

**Caggiano v Cooling**

2011 NY Slip Op 30193(U)

January 21, 2011

Sup Ct, Suffolk County

Docket Number: 06-27017

Judge: Peter H. Mayer

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 17 - SUFFOLK COUNTY

**PRESENT:**

Hon. PETER H. MAYER  
Justice of the Supreme Court

MOTION DATE 9-8-10  
ADJ. DATE 11-24-10  
Mot. Seq. # 007 - MD  
          # 008 - XMD  
          # 009 - XMD

-----X		
MICHAEL CAGGIANO and DONNA	:	CHRISTOPHER A. BACOTTI, ESQ.
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	:	
	:	KAUFMAN BORGEEST & RYAN LLP
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- against -	:	1205 Franklin Avenue, Suite 301
	:	Garden City, New York 11530
	:	
	:	ANDREW M. CUOMO, ESQ., Attorney General
	:	By: Marcia K. Glasser, Esq.,
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MILLER, R.N. (first name being fictitious as	:	New York, New York 10271
unknown) and "JANE" MEDINA, R.N. (first name	:	
being fictitious as unknown), ANTHONY A.	:	GEISLER & GABRIELE, LLP
GUIDA, M.D., LEONARD P. SAVINO, D.O.,	:	Attorney for Defendants Gigante, Guida & Savino
KATEN VORA, M.D., and JOSEPH GIGANTE,	:	100 Quentin Roosevelt Boulevard
D.O.,	:	Garden City, New York 11530
Defendants.	:	
-----X		

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion (007) by the defendant Cooling dated August 17, 2010 and supporting papers numbered 1-17; Notice of Cross Motion (008) by defendants Miller and Medina dated August 25, 2010 and supporting papers numbered 18-26; Notice of Cross Motion (009) by plaintiffs Caggiano dated October 28, 2010 and supporting papers numbered 27-31; (2) Affirmation in Opposition by the defendants Miller and Medina dated November 5, 2010 and supporting papers numbered 32-35; Affirmation in Opposition by the defendants Guida, Savino, Gigante, dated November 16, 2010, and supporting papers numbered 36-37; (3) Reply Affirmation by the defendant Cooling dated November 19, 2010 and supporting papers numbered 38-41; Reply Affirmation by the plaintiffs dated November 24, 2010 and supporting papers numbered 42-48; (4) Other and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

**ORDERED** that this motion (007) by the defendant David Cooling, M.D., pursuant to CPLR 3212 for summary judgment dismissing the plaintiffs' verified complaint is hereby denied; and it is further



**ORDERED** that this cross motion (008) by the defendants Diane Medina R.N. and Maryann Miller, R.N. pursuant to CPLR 3212 for an order granting summary judgment dismissing the plaintiffs' complaint and any cross claims asserted against them is hereby denied; and it is further

**ORDERED** that this cross motion (009) by the plaintiffs Michael Caggiano and Donna Caggiano pursuant to CPLR 3212 for an order granting summary judgment to the plaintiffs is hereby denied.

The complaint of this action sets forth causes of action sounding in negligence and medical malpractice on behalf of the plaintiff Michael Caggiano and a derivative claim on behalf of his spouse, Donna Caggiano. It is claimed that on or about December 26, 2005, the defendants rendered certain medical, nursing, technical, radiological, cardiological, neurological, surgical, respiratory and internal health care to Michael Caggiano in a negligent and careless manner, departing from accepted standards of care, at Stony Brook University Hospital, causing the plaintiff to sustain serious and permanent injury including paralysis of the lower extremities.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [2<sup>nd</sup> Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2<sup>nd</sup> Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]).

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (*Holton v Sprain Brook Manor Nursing Home*, 253 AD2d 852, 678 NYS2d 503 [2<sup>nd</sup> Dept 1998], *app denied* 92 NY2d 818, 685 NYS2d 420 [1999]). To prove a prima facie case of medical malpractice, a plaintiff must establish that defendant's negligence was a substantial factor in producing the alleged injury (*see, Derdarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166 [1980]; *Prete v Rafla-Demetrious*, 224 AD2d 674, 638 NYS2d 700 [2<sup>nd</sup> Dept 1996]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury (*see, Fiore v Galang*, 64 NY2d 999, 489 NYS2d 47 [1985]; *Lyons v McCauley*, 252 AD2d 516, 517, 675 NYS2d 375 [2<sup>nd</sup> Dept], *app denied* 92 NY2d 814, 681 NYS2d 475 [1998]; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [2<sup>nd</sup> Dept 1994]).

