER A. SALZER, M.D., JOHN DECICCO, D.P.M., RONALD KLINGER, M.D., AJAY K. MISRA, M.D., MICHAEL CARVO, M.D., ROBERT F. CARTER, M.D., NASSAU ORTHOPEDIC SURGEONS, P.C., ANGELA CAPO-GRANATA, M.D., ALAN P. SITRON, M.D., SITRON & CILLUFFO, M.D., P.C., and HORMOZ MANSOURI, M.D.,

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The following papers were read on this motion:

Notice of Motion.....1
Affirmation in Opposition.....2
Reply Affirmation.....3
Memorandum of Law.....4

The motion brought by the defendant, John Decicco, D.P.M., in the above captioned medical malpractice action, for an order of this Court, pursuant to Rule 3212 of the CPLR, granting summary judgment in favor of the movant, dismissing the plaintiff's complaint is denied.

On June 9, 1998, the plaintiff, Mary Slone, presented to the defendant, Michael Carvo, M.D., her primary care physician. The said defendant referred her to the defendant, Peter A. Salzer, M.D., a vascular surgeon. Mrs. Slone was thereafter referred to the defendant, Robert F. Carter, M.D., an orthopedist, who referred her to the defendants, Ronald Klinger, M.D., and Ajay K. Misra, M.D., who are neurologists. On July 13, 1998, Mrs. Stone presented to the moving defendant, John DeCicco, D.P.M.

According to the medical information sheet that plaintiff personally completed that day, she was seeing Dr. DeCicco because of complaints of spasms in her foot and that, two days before, her big toe and two small toes became infected. She also reported that she had a history of foot numbness and that she had been referred for an MRI, which was reported to be negative. She further indicated a history of high blood pressure, and that she was presently under a physician's care for a "numb foot" and "sacatia [sp] nerve" for which she was being treated by Dr. Carvo and co-defendant, Dr. Ronald Klinger. The patient also reported to Dr. DeCicco a history of severe Raynaud's Disease for which she was under the care of a vascular surgeon.

After obtaining the plaintiff's history, Dr. DeCicco performed a vascular and neurological examination of the plaintiff's foot. The vascular examination consisted of testing the patient's pulses via palpation and noting the color, skin temperature and capillary return. Dr. DeCicco's vascular findings were significant for rubor on dependency, pallor on elevation, decreased skin temperature, and delayed capillary return bilaterally in the dorsalis pedis and posterior tibial pulses.

Dr. DeCicco's neurological examination consisted of testing for Babinski's and Anchilles tendon refluxes, whether anesthesia or paresthesia was present, and perhaps a vibratory sensory test. Dr. DeCicco purportedly found no abnormalities with respect to his neurological examination.

Dr. DeCicco next performed a visual examination of plaintiff's foot. He found erythema extending along the entire hallux to the metatarsal phalangeal joint. Moreover, honey-colored discharge drainage was noted to be exuding from the right hallux, and, according to Dr. DeCicco's office records, half of the toenail was already avulsed at the time of presentation. According to plaintiff, however, half of the toenail was removed by Dr. DeCicco during this office visit. Dr. DeCicco further observed that the fourth and fifth digits were dusky. Dr. DeCicco debrided the

discharge from the area of the plaintiff's nail by cutting away the infected nail tissue utilizing an antiseptic tissue nipper and sent it off to a laboratory for a culture and sensitivity test.

After performing the debridement, Dr. DeCicco applied a sterile dressing utilizing Gentamycin. Dr. DeCicco also prescribed Keflex, a broad-spectrum antibiotic, to be utilized twice a day for one week.

Dr. DeCicco did not see the plaintiff again, but prepared a consultation report concerning his examination. He forwarded it to Dr. Carvo on July 20, 1998.

