

GEORGE M. HERB, INDIVIDUALLY  
AND AS ADMIN. OF THE ESTATE  
OF ROCHELLE R. HERB,  
DECEASED,

Plaintiffs

vs

NICHOLAS SPOCK, M.D., JOHN  
HAUN, M.D., KALYAN S.  
KRISHNAN, M.D., JOHN F.  
DANELLA, M.D., JAMES R.  
ELMORE, M.D., ROBERT E.  
LEGGON, M.D., and GEISINGER  
MEDICAL CENTER,

Defendants

IN THE COURT OF COMMON PLEAS  
FOR THE 26TH JUDICIAL  
DISTRICT, MONTOUR COUNTY  
BRANCH, PENNSYLVANIA  
CIVIL ACTION - LAW

CASE NO: 82 of 2000

APPEARANCES:

PAUL F. D'EMILIO, ESQUIRE, and STEPHANIE E. CHERTOK, ESQUIRE,  
Attorneys for the Plaintiff  
DARRYL R. WISHARD, ESQUIRE, Attorney for Defendant Nicholas  
Spock, M.D.  
DONNA L. RAE, ESQUIRE, Attorney for Defendant Geisinger Medical  
Center  
KEVIN OSBORNE, ESQUIRE, Attorney for Defendant John Danella,  
M.D.  
STEPHEN RYAN, ESQUIRE, Attorney for Defendant Robert E. Leggon,  
Jr., M.D.

September 24, 2004. JAMES, J.

OPINION

This matter is before the court to consider defendant  
Spock's Motion for Summary Judgment. The pleadings are closed  
and discovery is essentially complete.

## Factual History

Defendant Spock was the primary care provider for Rochelle R. Herb (hereinafter "decedent"). Defendant Spock saw decedent on March 24, 1997, for complaints of abdominal pain. Defendant Spock diagnosed possible gall bladder disease and referred decedent to Dr. Yavorek, a general surgeon not affiliated with any other defendants in this case. Dr. Spock also ordered an ultrasound of decedent's abdomen. The ultrasound and a CT scan were performed and revealed a large renal mass in the decedent's right kidney. Dr. Yavorek, with Dr. Spock's concurrence, referred the decedent to defendant Dr. Danella, a urologist specializing in urologic oncology at the defendant Geisinger Medical Center.<sup>1</sup> Defendant Danella became decedent's treating physician and, with a vascular surgeon, Dr. Elmore, removed the cancerous kidney at the Geisinger Medical Center on April 3, 1997. Dr. Danella continued to treat decedent and saw her on regular appointments (at least 11 times) through November 17, 1997. He also saw her during an inpatient hospitalization at the Geisinger Medical Center from July 31, 1997, through August 3, 1997, to repair an UPJ obstruction.

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<sup>1</sup> Dr. Danella was board certified in urology. He did a fellowship at UCLA in urologic oncology. Approximately two-thirds of his practice is devoted to urologic oncology. Geisinger Medical Center is accredited by the Commission on Cancer (a subgroup of the American College of Surgeons) as a general cancer center.

After his initial referral of decedent in March 1997, defendant Spock saw decedent for an appointment on May 13, 1997, for complaints of abdominal and right quadrant pain and nausea. He diagnosed GERD and ordered an upper GI series and tests to rule out pancreatitis. The next and the last time that he saw and treated decedent was on March 10, 1998. Until that time, Dr. Danella regularly sent Dr. Spock status reports and medical records concerning decedent's treatment by Dr. Danella and the Geisinger Medical Center. On March 10, 1998, decedent was complaining of right buttock and leg pain. Defendant Spock ordered an MRI of the lumbar spine which showed no evidence of metastatic disease. Nevertheless, defendant Spock referred decedent to a neurosurgeon at Geisinger. The neurosurgeon ordered an MRI of the hip and pelvis which showed evidence of metastatic disease. She died from the sequelae of the cancerous disease on October 18, 1999.