To rebut a prima facie showing of entitlement to an order granting summary judgment by the defendant, the plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice, and containing an opinion that the defendant's acts



or omissions were a competent-producing cause of the injuries of the plaintiff (*see, Lifshitz v Beth Israel Med. Ctr-Kings Highway Div.*, 7 AD3d 759, 776 NYS2d 907 [2<sup>nd</sup> Dept 2004]; *Domaradzki v Glen Cove OB/GYN Assocs.*, 242 AD2d 282, 660 NYS2d 739 [2<sup>nd</sup> Dept 1997]).

#### MOTION (007)

In motion (007), defendant David Cooling, M.D., seeks summary judgment dismissing the plaintiffs' complaint and supports the application with, inter alia, an attorney's affirmation; the expert affidavit of Joel M. Bartfield, M.D.; copies of the summons and complaint, answers served by defendants Cooling, Guida, Savino, plaintiff's verified bill of particulars; uncertified copies of plaintiff's medical records; unsigned copies of the transcripts of the examinations before trial of Michael Caggiano, Katrina Guglielmo dated February 18, 2010, Leonard Savino dated November 20, 2009, and Joseph Gigante dated November 23, 2009; and the signed transcripts of the examination before trial of David Cooling dated September 9, 2009. The unsigned copy of the deposition transcripts are not in admissible form as required by CPLR 3212 (*see, Martinez v 123-16 Liberty Ave. Realty Corp.*, 47 AD3d 901, 850 NYS2d 201 [2<sup>nd</sup> Dept 2008]; *McDonald v Maus*, 38 AD3d 727, 832 NYS2d 291 [2<sup>nd</sup> Dept 2007]; *Pina v Flik Intl. Corp.*, 25 AD3d 772, 808 NYS2d 752 [2<sup>nd</sup> Dept 2006]) and are not considered.

Upon review of the admissible evidence, it is determined that there are factual issues and conflicting expert opinions which preclude summary judgment dismissing the complaint as asserted against David Cooling, M.D.

The plaintiff's verified bill of particulars sets forth in part that the defendant David Cooling, M.D., ignored Mr. Caggiano's complaints, signs and symptoms of pain in his pelvis and spine, uncontrollable back pain, shaking in his back and pelvis, inability to stand or ambulate, and history of taking Coumadin with blotching of the right leg and spider vein appearance on the left leg.

The ambulance record referred to by Dr. Cooling's expert, Dr. Joel M. Bartfield, indicates in part that the plaintiff was found lying in bed with complaints of uncontrollable pain and shaking in his back and pelvis areas for several hours and was unable to stand upright on his own.

Joel M. Bartfield, M.D., has set forth in his expert affirmation submitted on behalf of defendant David Cooling that he is duly licensed to practice medicine in the State of New York and is board certified in Internal Medicine and in Emergency Medicine. It is Dr. Bartfield's opinion with a reasonable degree of medical certainty that at all times the treatment rendered by Dr. Cooling was in accordance with good and accepted medical practice and did not proximately cause any of the plaintiff's alleged injuries and damage. He states that on December 26, 2005, Michael Caggiano, then 56 years of age, presented to Stony Brook University Hospital Emergency Department at approximately 4:22 a.m. by ambulance with extreme lower back pain with shaking in the back, groin and pelvic area, pain radiating from his back around his hips, down his sides and legs to the middle of the upper thigh. He had a prior history of "back problems and spinal pain." A nurse's note at 5:40 a.m. indicated he had spinal pain radiating to the bilateral groin and thighs for which he was medicated with Morphine as the pain had increased to 10+ on a scale of 1-10. Mr. Caggiano was seen by Dr. Cooling at approximately 6:25 a.m. who noted complaints of chronic degenerative joint disease of the lower back with chronic back pain, but that Mr. Caggiano denied any muscle weakening or incontinence. His examination revealed a "normal neurological exam with normal deep tendon reflexes." No focal weakness was noted and he had normal motor function. Mr. Caggiano was taking Coumadin, but Dr. Bartfield states that Dr. Cooling did not feel the need for blood testing to test for coagulation or Coumadin levels based on the lack of neurological



symptoms and the prior history of degenerative spine disease. He discharged Mr. Caggiano at 8:15 a.m. with a diagnosis of chronic back pain and gave him instructions not to bend or lift and to return to the emergency department or contact his primary care doctor if his condition worsened.

