SHORT FORM ORDER

INDEX No. 05-9623
CAL. No. 06-02885-MM

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 5-11-07
ADJ. DATE 7-18-07
Mot. Seq. # 001 - MG; CASEDISP

GRACE A. FELTMAN and JOHN P. FELTMAN, Plaintiffs, - against - SHAFI M. WANI, M.D. and SHAFI WANI, M.D., P.C., Defendants.	SAM ROSMARIN, PLLC Attorney for Plaintiffs 11 Martine Avenue, 9th Floor White Plains, New York 10606 FUMUSO, KELLY, DeVERNA, SNYDER, SWART & FARRELL, LLP Attorneys for Defendants 110 Marcus Boulevard, Suite 500 Hauppauge, New York 11788

Upon the following papers numbered 1 to 73 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 56 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 57 - 69 ; Replying Affidavits and supporting papers 70 - 74 ; Other__; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants, Shafi M. Wani, M.D. and Shafi Wani, M.D., P.C., for an order pursuant to CPLR 3212, granting them summary judgment dismissing plaintiffs' complaint is granted.

Plaintiff Grace A. Feltman commenced this medical malpractice action to recover damages for the alleged malpractice of the defendants in rendering medical treatment to her in December of 2004. Plaintiff John P. Feltman interposed a claim for loss of services.

On August 8, 2004, Mrs. Feltman, while a passenger in her son's car, was involved in a motor vehicle accident on the George Washington Bridge. The vehicle that Mrs. Feltman was riding in was struck in the rear by another vehicle while stopped on the bridge. Following the accident, Mrs. Feltman sought treatment with her primary care physician, Dr. John R. Morseman. Dr. Morseman then referred Mrs. Feltman to Park Avenue Physical Therapy due to the pain that she was experiencing in her back and the left side of her neck. After months of physical therapy at Park Avenue Physical Therapy, instead of the pain alleviating, it was intensifying, so the physical therapist recommended that Mrs. Feltman seek the assistance of a pain specialist. On December 7, 2004, Mrs. Feltman saw Dr. Wani for the first time. During the initial consultation, although requested, Mrs. Feltman's medical records were not delivered to

Dr. Wani's office prior to the consultation, Mrs. Feltman provided Dr. Wani with her medical history, which included having been diagnosed with osteoarthritis and trigiminal neuralgia. At the initial visitation Dr. Wani diagnosed Mrs. Feltman with myosfascitis and fibromyalgia syndrome and stated that the possibility of cervical radiculopathy and carpal tunnel syndrome could not be ruled out. Dr. Wani ordered further testing of Mrs. Feltman, which included a nerve conduction study and an electromyogram ("EMG") to confirm his suspicion of cervical radiculopathy and carpel tunnel syndrome and recommended trigger point therapy for the myosfascitis and fibromyalgia syndrome. Dr. Wani informed Mrs. Feltman to make appointments with the receptionist if she wished to move forward with his recommendations.

On December 14, 2004, Mrs. Feltman returned to Dr. Wani's office, and a nerve conduction study was performed. On December 15, 2004, Mrs. Feltman had her second visit to Dr. Wani's office, and Dr. Wani performed trigger point therapy, which consisted of approximately 6 to 7 injections containing a mixture of a steroid (1cc of the cortisone Depo-Medrol) and a local anaesthetic (10 cc of Marcaine) on Mrs. Feltman's trapezius muscle. Mrs. Feltman was to return to Dr. Wani's office on January 5, 2005 for her second round of trigger point injection therapy. On December 16, 2004, Mrs. Feltman returned to Dr. Wani's office for an EMG, which revealed that Mrs. Feltman had cervical radiculopathy and bilateral carpal tunnel syndrome. On December 20, 2004, Mrs. Feltman contacted Dr. Wani's office stating she was having facial pain, and she was referred to her primary physician, Dr. Morseman, by Dr. Wani's office. Dr. Morseman diagnosed Mrs. Feltman with Herpes Zoster ("shingles") and prescribed an anti-viral drug. Following her diagnosis with the shingles, Dr. Morseman then referred her to a neurologist, but after calling and not getting an appointment, she was then referred to a pain specialist, Dr. Craig Shalmi, whom she first saw in March of 2005 and was diagnosed with post-herpetic neuralgia ("PHN"), which resulted from having had the shingles.