Plaintiff has produced two expert reports concerning defendant Spock's liability for decedent's demise and damages. First, Dr. I.L. Lifrak opines that "Dr. Spock deviated from the appropriate standards of medical care which are incumbent upon a primary care physician in that he did not arrange for follow-up with an oncologist immediately after the initial diagnosis of renal cell carcinoma was made following the surgery performed by Dr. Danella in April of 1997. It is further my

contention with a reasonable degree of medical probability and certainty that it was this failure to arrange for appropriate referral to an oncologist that contributed to the unfortunate and untimely demise of Ms. Herb."

The second opinion by Dr. Gerald H. Sokol states:

[T]he standard of care obviously demands that primary care physicians follow their patients carefully with routine laboratory studies at periodic intervals so that advanced disease can be prevented. In this particular case, Ms. Herb presented with severe anemia, severe shortness of breath, and a large tumor. Surely, these signs could have been elicited on careful history and physical examination during the six months to year prior to tumor diagnosis. At that time likely tumor cure could have been obtained...

CAUSATIONAL ISSUES: Because of the lack of follow-up of her primary care physician, Mr. (sic) Herb presented in an advanced stage of cancer, which ultimately cost her life approximately two year status post resection. She required later biological therapy for therapy rather than for adjuvant prevention, and radiotherapy for palliation rather than again for adjuvant treatment. As Ms. Herb was deprived the chance for oncological treatment, it is not clear that oncological treatment, would be lifesaving in her circumstances, but that clearly would have been a decision for her and her oncologist to make, had a referral been made.

Dr. Sokol's report and the records make no mention of defendant Spock's treatment six months to a year prior to March 24, 1997. Therefore, it is clear that the "six months to year prior to tumor diagnosis" refers to the time after March 24, 1997, and prior to March 10, 1998.

## Discussion

The standard for determining whether summary judgment should be granted is set forth in Pa.R.C.P. 1035.2:

After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law

- (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or
- (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

"The essence of the revision set forth in New Rule 1035.2 is that the motion for summary judgment encompasses two concepts: (1) the absence of a dispute as to any material fact and (2) the absence of evidence sufficient to permit a jury to find a fact essential to the cause of action or defense. The former rule was unclear as to whether it encompassed the type of motion which is based upon a record which is insufficient to sustain a prima facie case. New Rule 1035.2(2) is explicit in authorizing such a motion." Pa.R.C.P. 1035.2 Explanatory Comment-1996.

In determining the merit of a motion for summary judgment the court must examine the record in the light most favorable to the non-moving party. Ward v. Rice, 828 A.2d 1118, 1119 (Pa.Super. 2003). All doubts as to the existence of a genuine issue of material fact must be resolved in favor of the non-moving party on motion for summary judgment. Id.

The requisite proof required for a medical malpractice action is well settled. In order to establish a prima facie case of malpractice, plaintiff must establish (1) a duty owed by the physician to the patient; (2) a breach of duty from the physician to the patient; (3) that the breach of duty was the proximate cause, or substantial factor in bringing about the harm suffered by the patient; and (4) damages suffered by the patient that were a direct result of the harm. Mitzelfelt v. Kamrin, 526 Pa. 54, 62, 584 A.2d 888, 891 (1990).

The issue in this summary judgment motion is whether, under the undisputed material facts of this case, defendant Spock had a duty to the decedent as a referring family practitioner. "There is no precedent in Pennsylvania which requires a family practitioner to follow a patient after referring the patient to a specialist." Estate of Hannis v. Ashland State General Hospital, 123 Pa.Cmwlth. 390, 398, 554 A.2d 574, 578 (1989). "[U]nder normal circumstances a referring physician's duty to a patient is extinguished once

another physician exercises independent medical judgment as to a patient's medical care in performing a surgical procedure." Billebault v. Dibattiste, 1998 WL 255546 (E.D.Pa.), citing Strain v. Ferroni, 405 Pa.Super. 349, 592 A.2d 698 (1991); Hannis, supra; and Weidner v. Nassau, 28 Pa. D.&C.4<sup>th</sup> 269, 270 (1993), aff'd 436 Pa.Super. 658, 647 A.2d 274 (1994). See also Joyce v. Boulevard Physical Therapy & Rehabilitation Center, P.C., 694 A.2d 1997).