Later that day, Mr. Caggiano presented to the office of his primary physicians, Anthony Guida, Leonard Savino and Joseph Gigante, where he was examined by Katrina Guglielmo, P.A., for complaints of severe lower back pain radiating down both legs. He was walking with a cane. A neurological examination was conducted as were blood tests for PT/PTT and INR levels which came back elevated at 5.0. He was instructed the following day to discontinue the Coumadin and have repeat blood tests done. He was urinating without blood or unusual color. He was ambulating on crutches but able to put weight on both legs. A CAT scan of the lumbar spine was conducted on December 27, 2005, revealing bilateral S1 degeneration. On December 29, 2005, he was taken to Brookhaven Memorial Hospital by ambulance at 10:15 a.m. He was unable to move his lower extremities, and was experiencing numbness and coldness of his legs and abdominal pain. Physical examination revealed no motor responses to both feet, but pulses to the feet were intact. He was diagnosed with hemiplegia (severe or complete loss of motor function) with no sensation below the knees. There was no rectal tone. He had priapism (prolonged erect penis). The INR level was elevated to 5.5 and the PT level was elevated to 47.5. Dr. Sathi conducted a neurosurgery consult on December 29, 2005, at which time he found no motor strength in the lower extremities and found significant defects below L2 but normal above L1. There were no deep tendon reflexes at the knees and ankles. Mr. Caggiano could not move or feel his legs, and described them as "sea legs or wobbly." A CT scan of the pelvis and abdomen revealed evidence of minimal free pelvic fluid of indeterminate etiology and clinical significance. The CT of the lumbar spine revealed no herniations and no definite abnormal epidural soft tissue attenuation. Upon bringing Mr. Caggiano's blood INR level to 1.42, a lumbar myelogram was performed which revealed a complete obstruction at the level of T12. A dorsal CT scan revealed an epidural hematoma causing effacement of the thoracic cord at the level of T12. An urgent surgical decompression was recommended and the plan was for a thoracic laminectomy with evacuation of the lesion. Bilateral T9-T12 and partial L1 laminectomies were performed for evacuation of the hematomas at the T10 and T12 levels. After surgery, Mr. Caggiano reported some feeling in his legs, but he had no movement. He was transferred to Southside Acute Rehabilitation Program thereafter.

Dr. Bartfield states that all the treatment rendered by Dr. Cooling in the emergency department at Stony Brook was done in accordance with good and accepted medical practice. He states Mr. Caggiano presented with typical back pain that worsened in the absence of trauma "because he had run out of Vicodin three days prior." He further opined that conservative medical treatment was appropriate in the absence of neurological symptoms, such as neurogenic bladder, saddle anesthesia (lack of rectal tone), weakness to the extremities that is more severe than just numbness and pain, and also because Mr. Caggiano did not present signs of bleeding. Dr. Bartfield states that the note by the ambulance crew that Mr. Caggiano was unable to stand does not indicate a true inability to feel his legs, and that it was his opinion that Mr. Caggiano could not stand due to pain. Mr. Caggiano, he opines, did not have any neurological pain radiating into his abdomen that would be consistent with a hematoma at the T12 level, and the pain radiating into his groin was consistent with his history of lumbar spine problems and not higher up at the T12 level. Dr. Bartfield also opines that there was no need for Dr. Cooling to have order blood tests based upon Mr. Caggiano being on Coumadin as Mr. Caggiano's pain was a "worsening of pre-existing symptoms" and that there was no need for the blood levels to be tested as Mr. Caggiano had chronic back pain. He states that if the levels were tested and found to be supratherapeutic with respect to Coumadin, Mr. Caggiano would have been referred back to his own physician. He states that it is not the standard of care for emergency room physicians to order CT scans and that Vitamin K should not be given unless there are obvious emergent and acute symptoms. Additionally, Katrina Guglielmo ordered blood tests that same day when Mr. Caggiano presented to his doctor's office.



