

Balzola v Giese

2013 NY Slip Op 30324(U)

February 5, 2013

Supreme Court, New York County

Docket Number: 114205/2009

Judge: Alice Schlesinger

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SCANNED ON 2/13/2013
SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER
Justice

IA PART 16
PART _____

Index Number : 114205/2009
BALZOLA, PABLO
vs.
GIESE, SHARON
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is *denied*. As demonstrated in the accompanying memorandum decision defendants are not entitled to summary judgment dismissing this action.

FILED
FEB 13 2013
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FEB 05 2013

Dated: _____

Alice Schlesinger
ALICE SCHLESINGER, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
PABLO BALZOLA as Administrator of the Estate of
ADRIANA PORRAS, and PABLO BALZOLA,
Individually,

Plaintiffs,

-against-

Index No. 114205/09
Motion Seq. 003

DR. SHARON GIESE, M.D., and DR. SHARON
GIESE, M.D., P.C., and SARAH LAZARUS, P.A.,

Defendants.

SCHLESINGER, J.:

FILED

FEB 13 2013

NEW YORK
COUNTY CLERK'S OFFICE

On June 27, 2009 Adriana Porras died. She was 32 years old. She had two small children, Nicolas who was 5, and Maria, 18 months. The cause of death, as reported in an autopsy report of June 29, 2009 (attached to plaintiff's opposition as Exh B), was:

Acute cardiopulmonary failure due to bilateral obstructive pulmonary thromboemboli originating from thrombosed right popliteal vein 3 days following elective abdominoplasty and liposuction of thighs and knees. **Other significant conditions contributing to death but not related to cause given above:** Status post gastric bypass for obesity (remote); History of contraceptive usage. (p 3, emphasis in original).

There also was an analysis of the lungs and popliteal vein. The microscopic description of the lungs (at p. 7) was as follows:

Lungs

Sections of lung showing organizing thromboembolus of pulmonary artery composed of red blood cells, platelets, fibrin and fibroblasts with foci of layering.

The plaintiff, her widower and Administrator of the estate, is Pablo Balzola. It is his account of Ms. Porras' last days which forms the critical part of this action, one sounding in wrongful death and medical malpractice. It is also the critical part of the motion now before me by the defendants, a motion to dismiss the action in its entirety.

His account is so critical because Mr. Balzola, at his deposition, testified about the symptoms his wife was having as she reported them to him. Those symptoms, which included chest pains and shortness of breath, form a good part of the predicate for the opinions provided by Dr. Mark Taff, a Pathologist and Chief Medical Examiner of Rockland County and expert for plaintiff on the issue of causation, as well as for the opinions provided by a board certified plastic surgeon and expert for the plaintiff on the issue of departures. The moving defendants are her doctor, Sharon Giese, who performed this elective surgery on June 25, her P.C., and Sarah Lazarus, her Physician's Assistant. Pursuant to CPLR §3212, they are all moving for summary judgment.

Movants attack the action on two fronts. First, they argue, with the aid of an affirmation from a board certified plastic surgeon Dr. Richard Coburn, that the care and treatment provided by Dr. Giese and P.A. Lazarus was at all times within good and accepted medical practice. Dr. Coburn discusses, in a detailed affirmation, the procedures followed by Dr. Giese before, during and after her surgery. However, it is via the affirmation of board certified pathologist Dr. Stephen Factor that the moving defendants press their main point. This pertains to causation. In other words, counsel for defendants argues that, even if there had been malpractice, there is no merit to the plaintiff's contention that the embolism which killed Ms. Porras could have been treated, in other words, that there was time to treat it. This is from a pathology perspective.

After reviewing pathology slides, Dr. Factor states that he is able to ascertain the timing of the decedent's fatal pulmonary embolism. In his affirmation he opines that "the fatal pulmonary embolism was acute, fresh, and traveled to the decedent's lung only 20 to 30 seconds prior to the decedent's acute cardiopulmonary failure." (¶9, emphasis in the original).

Dr. Factor further opines, also with a reasonable degree of medical certainty, that "after forming, the thrombus broke off from a vein in decedent's lower extremity and traveled to (her) pulmonary artery only moments before it caused the acute cardiopulmonary failure and her ultimate death." (¶10, emphasis in the original).