Defendants now move for summary judgment on the basis that defendants did not deviate from the acceptable standard of care in treating Mrs. Feltman and that all treatments provided by defendants were within that standard of care. Defendants also contend that the development of Herpes Zoster was not a foreseeable and known risk of trigger point therapy. Defendants further assert that res ipsa loquitur is inapplicable because Herpes Zoster does not arise exclusively from a physician's negligence, nor did the defendants have exclusive control over the plaintiff. Defendants submit the pleadings, copies of the deposition transcripts of plaintiff Grace Feltman and defendant Shafi Wani, copies of plaintiff Grace Feltman's medical records, copies of plaintiff Grace Feltman's prescription record and the affidavit of Gary P. Thomas, M.D., defendants' expert.

Plaintiffs oppose the instant motion on the grounds that Grace Feltman's development of post-herpetic neuralgia was a direct result of defendants' deviation from acceptable medical standards of care because he failed to exhaust conservative modalities of treatment before administering the trigger point therapy and complete the diagnostic work up. Plaintiffs also assert that Grace Feltman was not fully informed of the risks, benefits or alternatives to trigger point therapy, and had she been so informed she would have chosen another method of treatment. Plaintiffs submit the affidavit of plaintiff Grace Feltman, plaintiff's appointment card from Dr. Wani's office, a copy of plaintiff's prescription slip, copies of Dr. Wani's progress notes for plaintiff's treatment, copies of Dr. Wani's routing slips and billing forms, copies of Medicare's denial of reimbursement forms and the redacted affidavit of plaintiffs' expert.

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 demonstrate the absence of any material issues of fact (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Failure to make such a showing requires denial of the motion regardless of the sufficiency of the opposing party's moving papers (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]). However, once the showing has been made, the burden will then shift to the opposing party to raise an issue of fact by producing evidentiary proof in admissible form sufficient enough to require a trial on the merits (***Zuckerman v City of New York***, *supra*).

In a medical malpractice action, in order to make a prima facie showing of entitlement to summary judgment, a physician must establish through medical records and competent expert affidavits that the defendant did not deviate or depart from accepted medical practice in defendant's treatment of the patient and that defendant was not the proximate cause of plaintiff's injuries (***Mendez v City of New York***, 295 AD2d 487,744 NYS2d 847 [2002]; *see also,* ***Koeppel v Park***, 228 AD2d 288, 644 NYS2d 210 [1996]; ***Fridovich v David,*** 188 AD2d 984, 591 NYS2d 885 [1992]; ***Pocchia v Motahedeh***, 123 AD2d 426, 506 NYS2d 730 [1986]). A physician owes a duty of reasonable care to his patients and will generally be insulated from liability where there is evidence that he conformed to the acceptable standard of care and practice (***Spensieri v Lasky***, 94 NY2d 231, 701 NYS2d 689 [1999]; ***Roth v Tuckman***, 162 AD2d 941, 558 NYS2d 264 [1990]). Where the defendant has met that burden, the plaintiff, in opposition, must submit a physician's affidavit of merit, attesting to a departure or deviation from acceptable medical practice and attesting to the fact that the departure or deviation was a competent cause of the injuries sustained by the plaintiff (***Domaradzki v Glen Cove Ob/Gyn Assoc.***, 242 AD2d 282, 660 NYS2d 739 [1997]; ***Cerkvenik v County of Westchester***, 200 AD2d 703, 607 NYS2d 66 [1994]). However, general allegations of medical malpractice, merely conclusory in nature and unsupported by competent evidence establishing the essential elements of the claim, are insufficient to defeat a motion for summary judgment (***Holbrook v United Hosp. Med. Ctr.***, 248 AD2d 358, 669 NYS2d 631 [1998]; ***Toledo v Ordway***, 208 AD2d 518, 616 NYS2d 1006 [1994]; ***Alvarez v Prospect Hosp.***, *supra*).