The plaintiffs' expert, who is licensed to practice medicine in the State of New York and is board certified in Neurological Surgery, sets forth with a reasonable degree of medical certainty that the plaintiff, Michael Caggiano, was rendered a paraplegic owing to the medical malpractice and negligence of the defendants, including David Cooling. He states Mr. Caggiano has been caused to be confined to a wheelchair for the remainder of his life as a result of the defendants' departures from accepted medical practice. The plaintiff's expert states that Mr. Caggiano suffered an internal spinal hemorrhage wherein the pooling of blood in and around his spine compressed his spinal cord, resulting in the bilateral lower level paraplegia and incontinence. The process of such spinal cord compression began with the sudden onset of acute, non-trauma related pain, resulting in paraplegia occurring over a period of hours as his internal hemorrhage and blood pooling progressed compressing his spinal cord to a state of non-neurotransmission.

Based upon Mr. Caggiano's testimony, the plaintiff's expert states that Mr. Caggiano's pain began on Christmas Day, December 25, 2005, and was manifestly and definitely different from any back pain he had ever experienced before and that the pain was in a different location than experienced previously. Vicodin provided no relief from the pain. At 11:30 p.m., he felt the urge to urinate but was unable to do so, and despite a hot bath, was still unable to urinate. Additional Darvocet provided no relief from pain and his body began shaking involuntarily. He began to sweat and developed tightness in his chest which felt like a band holding him. He had bruising on his knees unrelated to trauma or contact. He was transported to Stony Brook University Hospital emergency department by ambulance. After being admitted to the emergency room, he complained as he received no attention for 45 minutes after arrival, was told to "shut up" by a doctor and was closed in a room. During his admission to the emergency department, Mr. Caggiano began to experience numbness and loss of sensation from both his knees down and was denied requests for a CT scan and for a blood test to determine the INR level.

The plaintiff's expert states that Dr. Cooling, who attended Mr. Caggiano in the emergency department, failed to order blood tests to measure the INR level or order a CT scan and merely concluded that Mr. Caggiano was experiencing chronic back pain. A urine test was taken which revealed a tremendously high level of blood in his urine (40% greater than any range enumerated on the lab report), but Dr. Cooling did not follow up with additional testing or determination of INR level which would have ascertained the high Coumadin levels and would have corroborated all of Mr. Caggiano's expressed and manifest symptoms, including internal bleeding. Vitamin K could have been administered to reverse the anti-coagulation process. Dr. Cooling discharged Mr. Caggiano without having conducted a proper, complete, or accurate assessment or determination as to his condition, and, in fact, failed to provide treatment. Mr. Caggiano was unable to walk, but no neurological testing was conducted. The banding tightness in Mr. Caggiano's chest was ignored despite his being on Coumadin. The plaintiff's expert states that these departures from accepted medical practice were the proximate cause of Mr. Caggiano's injuries and condition, and had Dr. Cooling not departed from the accepted medical practice Mr. Caggiano would not have continued to suffer the progressive internal bleeding, compression of the spinal cord and state of non-neurotransmission secondary to the high levels of Coumadin, and would not have become bilaterally paralyzed, incontinent and confined to a wheelchair for the rest of his life, requiring the intermittent use of a catheter.

Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions (*see, Shields v Baktidy*, 11 AD3d 671, 783 NYS2d 652 [2d Dept 2004]; *Barbuto v Winthrop Univ. Hosp.*, 305 AD2d 623, 624, 760 NYS2d 199 [2d Dept 2003]). Such credibility issues can only be resolved by a jury (*see, Shields v Baktidy, supra; Halkias v Otolaryngology-Facial Plastic Surgery Assoc.*, 282 AD2d 650, 724 NYS2d 432 [2d Dept 2001]). Here, the parties have raised factual issues and conflicting expert opinions. It is therefore determined that based upon the foregoing, that these factual



issues and conflicting opinions preclude summary judgment dismissing the complaint.

Accordingly, motion (007) by the defendant David Cooling, M.D. for an order granting summary judgment dismissing the complaint as asserted against him is hereby denied.

#### CROSS MOTION (008)

In cross motion (008), the defendants, Diane Medina, R.N., and Maryann Miller, R.N., seek summary judgment dismissing the complaint and any cross claims asserted against them and support the motion with an attorney's affirmation, their respective affidavits; a copy of the summons and complaint, copies of their respective answers, plaintiffs' verified bill of particulars; and an uncertified copy of Stony Brook Hospital Emergency Department record. The moving defendants, however, have not submitted copies of the co-defendants' answers with any crossclaims they wish to dismiss.