Finally, and this is of great significance, Dr. Factor states that "the decedent would not have experienced any symptoms related to the fatal pulmonary embolism at any time prior to the moments immediately before she lost consciousness in the late evening of Saturday, [June] 27, 2009." (¶11, emphasis in the original). Thus, Dr. Factor concludes that there would have been no time for Ms. Porras to seek medical assistance. In other words, he either challenges the veracity of Mr. Balzola's testimony regarding the reported symptoms, or he feels the symptoms are not related to the embolism.

Plaintiff confronts these opinions and submits two of his own expert affirmations to refute them. The second (Exh. C to the opposition papers) is from an unnamed board certified doctor in the field of plastic surgery. This doctor states that he has read all the records and affirmations of the defendants' experts. He then sets forth seven departures committed by the defendants (a-g on pages 2-3), which he opines with a reasonable degree of medical certainty had an adverse effect on the care and

treatment of Ms. Porras. However, as alluded to earlier, what is largely determinative of this motion and action is the issue of causation. For as we all know, the defendant doctor might have been grossly negligent or terribly uncaring or worse, but if such behavior would not have made any difference in the ultimate outcome, the tragic death of Adriana Porras, then the action must fail.

Dr. Taff tells us that in his role as Chief Medical Examiner of Rockland County, he was present at the June 29, 2009 autopsy of the decedent.¹ He then states that his opinions rely not only on the medical records, litigation documents and affirmations of the defense experts, but also on his own observations during the autopsy. He then recites the cause of death as was reported in the Autopsy Report. Immediately thereafter, he gives his opinion "within a reasonable degree of medical certainty that based upon the results of the autopsy, there was sufficient time to intervene to treat her pulmonary emboli and the failure of the defendants ... to take any action deprived her of a substantial chance of cure and was the proximate cause of her death." (Exh A to Opposition, ¶6).

However, Dr. Taff relies on more than "the results of the autopsy" to arrive at this conclusion. Later on in his affirmation, he discusses the testimony of Mr. Balzola as to the complaints made to him by his wife in the post-operative days, Friday and Saturday, June 26 and June 27, 2009. He relates those symptoms to his observations and explains how the latter were responsible for the former.

¹That fact is corroborated by the report, which states at its beginning that it was performed by Dr. M. Zappi, assisted by several named Medical Investigators and "in the presence of Mark L. Taff, M.D. Chief Medical Examiner."

Specifically in this regard, Dr. Taff states that during the autopsy “we found” that rather than seeing one massive clot to the lung, in fact “both of her lungs contained multiple small clots obstructing both lungs as well as one large clot lodged in the pulmonary artery and branches.” (¶13). This physician then agrees with the report’s conclusion that it was the larger clot that caused Ms. Porras’ death, as it broke off and traveled to her lung.

However, Dr. Taff then goes on to opine, within a reasonable degree of medical certainty, that these smaller clots or “bits and pieces of the thrombosed right popliteal vein” were the cause of the “shortness of breath and chest pains” which Ms. Porras complained of to her husband on the Friday and Saturday after the surgery. (¶14). In other words, the smaller clots were not enough to “completely obstruct her lung function” but were enough to diminish that function to the extent of causing her to experience shortness of breath and chest pain.

After laying the ground work, the explanation for the symptoms of chest pain and shortness of breath that Ms. Porras was experiencing, and then connecting the symptoms to the conditions which he observed during the autopsy, Dr. Taff goes on to opine about the window of opportunity for medical intervention that existed here, which if such intervention had occurred, would likely have changed the result. Dr. Taff enumerates four such interventions: a) administering anticoagulation therapy to prevent clot formation; b) administering thrombolytic therapy to dissolve clots; c) placing a venous filter to catch the large clot that had traveled from the popliteal vein; and d) removing the clots through catheterization or surgery. (¶15).

Specifically, Dr. Taff describes this window of opportunity as the period of time between Friday, June 26, one day after surgery when Ms. Porras first complained of chest pain and shortness of breath, to the evening of the next day, Saturday, before the large clot had reached her artery and ended her life. He states (at ¶16) that:

Had one or more of these measures been taken, it is my opinion within a reasonable degree of medical certainty that Ms. Porras' chance of survival would have been substantially increased. The failure to do so, substantially decreased her chances of survival and proximately caused her death.