The plaintiff ultimately was diagnosed with anticardiolipin syndrome. Due to the gangrene in the fourth and fifth toes of the right foot, she eventually underwent amputation of those toes, which Dr. Salzer performed at Mid-Island Hospital on August 10, 1998. On August 31, 1998, the patient underwent transmetatarsal amputation of the right foot performed by non-party vascular surgeon, Dr. Patrick Lamporello at New York University Medical Center.

> "It is well established that a party moving for summary judgment must make a prima facie showing of entitlement as a matter of law offering sufficient evidence to demonstrate the absence of any material issues of fact (**Winegrad v. New York Univ. Med. Center**, 64 NY2d 851, 853, **Zuckerman v. City of New York**, 49 NY2d 557, 562.) Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (**State Bank v. McAuliffe**, 97 AD2d 607), but once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (**Alvarez v. Prospect Hosp.**, 68 NY2d 320, 324; **Zuckerman v. City of New York, supra.**, at 562)."

In support of the instant motion the movant has submitted the affirmations of Lawrence Kobak, D.P.M. and Donna Mendes, M.D.

In his affirmation in support, Dr. Kobak, a podiatrist, opines:

"...it is my opinion to a reasonable degree of podiatric certainty that Dr. DeCicco acted entirely appropriately and within accpeted standards of appropriate podiatric practice in treating the patient's infected right hallux. On the date plaintiff saw Dr. DeCicco, she complained of pain in her big toe, and Dr. DeCicco observed the presence of erythema extending along the entire hallux to the metatarsal phalangeal joint and honey-colored discharge drainage exuding from the distal portion of the patient's right hallux. It is my opinion to a reasonable degree of podiatric certainty that the presence of such discharge, together with plaintiff's symptoms, were clear indications that the patient had a possible bacterial infection in that area requiring immediate treatment.

Accordingly, it is further my opinion to a reasonable degree of podiatric certainty that Dr. DeCicco arrived at an appropriate differential diagnosis of possible cellulitis in the right foot, debrided the infectious discharge, and even if Dr. DeCicco also removed a part of the patient's toenail, it would have been appropriate to do so in order to assure that all the infectious material was debrided from the area. Dr. DeCicco then appropriately applied a sterile dressing utilizing Gentamycin, instructed the patient to utilize Betadine soaks on the toe twice a day, and prescribed Keflex, a broad-spectrum antibiotic, to control and prevent the spread of any further infection. Dr. DeCicco also then appropriately forwarded the debrided material to a laboratory for a culture and sensitivity analysis to be performed, which ultimately confirmed Dr. DeCicco's suspicion that the patient had an infection of the right hallux as the culture and sensitivity report revealed that the discharge material was significant for the presence of pseudomonas aeruginosa and many Serratia marcescens. It is my opinion to a reasonable degree of podiatric certainty that the presence of such bacterial microorganisms represent a serious infection that can quickly spread to other parts of the foot and may also lead to an abscess if not immediately treated.

It is further my opinion to a reasonable degree of podiatric certainty that Dr. DeCicco correctly performed this procedure notwithstanding that the patient had also presented with vascular abnormalities on the opposite side of the patient's foot on the date Dr. DeCicco saw this patient. In that regard, Dr. DeCicco adequately performed an appropriate vascular workup from a podiatric perspective noting the absence of pulses and abnormal color and skin temperature in the fourth and fifth toes,

suggestive of ischemia. There were no additional findings of ischemia noted by Dr. DeCicco anywhere else on the patient's foot and, in particular, in the area of the right hallux where Dr.DeCicco performed the debridement procedure. Moreover, based on these vascular symptoms and the patient's history of severe Raynaud's disease and spasms, Dr. DeCicco appropriately opined that these symptoms were consistent with possible vasospastic disease. Accordingly, Dr. DeCicco appropriately made no attempt to treat this area of her foot and, instead, instructed the patient to return to see her vascular surgeon as soon as possible for further treatment.