Upon reviewing the submitted evidence, it is determined that there are factual issues which preclude summary judgment to the moving defendants.

Diane Medina, R.N., set forth in her affidavit that it is her opinion with a reasonable degree of nursing certainty that the care and treatment she provided to Michael Caggiano did not depart from good and accepted nursing practice and none of the care and treatment provided contributed to the injuries claimed by Mr. Caggiano. She set forth the nursing duties she performed from 5:40 a.m. until Mr. Caggiano was discharged and stated she is not authorized to order any medical tests, procedures, laboratory or radiological studies or medication. She stated that the emergency room physician made the decisions with respect to the medical aspects of Mr. Caggiano's care and treatment, including discharging him. She did not make any independent judgments or decisions concerning Mr. Caggiano's medical management and care. The care and treatment she rendered was overseen by the attending physician.

Maryann Miller, R.N., set forth in her affidavit that it is her opinion with a reasonable degree of nursing certainty that the care and treatment she provided to Michael Caggiano did not depart from good and accepted nursing practice and that none of the care and treatment she provided to Mr. Caggiano contributed to his injuries. She was working as a triage nurse when Mr. Caggiano presented to the emergency room. After taking his medical history, she recorded his pain scale, blood pressure, heart rate and respiratory rate, and took him to the main emergency room for evaluation and treatment. Thereafter, Mr. Caggiano was no longer under her nursing care following the triage encounter. She stated she is not authorized to order any medical tests, procedures, laboratory or radiological studies or medication, and that the emergency room physician made the decisions with respect to the medical aspects of Mr. Caggiano's care and treatment, including discharging him. She did not make any independent judgments or decisions concerning Mr. Caggiano's medical management. The care and treatment she rendered was overseen by the attending physician.

The plaintiff's expert opines with a reasonable degree of medical certainty that defendants Miller and Medina were nurses who attended Mr. Caggiano, and as preliminary health care providers, they had an obligation and responsibility to alert defendant Cooling as to Mr. Caggiano's dire, emergent and deteriorating condition. He states Miller and Medina had the obligation to thoroughly take a medical history and record the same, and make and record all initial and preliminary medical assessments as to Mr. Caggiano's presented medical condition and relate such information to the hospital's attending physician. This obligation included the need to monitor a simple blood test for the INR level. Miller and Medina's failures to do so constituted

negligence and departures from accepted medical practice proximately causing Mr. Caggiano's claimed injuries.

Here, the parties have raised factual issues and have conflicting expert opinions. It is therefore determined that based upon the foregoing, that these factual issues and conflicting opinions preclude summary judgment.

Accordingly, cross motion (008) by the defendants Medina and Miller for summary judgment dismissing the complaint and cross claims asserted against them is hereby denied.

#### CROSS MOTION (009)

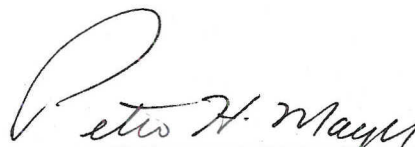
In cross motion (009), the plaintiffs seek summary judgment against the defendants. In support of such motion the plaintiffs have submitted an attorney's affirmation; plaintiff's expert's affirmation; and photographs. The plaintiff have failed to provide copies of the pleadings, answers and bills of particulars for each defendant and therefore their cross motion fails to comport with CPLR 3212. It is additionally noted that the cross motion was not filed within 120 days of the filing of the Note of Issue.

The Note of Issue in this action was filed on May 14, 2010. CPLR 3212(a) provides in pertinent part that a motion for summary judgment shall be made no later than one hundred twenty days after the filing of the Note of Issue, except with leave of court on good cause shown. Cross motion (009) was served on October 28, 2010, according to the affidavit of service, more than one hundred twenty days after the Note of Issue was filed. The plaintiff has made no application for leave of court on good cause shown to file this cross motion beyond the statutory one hundred twenty days, and, in fact, has not submitted any reason for the delay in the moving papers (*see, Brill v City of New York*, 2 NY3d 648, 781 NYS2d 261 [2004]).

Accordingly, cross motion (009) is denied.

Dated: \_\_\_\_\_

1/21/11



PETER H. MAYER, J.S.C.