Finally, Dr. Taff disagrees and takes issue with Dr. Factor's opinions in favor of the moving defendants on two counts. First, he says that Dr. Factor's statement that the large, deadly clot traveled only 20-30 seconds prior to Ms. Porras' death is "completely unfounded in medical science." (¶17). He does not elaborate further on this point.

Second, he accuses Dr. Factor of ignoring the signs and symptoms of an embolism experienced by the decedent in the two days preceding her death and also ignoring "the fact that Ms. Porras suffered from multiple smaller clots in her lungs as well as the large clot." (¶17).² As mentioned earlier, a plastic surgeon expert for the plaintiff then opines, based in part on the opinions of Dr. Taff, that the defendants Dr. Sharon Giese and P.A. Sarah Lazarus committed departures from accepted standards of medical care.(Exh C, Opposition). These concerned the failure to ensure verbal

²One could say that this accusation is unfair in light of the fact that the autopsy report is essentially silent on the existence of smaller bits and pieces of the embolism also traveling to the lungs. In fact, moving defense counsel characterizes this accusation much more harshly than "unfair" based on its omission from the autopsy report. More on this later.

communication with Ms. Porras and her family or to respond to telephone calls made to them by her husband during the forty-eight hours after surgery. He also states that the defendants violated their own protocol (a letter given to patients, including Ms. Porras, pre-surgery) by performing this type of surgery in her office rather than in a hospital. Relying on the complaints of chest pain and shortness of breath which Dr. Taff pointed to, this doctor opines that the described departures did deprive Ms. Porras of a substantial likelihood of cure.

The plastic surgeon explains further that these departures were particularly egregious in light of the fact that Ms. Porras was at increased risk of forming a pulmonary embolus after this procedure because of her use of oral contraceptives, her history of obesity and gastric by-pass, and the expected post-operative immobility after surgery. (¶14d).

In the rest of his affirmation he says why he disagrees with many of Dr. Coburn's opinions both as to the standard of care and causation. As to the former, he disagrees with Dr. Coburn that providing the patient with the doctor's cell phone number, as Dr. Giese did, was sufficient to satisfy the standard of care. This doctor says, no, that is not enough. Rather, there must be effective post-operative follow-up wherein the patient or family can relate what is going on. On causation, this doctor relies on Dr. Taff's window of opportunity to show that, for example, meaningful communication certainly could have made a difference, in other words, it could have led to an outcome of continued life for Ms. Porras.

In her Reply Affirmation, moving counsel argues that, wherein the defendants have met their burden in establishing a prima facie case as to causation and the

opposing plaintiff has not met his, summary judgment dismissing the action in its entirety is in order. Counsel's first point as to the insufficiency of plaintiff's response concerns Dr. Taff's opinions. They are claimed to lack value because they are "based upon facts not in the record, and are highly speculative." (§13). Citing to case law, counsel correctly states what the law is with regard to matters an expert may opine on. She says that "expert opinion evidence must be based upon facts in the record or personally known to the witness, and an expert cannot reach a conclusion by assuming material facts not supported by the evidence." (§17, emphasis in the original).

Specifically here, counsel states that nowhere in the autopsy report or the pathology report is there any mention of the existence of "multiple smaller clots" or "small bits and pieces of the thrombosed right popliteal vein" or even "small bits and pieces of the thromboemboli within the decedent's respiratory or cardiovascular system." Thus, she concludes, there is no basis to support Dr. Taff's conclusions.

However, while counsel is correct in pointing out the silence in the autopsy report about smaller clots and small bits and pieces, she pays no attention to the fact that Dr. Taff, who was and still is Chief Medical Examiner of Rockland County, was present at the autopsy of Adriana Porras performed at 2:15 p.m. on June 29, 2009. Although he did not actually perform it, a Dr. M. Zappi did, he is listed on the top of the report where it states that it was performed "in the presence of Mark L. Taff, M.D. Chief Medical Examiner." Therefore, pursuant to the legal principle cited by counsel in the above non-underlined portion regarding facts "personally known to the witness", that is precisely the situation here.