It is further my opinion to a reasonable degree of podiatric certainty that notwithstanding the patient's vascular history and symptoms which Dr. DeCicco noted at the time of the office visit, that it was still appropriate and necessary for Dr. DeCicco to treat and debride the infectious material that was present in the right hallux. It is my opinion to a reasonable degree of podiatric certainty that such a procedure is one that is routinely and normally performed by a podiatrist and not by a vascular surgeon, and that it was entirely appropriate for Dr. DeCicco to perform this procedure on his own without first consulting with a vascular specialist given that the patient had no vascular symptomatology in the area that he treated.

It is also my opinion to a reasonable degree of podiatric certainty that arterial insufficiency, severe small vessel disease, anticariolipin antibody syndrome and Raynaud's disease are vascular abnormalities and/or disease and, and, as such, their diagnosis and treatment are not within the province of a podiatrist. Accordingly, it is further my opinion to a reasonable degree of podiatric certainty that it was not a departure for Dr. DeCicco not to have diagnosed any of these conditions and, instead, to have referred the patient back to her vascular specialist for treatment of the patient's vascular abnormalities that were noted by Dr. DeCicco during that office visit.

Lastly, it is my opinion to a reasonable degree of podiatric certainty that Dr. DeCicco's treatment of the right hallux was ultimately successful in treating the infection given that by the time the patient was seen by her vascular specialist only two days after Dr. DeCicco's office visit, pursuant to Dr. DeCicco's instructions, that the infection had resolved given that the vascular specialist, co-defendant Dr. Peter Salzer, made no findings as to the existence of any infection in the right hallux when he saw the patient, and the only finding he made with regard to the right hallux was that half of that toenail was not present."

In her affirmation in support, Dr. Mendes, a vascular surgeon, opines:

"...it is my opinion to a reasonable degree of medical certainty that on the date Dr. DeCicco saw the patient pursuant to a referral from plaintiff's treating family physician, co-defendant, Dr. Michael Carvo, for complaints of swelling in the patient's right big toe and two smaller toes, that Dr. DeCicco appropriately debrided honey-colored discharge from the patient's hallux that was ultimately determined to contain bacterial microorganisms, and that he appropriately referred the patient back to her vascular surgeon for further follow-up treatment with respect to her fourth and fifth toes, which Dr. DeCicco noted to be ischemic.

It is my opinion to a reasonable degree of medical certainty that the presence of honey-colored discharge in the area beneath or at the patient's toenail is a clear indication that the drainage is likely to be infectious requiring immediate treatment consisting of debridement of the affected area. This would include removal of the material and all or part of the toenail if the practitioner deems it necessary to remove all or part of the toenail in order to be sure that he has debrided all the infectious material away from the affected area. In addition, after appropriately debriding the drainage and arriving at a differential diagnosis of possible cellulitis, Dr. DeCicco then appropriately sent the discharged material to a laboratory for a culture and sensitivity test that ultimately and irrefutably stated that the debrided material that grew out of the culture was significant for the presence of many pseudomonas aeruginosa and many serrata marcescens. These microorganisms represent a serious bacterial infection that Dr. DeCicco could not, and appropriately did not, ignore. Furthermore, Dr. DeCicco also acted appropriately and precipitously in prescribing antibiotics to treat that infection based on his suspected diagnosis of an infection that ultimately proved to be correct.

It is further my opinion to a reasonable degree of medical certainty that it was not a departure for Dr. DeCicco to perform this debridement even though the plaintiff had an underlying acute vascular disturbance in the opposite end of her foot, specifically the fourth and fifth toes. Dr. DeCicco appropriately obtained a medical history of the patient which included that she had a history of Raynaud's disease, for which she was under the care of a vascular surgeon, and appropriately conducted a vascular examination of her entire foot which was significant for rubor on dependency, pallor on elevation, decreased skin temperature, delayed bilateral

capillary return, non-palpable dorsalis pedis and posterior tibial pulses bilaterally, and noting that the fourth and fifth digits were dusky. Based on the vascular abnormalities noted by Dr. DeCicco, he appropriately opined that the patient's symptoms were consistent with possible vasospastic disease, and, accordingly, instructed her to return to see her vascular surgeon as soon as possible, which she did only two days later.