Gary P. Thomas, M.D., indicates in his affirmation that he is a physician licensed to practice medicine in the state of New York and is board certified in the fields of pain management and anesthesiology. Dr. Thomas stated that in his opinion, within a reasonable degree of medical certainty, neither Dr. Wani nor his staff deviated or departed from acceptable medical standards of care in rendering treatment to Mrs. Feltman. Dr. Thomas stated that it was appropriate for Dr. Wani to recommend trigger point therapy to Mrs. Feltman, as more conservative modalities of treatment, such as physical therapy and pain medications, had already failed her. Dr. Thomas also stated that a patient's written consent is not required where the doctor is not performing an operation or an invasive diagnostic procedure. Dr. Thomas then explained that there is no medical nexus between the trigger point therapy treatment provided to Mrs. Feltman and her development of Herpes Zoster and/or post-herpetic neuralgia. Dr. Thomas stated that immuno-suppression is not a known risk of trigger point therapy, and therefore, Dr. Wani did not have a duty to disclose its possibility, nor did Dr. Wani have a duty to recommend a repeat of the failed treatment methods. Dr. Thomas explained that since the plaintiff did not present with or report any clinical signs of Herpes Zoster, nor was the condition diagnosable while under the defendants' care, Dr. Wani was not obligated to prescribe or administer an anti-viral agent. Dr. Thomas explained that the plaintiff, in 1941, contracted the initial case of the Varicella virus ("chicken pox"), and it remained dormant in the body in the dorsal nerve roots, and a reactivation of the condition is called Herpes Zoster,

also known as the shingles. Dr. Thomas stated that immuno-compromised patients are at a greater risk of developing the shingles, but Herpes Zoster has never been caused by injections or local traumas. Dr. Thomas further explained that Dr. Wani's administration of a one-time single dosage of a one-time minuscule amount of steroid during a subcutaneous intra-muscular injection is insufficient to cause immuno-suppression or precipitate Herpes Zoster. Dr. Thomas stated that the plaintiff's development of Herpes Zoster was of an unknown etiology and her claimed neuralgias pre-existed and were unrelated to Dr. Wani's or Dr. Wani's staff's treatment of the plaintiff. Dr. Thomas further stated Herpes Zoster can occur in the absence of any physician's negligence.

Based upon the foregoing, defendants have met their burden of establishing their prima facie entitlement to judgment as a matter of law (***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*; ***Zuckerman v City of New York***, *supra*). Defendants have demonstrated that they did not depart or deviate from acceptable medical practice in their treatment of Mrs. Feltman (***Streisand v West***, 304 AD2d 650, 757 NYS2d 600 [2003]; ***Mendez v City of New York***, 295 AD2d 487, 744 NYS2d 847 [2002]; ***Yasin v Manhattan Eye, Ear & Throat Hosp.***, 254 AD2d 281, 678 NYS2d 112 [1998]). Dr. Wani's deposition testimony is amply supported by both Mrs. Feltman's medical records, and the affirmations of the medical expert and rebuts with factual proof plaintiffs' claim that Dr. Wani's trigger point therapy was the cause of Mrs. Feltman's development of Herpes Zoster and post-herpetic neuralgia. Therefore, the burden has shifted to the plaintiffs to come forth with admissible evidence to refute the defendants prima facie showing (***Pierson v Good Samaritan Hosp.***, 208 AD2d 513, 616 NYS2d 815 [1994]; ***Holbrook v United Hosp. Med. Ctr.***, *supra*).