While it is true that Dr. Taff did not actually perform the autopsy himself or sign the report, he states that he is relying on many records and court papers "in addition to

my personal observations made at the time of the autopsy..." (¶¶4 & 5 his affirmation).

Further, Dr. Taff states in ¶13:

During the performance of the autopsy, we found that there was not one massive clot to the lung. Rather, both of her lungs contained multiple small clots obstructing both lungs as well as one large clot lodged in the pulmonary artery and branches.

So while those findings are not included in the report, Dr. Taff affirms he was there and saw those things for himself; i.e., the facts were "personally known" to him. Is Dr. Taff lying? Is he not remembering correctly? Is he testifying to things it was impossible to see? I have no idea. To have one at this time would be to speculate. His reliability and credibility as a witness, pursuant to the manner in which a jury is instructed, is to be weighed in the same manner as any other witness. And of course, at a trial he is subject to cross-examination. Also, at a trial the defense could, if they wish, call other doctors present at the autopsy to describe their own observations.

Finally, in this regard it should be noted that the decedent's death was caused, according to the autopsy report, by "acute cardiopulmonary failure due to bilateral obstructive pulmonary thromboemboli," a conclusion Dr. Taff agrees with. The use of the final word "thromboemboli", in the plural, suggests that more than one embolus was present, supporting Dr. Taff's observations.

Therefore, while it is understandable that Dr. Factor's opinion, relying exclusively on the autopsy report since he was not present as Dr. Taff was, spoke of only one large clot or embolus, that opinion under these circumstances does not preclude the Court from considering Dr. Taff's opinions.

Similarly, in the second point argued by counsel, the Court is asked to disregard the plaintiff's expert plastic surgeon's opinions because they rely in part on facts not in the record and are speculative "particularly as to causation" (¶24). Counsel denigrates these opinions because she feels they mischaracterize the evidence, such as in regard to the letter mentioned earlier, or that they fail to sufficiently connect the named departures with the death of Ms. Porras. But in fact they do, particularly regarding the alleged failure to successfully communicate with this surgical patient in the post-operative period.

Rather, I believe counsel is really taking issue with this physician's reliance on what she calls the "baseless" opinions of Dr. Taff. (¶29). These are the same arguments previously discussed and rejected by this Court.

Finally, counsel puts forth an interesting, thought-provoking argument concerning the plastic surgeon's reliance "upon inadmissible testimony" (¶31). Actually, the argument applies to Dr. Taff as well. This is the case because both experts base their opinions on allegedly inadmissible testimony regarding the decedent's symptoms, which goes directly to the issue of causation here. In this regard, counsel first recalls the sworn testimony given by the plaintiff Pablo Balzola, Ms. Porras' widower, at his deposition as to how Ms. Porras was feeling on Friday and Saturday and specifically her reported chest pain and shortness of breath. It should be noted here that even defendant Dr. Giese agrees that these symptoms are relevant to the formation of post-surgical emboli. Counsel points out that neither of these symptoms is supported by what Mr. Balzola told Nyack Hospital or the physicians performing the autopsy. Only nausea, as a symptom, was given. Also, there are no phone records or recorded messages to confirm that these symptoms were reported.

Therefore, the symptoms that Ms. Porras purportedly complained of to her husband are hearsay, which is defined as an out-of-court statement offered to prove the truth of the matter asserted therein. Defense counsel argues that assuming that they fall into one of the myriad exceptions to hearsay, and I believe they do here as a "present sense impression," there still must be a demonstration that they are reliable.³

Again, defense counsel is right in her statement of the law, but wrong in its application. "Present sense impression" is a somewhat esoteric exception to the hearsay rule but has been codified in the Federal Rules of Evidence and has been accepted as a valid exception in New York State [See, e.g., *People v. Brown*, 80 NY2d 729 (1993)]. As stated in Rule 803 of the Federal Rules of Evidence:

The following are not excluded, even though the declarant is available as a witness; [although in most of the reported cases, as in this one, the declarant, here Ms. Porras, is not available due to her death]. (1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

According to Fisch on New York Evidence, §1002, p. 581 (2d ed.), who calls the "present sense" exception a "contemporaneous declaration," the statement derives its trustworthiness from the following factors: 1) such statements are not subject to errors of memory; 2) being contemporaneous, they are to some degree spontaneous and unreflective; 3) the conditions or events to which the statements relate are usually open to the observation of the person to whom the statement was made and who can be

³ This argument was first raised by moving counsel in her Reply. Therefore, plaintiff's counsel was not able to formally respond in papers, leaving the Court to deal with the issue without formal aid by the plaintiff.

cross-examined; and 4) the veracity of the declarant can be checked either through cross-examining him or the reporting witness. Normally the element of excitement is missing so it does not, in theory, impede the accurate functioning of the faculties of the declarant.