Furthermore, notwithstanding these vascular abnormalities noted by Dr. DeCicco, it was entirely appropriate and, in fact, necessary for Dr. DeCicco to have debrided the patient's right hallux at that point in time, and it was not at all incumbent upon Dr. DeCicco to have consulted with a vascular surgeon prior to performing the debridement procedure. It is my opinion to a reasonable degree of medical certainty that the type of procedure performed by Dr. DeCicco involving drainage of infectious discharge in the area of a patient's toes, even if it included partial removal of her toenail, is the type of procedure typically performed by a podiatrist and not a vascular surgeon.

Thus, Dr. DeCicco correctly and appropriately treated only the condition that was within his province, i.e., cellulitis of the right hallux, and deferred treatment of the vascular abnormalities in the other part of her foot which were limited to the right fourth and fifth toes to the patient's vascular surgeon.

Lastly, it is also my opinion to a reasonable degree of medical certainty that Dr. DeCicco's removal of the drainage of the patient's right foot, even if it also included clipping part of her right toenail, did not cause or contribute to the exacerbation of the plaintiff's already existing underlying vasopastic disease. First, it is undisputed both in the deposition testimony of the parties as well as the medical records that plaintiff was not suffering from any vasospastic or vascular disturbance in the area on her right toe, both immediately prior to and subsequent to Dr. DeCicco's office visit, and Dr. DeCicco had no findings of ischemia with respect to the right hallux, only discharge and erythema along the right big toe. In fact, the presence of erythema is an indication that there was vascular circulation to that area.

The only areas noted to be ischemic both at the time Dr. DeCicco saw the patient and when she returned to see her treating vascular surgeon, Dr. Peter Salzer, two days later, were the right fourth and fifth toes. In fact, when the patient was

admitted to Mid-Island Hospital that same day (i.e. two days after Dr. DeCicco's office visit), Dr. Salzer specifically mentioned that he found ischemia only in the fourth and fifth toes, and that with respect to the right big toe, he only noted that half of the patient's toenail on her right hallux was not present, but made no other findings as to that toe, and specifically no mention of ischemia was noted in any area outside of the right fourth and fifth toes. Moreover, it is further my opinion that Dr. DeCicco's debirdement had no effect on the patient's underlying vasospastic disease because, if it had, there would have been some evidence of reactive spasm at the site of the debridement when the patient was seen by her vascular surgeon two days later. Here, there were no such findings.

Thus, given the lack of any indication that the patient had an underlying vasospastic disorder in the area that Dr. DeCicco treated, it is my opinion to a reasonable degree of medical certainty that such a minimally invasive procedure could not have in any way contributed to or exacerbated the vasospastic disease that was only affecting the opposite side of the patient's foot. Moreover, had Dr. DeCicco failed to drain the discharge in the right hallux, it is my opinion to a reasonable degree of medical certainty that an abscess would have likely soon developed in that area that could have likely exacerbated plaintiff's vascular disorder and healing process even further."

The defendant having, prima facie, demonstrated a lack of malpractice in his treatment of the plaintiff, Mary Slone, the plaintiffs oppose the instant motion with an affirmation from a Board eligible podiatrist wherein the doctor avers:

"...it is my opinion within a reasonable degree of podiatric certainty that the care and treatment rendered to plaintiff Mary Slone by Dr. John DeCicco, deviated from the accepted podiatric standards for the community. Furthermore, the care and treatment rendered by Dr.DeCicco was the proximate cause of Mary Slone's injury including the loss of her fourth and fifth toes, and ultimately a portion of her right foot.

On July 13, 1998, plaintiff, Mary Slone, presented to the office of Dr. John DeCicco. In the medical form that plaintiff, Mary Slone, completed at the time of her visit, Mary Slone indicated that she was having spasms in her right foot, and that two days prior thereto, her big toe and two small toes became infected.

Defendant, Dr. DeCicco, noted in his medical record that Mary Slone had a history of severe Raynaud's Disease. According to the testimony and medical record of Dr. DeCicco, he performed a vascular and neurological examination. As part of his vascular examination, Dr. DeCicco noted that he was unable to palpate the patient's dorsalis pedis pulses and posterior tibial pulses. Mary Slone had delayed capillary return bilaterally, rubor dependency, and pallor elevation. During his vascular examination, Dr. DeCicco noted a finding of decreased skin temperature bilaterally. Dr. DeCicco noted that Mary Slone's fourth and fifth toes were dusky. Finally, Dr. DeCicco noted that there was honey colored drainage from the right hallux (great toe).

Dr. DeCicco performed a debridement of the right hallux which, according to the testimony of the plaintiff, consisted of cutting off one-half of the toe nail on the big toe. Dr. DeCicco cultured the drainage, and prescribed Keflex.

Dr. DeCicco testified that at the time of his vascular examination, his findings of non-palpable dorsalis pedis pulses and posterior tibial pulses bilaterally were indicative of a vascular problem. Dr. DeCicco testified that the finding of delayed capillary return bilaterally was indicative of small vessel disease and Raynaud's Disease. Dr. DeCicco testified that findings during his vascular examination of rubor dependency, pallor elevation and decreased skin temperature bilaterally were consistent with vasospastic disease and vascular disease. The defendant testified that his findings of the plaintiff's fourth and fifth toes being dusky was indicative of vasospastic disorder or vascular disease.

It is my opinion within a reasonable degree of podiatric certainty that based upon the above findings by examination, and based upon the history of severe Raynaud's Disease and treatment by a vascular physician, that defendant, Dr. DeCicco, departed from the podiatric standard of care by failing to immediately notify and consult the plaintiff's vascular physician of Dr. DeCicco's findings before performing any treatment on plaintiff. Appropriate care of the condition of Mrs. Slone's foot, found by Dr. DeCicco, called for immediate contact of Mrs. Sone's medical doctor. That the failure to notify the plaintiff's vascular physician resulted in a delay of treatment of the vascular condition which exacerbated plaintiff's condition, ultimately resulting in the partial loss of her foot. That acceptable care called for the podiatrist to immediately contact the vascular physician, or advise the

plaintiff to immediately contact her vascular physician, with the findings from his examination. Furthermore, the defendant podiatrist deviated from the accepted standard of care by treating plaintiff prior to consulting with plaintiff's vascular physician.

Based upon the foregoing, it is my opinion within a reasonable degree of podiatric certainty, that Dr. DeCicco's treatment of Mrs. Slone departed from that which is acceptable and said departure was a substantial and proximate cause of and exacerbated the loss of plaintiff's toes and a portion of her right foot."

In determining the instant motion, the Court is required to accept the plaintiffs' pleadings as true and the Court's decision must be made upon the version of the facts most favorable to the plaintiffs. **Henderson** v. **City of New York**, 178 AD2d 129; **Weiss** v. **Garfield**, 21 AD2d 156.

Based upon all the papers submitted for this Court's consideration, the differing opinions of the plaintiff's and defendant's medical experts are best left to be decided by a trial of the facts herein. **Dunlop** v. **Sivaraman**, 272 AD2d 570; **Baez** v. **Lockridge**, 259 AD2d 573; **McMahon** v. **Badia**, 195 AD2d 445.

Accordingly, this Court concludes that material issues of fact exist, particularly as to whether the alleged departures from accepted medical practice by the defendant, Dr. John DeCicco, caused or contributed to the medically required amputation of the right foot of the plaintiff, Mary Slone.

Dated: March 21, 2003

MARVIN E. SEGAL, J.S.C.