In the present case, defendant Spock was a general practitioner. He referred decedent to a specialist who treated and followed the decedent. Although defendant Spock saw the decedent on one occasion shortly after her initial surgery, that appointment was for an unrelated medical issue and decedent continued to be seen and followed by the specialist for many months thereafter. Although Dr. Danella sent reports to Dr. Spock, Dr. Danella specifically said that he did not expect Dr. Spock to take any action regarding her treatment or care. (Danella deposition December 18, 2003 p. 20). Dr. Spock quickly referred decedent to specialists in March 1997 and March 1998. He performed as he should have. After the referral to the specialists, he did not have a duty to treat and follow decedent who was being treated and followed by specialists.

Plaintiff also alludes to the theory that Dr. Spock may have negligently made the referral. In applying Pennsylvania law, the Federal District Court in Tranor v. Bloomsburg Hospital, 60 F.Supp.2d 412, 416 (1999), concluded that "negligent referral to a specialist, i.e., when the referring physician knows or has reason to know the specialist is incompetent, may be a basis for liability under general negligence principles." Plaintiff's experts allege that defendant Spock was negligent for not making an "appropriate referral to an oncologist" (Dr. Lifrak's report dated April 28, 2003). In his February 23, 2000, report, Dr. Sokol makes a similar conclusion.<sup>2</sup> Both of these opinions are belied by the undisputed facts, possibly because neither expert was aware of the facts. Their reports pre-dated Dr. Danella's December 29, 2003, deposition.

Dr. Spock referred the decedent to a urologist at an accredited cancer center who specialized in urologic oncology. Dr. Danella was board certified in urology. Although he was not board certified in urologic oncology, over two-thirds of his practice was devoted to urologic oncology. Although the plaintiff's experts opined that Dr. Spock's

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<sup>2</sup> Dr. Sokol's report also implies that the tumor should have been detected by Dr. Spock six months prior to March 24, 1997. But the record indicates that Dr. Spock had not treated decedent during those six months.

referral was negligent<sup>3</sup>, those opinions are not supported by the facts. They are unfounded, misleading, and confusing. Such evidence is inadmissible under these facts. See Pa.R.E. 403.<sup>4</sup>

Defendant Spock had no duty to decedent after he referred her to a specialist who proceeded to care for her and treat her. Defendant Spock's referral to a urologic oncologist at an accredited cancer center was not negligent in any way, shape, or form. Summary judgment in favor of defendant Spock is granted.

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<sup>3</sup> In proving his or her case, plaintiff is required to present an expert witness who will testify, to a reasonable degree of medical certainty, that the acts of the physician deviated from good and acceptable medical standards, and that such deviation was the proximate cause of the harm suffered. Flanagan v. Labe, 446 Pa. Super. 107, 111, 666 A.2d 333, 335 (1995).

<sup>4</sup> "Although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Pa.R.E. 403 (emphasis provided). The opinion that the referral to Dr. Danella was negligent is absolutely contradicted by the undisputed material facts and would simply mislead and confuse the jury.

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STEPHEN RYAN, ESQUIRE, Attorney for Defendant Robert E. Leggon,  
Jr., M.D.

ORDER

AND NOW, this 24<sup>th</sup> day of September 2004, after  
consideration of the Motion for Summary Judgment of defendant  
Spock and after further consideration of the record, briefs,  
and arguments of the parties, the Summary Judgment Motion is  
GRANTED and the action against defendant Spock is DISMISSED.

BY THE COURT

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HONORABLE THOMAS A. JAMES, JR., J.