Also, as stated in *People v. Watson*, 100 AD2d 452, 465 (2d Dep't 1984), a case cited in the Reply and one where the exception was not allowed into evidence as lacking in any corroboration, "the statement is usually made to one who has equal opportunity to observe and check misstatements." The *Brown* court, *supra*, said as to corroboration that its sufficiency "will depend on the particular circumstances of each case and must be left largely to the sound discretion of the trial court." (80 NY2d at 737).

So at this stage, without formal input by counsel for the plaintiff and keeping in mind the drastic nature of summary judgment which here would deny Ms. Porras' survivors their day in court, I find that there is sufficient corroborative evidence to allow consideration of the statements. Which is? First of all, Ms. Porras' statements of how she was feeling were made contemporaneously with those feelings. Thus, they were spontaneous and unreflective and not subject to errors of memory. Second, those symptoms, to a large extent, were observable to the witness Mr. Balzola, who was with his wife and could see for himself her "gagging" and her pointing to her mid-chest to show him where the pain was. He, of course, is subject to cross-examination, but his wife is not.

Further, as to outside reliability, there is Dr. Taff's affirmation where he states that he observed multiple smaller emboli which were responsible for the decedent's symptoms, such as the ones she reported regarding pain in the chest and shortness of

breath. In fact, the defendant herself acknowledges these are symptoms referable to blood clots and would, if known about, be dealt with on an emergency basis.

Therefore, this Court finds sufficient reliability at this stage to allow the stated symptoms in the post-operative period to be relied upon by the plaintiff's experts.⁴

At the conclusion of the Reply, counsel asks the Court to narrow the issues and dismiss some of the claims. These include pre-operative evaluation and treatment, informed consent, and post-operative follow-up care. The Court declines to do that now. With regard to aspects of each of these claims, opinions by the plastic surgeon do support departures. When the time comes for counsel to file 3101(d) expert disclosure statements, the defense will have a precise sense of which claims plaintiff is prepared to proceed with.

I am also declining at this time to dismiss the action against P.A. Sarah Lazarus. First of all, plaintiff's expert does include her in his discussion of departures, particularly with regard to her alleged failure to properly contact the decedent in the post-operative period. It should be noted here that despite her testimony that she did call on June 26, she acknowledges that she made no note of it until the 29th, after the death, when instructed to do so by Dr. Giese. Also, she acknowledges having left no message. Therefore, while Dr. Giese is probably responsible for the actions of P.A. Lazarus actions under principles of *respondeat superior*, she still may be found to be independently negligent. After all, here the post-operative period is critical to the action,

⁴In *Watson (supra)*, where reliability was found wanting, the witness was not with the declarant because it was a telephone conversation and so could not verify anything. Those unverifiable things were the alleged door bell ring and the sound of foot steps. Thus, one could not rely on the trustworthiness of the statement.

and P.A. Lazarus was a very significant actor during that period. Her actions and inactions are therefore relevant.

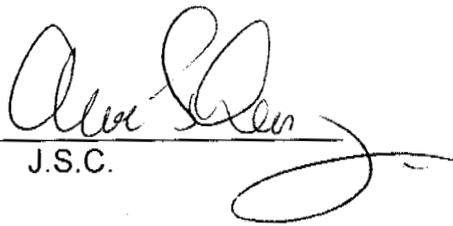
Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is in all respects denied; and it is further

ORDERED that both counsel shall appear in Room 222 for a pre-trial conference on Wednesday, February 27, 2013 at 9:30 a.m. prepared to discuss settlement and select a firm trial date.

Dated: February 5, 2013

FEB 05 2013



J.S.C.

ALICE SCHLESINGER

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