SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

PRESENT:

HON. IRA B. WARSHAWSKY

Justice.

TRIAL/IAS PART 22

BRIAN MOLINA, an infant by his father and natural guardian, GEORGE MOLINA and GEORGE MOLINA, Individually,

Plaintiffs,

NASSAU COUNTY
INDEX NO. 014335/98
MOTION DATE: 11/27/00
MOTION SEQUENCE: 003

-against-

WINTHROP UNIVERSITY HOSPITAL, DAVID KAO, P.A., and BRENDAN MCELROY, M.D.,

Defendants,

WINTHROP UNIVERSITY HOSPITAL,

Third-Party Plaintiff,

-against-

DAVID KAO, P.A., and BRENDAN MCELROY, MD.

Third-Party Defendants.

The following papers read on this motion:

Notice of Motion/Order to Show Cause	X
Answering Affidavits	X
Replying Affidavits	X
Memoranda of Law: Plaintiff's/Petitioner's	
Defendant's/Respondent's	

This motion by defendant/third-party plaintiff, Winthrop University Hospital, pursuant to CPLR 2221, for leave to reargue and renew a prior motion brought by defendant, Brendan McElroy, M.D., which resulted in an order dated September 22, 2000, granting him summary judgment and upon reargument for an order denying summary judgment is determined as follows.

Movant contends that in determining the prior motion the court overlooked or did not review an affidavit by Dr. Gerald Brody who is in charge of the Emergency Room at Winthrop University Hospital and misperceived the existence of a duty on the part of Dr. McElroy to exercise his best medical judgment in treating the plaintiff. In so far as reargument may be granted where it is alleged that the court has overlooked, or misapprehended a material factual matter or a controlling principle of law, McGill Goldman, 261 A.D. 2d 593 (2d Dept 1999); Uruggiero v Long Island Railroad, 555 N.Y.S. 2d 401 (2d Dept 1990); Cisco v Lavine, 72 Misc. 2d 1087 (Sup Ct. Nassau Co.1973), and since defendant has met that standard, reargument is granted and upon reargument the decision of the court is as follows.

Twenty month old Brian Molina and his parents presented at the Emergency Room in the Winthrop University Hospital for treatment on April 12, 1997, at approximately 1:41 P.M. Brian, was seen by a physician's assistant, who has been identified as David Kao. The Emergency Room was at that time under the supervision of an attending physician, who has not been conclusively identified. Dr. McElroy avers that he was not the attending physician when Brian presented for treatment and that he was not consulted by P.A. Kao on Brian's treatment which ultimately involved suturing under conscious sedation at 3:00 P.M. Dr. Mc Elroy states that he only engaged in the ministerial act of signing Brian's chart for release after his treatment had been concluded.

Although on first reading of the motion the court was persuaded that Dr. McElroy was not the attending physician at the time of Brian's treatment, and that he did not by any independent act engage in treatment of the child, and that, therefore, no doctor-patient relationship established, it now appears that there is a substantial question of material fact

as to who was the attending physician in the Emergency Room at the times relevant to this law suit. The attending physician in an Emergency Room is, per force, the physician responsible for rendering primary care to the patient who presents to the ER for medical treatment and has been seen by a physician's assistant. The doctor-patient relationship establishes in such circumstances notwithstanding the fact that the attending may neither examine, treat nor render advice other than through a physician's assistant.

For an action in malpractice to lie there must be a doctor-patient relationship. McKinney v Bellevue Hospital, 183 A.D. 2d 563, 564 (1st Dept 1992). Normally, a doctor-patient relationship is established when a physician undertakes to diagnose, treat and advise a prospective patient. Lee v City of New York, 162 A.D. 2d 42 (2d Dept 1990); see, also Cogswell v Chapman, 249 A. D. 2d 865 (3d Dept 1998) (motion for summary judgment denied where issue of fact found concerning whether opthamologist's telephone consult with the emergency room physician's assistant rose to the level of affirmative advise as to prospective treatment for ER patient.) In general terms, a claim sounds in malpractice when the challenged conduct constitutes medical treatment. Payette v Rockefellor, 220 A. D. 2d 69 (1st 1996). Plainly, plaintiff went to the emergency room for, and received, medical treatment, and the doctor-patient relationship was established through the attending doctor's diagnosis, recommendation of treatment and advice communicated through the physician's assistant.

In this case it cannot be said with any measure of certainty that Dr. McElroy was **not** the attending physician responsible for Brian's care. To do so would be to judge matters of credibility which is not the court's function on a motion for summary judgment. Section 3212 motion practice requires the movant to establish a prima facie case, and all inferences are to be drawn against the non-moving party. This rule has particular relevance here, where it is uncontroverted that there was an attending physician at the times relevant to this law suit and Dr. McElroy has not established by competent proof that it was not he who was in charge of the Emergency Room. It is, accordingly, a usurpation of the jury function to grant summary judgment in light of this question of fact and it is hereby,

ORDERED, that upon reargument the court vacates its prior order and issues a new order denying summary judgment to defendant, Brendan McElroy M.D. The motion for summary judgment is denied without prejudice to a subsequent motion for summary judgment should the subsequent proof establish that Dr. McElroy was not the attending physician in the Emergency Room when Brian Molina was examined, diagnosed and treated and did not participate in his treatment.

Dated: January 24, 2001

Ira B. Warshawsky

J.S.C.

ENTERED

JAN 30 2001

NASSAU COUNTY
COUNTY CLERK'S OFFICE