In opposition, plaintiffs submit the affirmation of an expert, who is a physician licensed to practice medicine in the state of New York and is board certified in internal medicine. Plaintiffs' expert states that Dr. Wani was required to do at least two things before administering any steroid injections -- first, he was required to complete a thorough exam and diagnostic workup to identify the cause of plaintiff's pain, and second, Dr. Wani was required to discuss the basis of his diagnosis with plaintiff and obtain her consent before initiating therapy. Plaintiffs' expert explained that steroids have a known immuno-suppressive effect on the system and immuno-suppression can allow an activation of a long dormant virus. Plaintiffs' expert states that Dr. Wani deviated from good and acceptable medical practice by administering the steroid injection, and had the steroid not been injected, the virus would not have been activated. Plaintiffs' expert opines that Dr. Wani was the cause of the activation of the plaintiff's latent virus, as well as the plaintiff's development of post-herpetic neuralgia.

However, it is well settled that an expert's opinion must be based upon facts that are recited in the record or upon the personal knowledge of the expert, and the expert is not allowed to assume facts not supported by the evidence in reaching his conclusion (***Cassano v Hagstrom***, 5 NY2d 643, 187 NYS2d 1 [1959]; ***Erbstein v Savasatit***, 274 AD2d 445, 711 NYS2d 458 [2000]). Furthermore, the expert's opinion, as a whole must reflect an acceptable level of certainty in order to be admissible (***Matott v Ward***, 48 NY2d 455, 423 NYS2d 645 [1979]).

Plaintiffs' expert's first contention that Dr. Wani failed to complete a thorough exam and diagnostic workup and discuss the basis of his diagnosis with the plaintiff before initiating any treatment is not supported by the adduced evidence (***Gross v Friedman***, 138 AD2d 571, 526 NYS2d 152 [1988], ***Pierson v Good Samaritan Hosp.***, *supra*). Dr. Wani testified that the plaintiff presented with three

different conditions and that his diagnosis of myosfascitis and fibromyalgia was a clinical diagnosis based upon his personal examination of Mrs. Feltman. Dr. Wani also testified that he recommended trigger point therapy to Mrs. Feltman because she had already tried more conservative modalities of treatment, which had not worked for her. Dr. Wani further testified that it is his custom and practice to fully explain what trigger point therapy entails, as well as refer each patient to a website to obtain a more "layman's" explanation of the therapy. Therefore, Dr. Wani was not required to retreat Mrs. Feltman with failed conservative methods of treatment, and Dr. Wani's recommendation of trigger point therapy was duly noted in his initial consultation report to Dr. Morseman, as well as the fact that Mrs. Feltman's appointment card for her December 15th visit to Dr. Wani's office clearly stated that trigger point therapy would be performed.

With respect to the second contention posited by plaintiffs' expert, it is also insufficient to raise a material question of fact (***Fileccia v Massapequa Gen. Hosp.***, 99 AD2d 796, 472 NYS2d 127 [1984], *affd* 63 NY2d 639, 479 NYS2d 520 [1984]). Plaintiffs' expert does not state with specificity whether the one-time single dosage of steroid mixture that was contained in the trigger point injection is sufficient enough to cause a suppression of the immune system (***Diaz v Downtown Hosp.***, 99 NY2d 542, 754 NYS2d 195 [2002]; ***Romano v Stanley***, 90 NY2d 444, 661 NYS2d 589 [1997]). Thus, plaintiffs' expert's affirmation lacks any real probative value and is insufficient as a matter of law to defeat the defendants' motion for summary judgment (***Wilson v Walgreen Drug Store***, 42 AD3d 899, 838 NYS2d 864 [2007]; ***Kipybida v Good Samaritan Hosp.***, 35 AD3d 544, 827 NYS2d 201 [2006]).

In addition, plaintiffs' expert's final suppositions fail to account for Mrs. Feltman's pre-existing neuralgia and degenerative conditions. Therefore, in viewing the evidence in the light most favorable to plaintiffs, plaintiffs' expert's affidavit has failed to demonstrate a triable issue of fact (***Pierson v Good Samaritan Hosp.***, *supra*; ***Holbrook v United Methodist Ctr.***, 248 AD2d 358, 669 NYS2d 631 [1998]; ***Kramer v Rosenthal***, 224 AD2d 392, 637 NYS2d 772 [1996]; *but see,* ***Texter v Middletown Dialysis Ctr., Inc.***, 22 AD3d 831, 803 NYS2d 687 [2005]).

Regarding plaintiffs' claim of lack of informed consent, the Court finds that it is without merit. In order for a plaintiff to establish that a physician failed to procure a patient's informed consent to perform a procedure, the plaintiff, pursuant to Public Health Law § 2805-d (2), must fulfill three requirements. First, the plaintiff must show that the doctor failed to apprise of her of the reasonably foreseeable risks associated with the procedure. Second, having been informed of the risks and alternatives, plaintiff must show that a reasonably prudent person in the plaintiff's position would have opted against the procedure. Third, the plaintiff must demonstrate that the procedure was the proximate cause of the plaintiff's injuries (***Manning v Brookhaven Mem. Hosp. Med. Ctr.***, 11 AD3d 518, 782 NYS2d 833 [2004]; ***Wilson v Buffa***, 294 AD2d 357, 741 NYS2d 713 [2002]; ***Bernard v Block***, 176 AD2d 843, 575 NYS2d 507 [1991]; *see also,* Public Health Law § 2805-d [3]). Plaintiffs' allegations stated in the complaint and bill of particulars fail to state a cause of action for lack of informed consent (***Martin v Hudson Valley Assoc.***, 13 AD3d 419, 785 NYS2d 700 [2004]; ***Hecht v Kaplan***, 221 AD2d 100, 645 NYS2d 51 [1996]). Plaintiff Grace Feltman has not established that there was a violation of her physical integrity through Dr. Wani's performance of trigger point therapy (*see generally,* ***Jaycox v Reid***, 5 AD3d 994, 773 NYS2d 637 [2004]; ***Pedone v Thippeswamy***, 309 AD2d 792, 765 NYS2d 532 [2003]). Mrs. Feltman has also failed to demonstrate that a reasonably prudent person in her situation would not have undergone the trigger point therapy recommended by Dr. Wani (*see generally,* ***Dodes v North Shore Univ. Hosp.***, 149 AD2d 455,

539 NYS2d 954 [1989]; ***Anderson v Weiner***, 100 AD2d 919, 474 NYS2d 801 [1984]). In addition, evidence has been submitted to show that Herpes Zoster does not arise from trigger point therapy; therefore, Dr. Wani did not have any duty to warn Mrs. Feltman of a condition that was not a known reasonably foreseeable risk of the procedure (***Smith v Fields***, 268 AD2d 579, 702 NYS2d 364 [2000]; ***Iazzetta v Vicenzi***, 200 AD2d 209, 613 AD2d 750 [1994]; *cf.*, ***Di Rosse v Wein***, 24 AD2d 510, 261 NYS2d 623 [1965]).

Furthermore, plaintiffs' use of res ipsa loquitur is inapplicable to this case. The doctrine of res ipsa loquitur allows for an inference of negligence to be drawn regarding a defendant's actions based upon the happening of an event where the plaintiff can establish that the event is of a type which would not ordinarily happen in the absence of someone's negligence; was caused by an agent or instrumentality exclusively within the defendant's control; and was not due to any voluntary action or contribution on the plaintiff's behalf (***Kambat v St. Francis Hosp.***, 89 NY2d 489, 655 NYS2d 844 [1997]; ***Dermatossian v New York City Transportation Authority***, 67 NY2d 219, 501 NYS2d 784 [1986]; ***Prosser and Keeton, Torts*** § 39 at 248-251). In the instant matter, it has not been proven by admissible evidence that but for the defendants' negligence, the plaintiff would not have developed Herpes Zoster or post-herpetic neuralgia.

Accordingly, defendants' motion for summary judgment is granted.

Dated: NOV 0 1 2007

J.S.C

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION