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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOBIS Justice PART 6

MILLER, RAMONA

-v-

ELTON STRAUSS, M.D., ET AL.

INDEX NO. 103157/09

MOTION DATE 1/25/11

MOTION SEQ. NO. 01

MOTION CAL. NO. ____

The following papers, numbered 1 to 24 were read on this motion to/for partial Summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-13
Answering Affidavits — Exhibits	14-23
Replying Affidavits	24

FILED

MAR 23 2011

NEW YORK COUNTY CLERK'S OFFICE

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

Dated: 3/21/11

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

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RAMONA MILLER,

Plaintiff,

Index No. 103157/09

-against-

Decision and Order

ELTON STRAUSS, M.D., MORGAN N. CHEN, M.D., and THE MOUNT SINAI MEDICAL CENTER,

Defendants.

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JOAN B. LOBIS, J.S.C.:

Defendants Elton Straus, M.D., and the Mount Sinai Hospital, s/h/a The Mount Sinai Medical Center (the "Hospital"), move, by order to show cause, for an order granting them partial summary judgment under C.P.L.R. Rule 3212 on the issue of plaintiff's claims sounding in res ipsa loquitur and dismissing such claims on the grounds that the theory does not apply to this action. Defendants also seek to delay scheduling the trial of this case until after they receive certain Social Security Disability records. At this time, this branch of the motion is denied, as the parties have a trial scheduled in September 2011; if defendants have good cause to seek an adjournment of the September date, they may request such relief at the next scheduled pre-trial conference on May 3, 2011.

On October 23, 2007, plaintiff presented to Dr. Strauss for a consultation regarding her right knee. She had a long-term history of juvenile rhumatoid arthritis and had undergone a bilateral total knee replacement approximately thirty (30) years prior. Her chief complaint was chronic pain in her right knee, coupled with instability and loss of function. Dr. Strauss discussed with plaintiff the need for revision of her right total knee replacement, and the records reflect that

he explained to her that her significant osteoporosis and osteolysis would make revision a very challenging procedure but that he believed the results would be acceptable. Dr. Strauss's records also reflect that he discussed with the patient the risks and benefits of the revision procedure, the anesthesia, and surgery in general, and that he gave her a consent form. The procedure was scheduled for November 5, 2007; on that date, surgery was started but the procedure was abandoned after plaintiff experienced an anaphylactic reaction to the anesthesia. The surgery was rescheduled for November 12, 2007. On that day, Dr. Strauss removed the old prosthesis and installed a new prosthesis. Dr. Strauss set forth in his operative report that due to plaintiff's osteoporosis and bone loss above and below the knee, it was necessary for him to use cement (methyl methacrylate) to stabilize the prothesis and offset the loads of the implant at the joints. He placed restrictors on either end of the medullary canals in the femur and the tibia, inserted the cement with a cement gun, and placed the prosthesis's intramedullary stems into the cemented canals. Dr. Strauss's report indicates that he took intraoperative and postoperative x-rays, which he described in his report as "excellent," and transferred plaintiff to the recovery room. He later handwrote an addendum to the operative report indicating that the postoperative x-ray showed cement adjacent to plaintiff's distal medial cortex of the tibia, which Dr. Strauss testified was approximately twelve to fifteen inches from plaintiff's knee.

On November 13, 2007, Dr. Strauss noted that plaintiff had developed a 0.5 centimeter blister on the distal tibia, medial side (right shin), in the same area where Dr. Strauss had noted the bone cement on the postoperative x-ray. Dr. Strauss testified that he believed that the blister was caused by the device immobilizing plaintiff's knee. He testified that he removed the knee

stabilizer and put a sterile dressing on the blister. He testified that the blister appeared as a superficial, slightly reddened friction irritation. The next day, November 14, Dr. Strauss determined that the blister looked better and he cleared plaintiff to move to the rehabilitation unit of the Hospital. Dr. Strauss testified that he continued to see plaintiff every day (except on the weekends) while she was in the rehabilitation unit and that he did not note any remarkable changes in the blister on plaintiff's right shin, which continued to be reddened, swollen, and irritated, and which the rehabilitation unit physicians and/or staff members were treating with topical antibiotics and pressure alleviation techniques. On November 26, after a discussion with plaintiff's physiatrist on the rehabilitation team, Dr. Strauss requested a plastic surgery consultation from Lester Silver, M.D., regarding the blister. One of Dr. Silver's associates actually performed the consultation. The notes from the consultation reflect a blister that was 5 centimeters by 2 centimeters. Dr. Strauss testified that he, the physiatrist, and Dr. Silver agreed that the blister could be treated with bacitracin and sterile dressings. Plaintiff was discharged on or about November 27 with instructions to apply bacitracin and change the dressing on the blister daily.

On December 4, 2007, plaintiff presented to Dr. Strauss at his office and the wound on her shin had worsened. Dr. Strauss called for a consultation from Dr. Silver, who suggested a hospital admission to administer intravenous antibiotics, elevation, and possible debridement. Dr. Strauss agreed with Dr. Silver's recommendation, and plaintiff was admitted to the Hospital the same day. During this hospitalization, Dr. Silver performed a debridement of the wound and applied a sterile "vac," which Dr. Strauss testified looks like a sponge with a tube attached and acts as a vacuum to keep topical bacteria off the wound. Plaintiff was discharged on December 17 with a

"home vac," antibiotics, and baby aspirin. Dr. Strauss was under the impression that the wound was caused by the knee immobilizer, plaintiff's thin rheumatoid skin with associated vasculitis, and poor capillary perfusion in the shin area. He testified that he did not think that the wound was caused by the cement adjacent to plaintiff's distal medial cortex of the tibia because the damage was occurring from the top of the skin inward, not from the inside out.

On January 29, 2008, plaintiff was readmitted to the Hospital for a course of treatment to close the open wound on her right shin. On January 31, Dr. Silver and Dr. Strauss performed a procedure to debride the shin wound, at which time hardened methyl methacrylate was removed from the base of the wound. Dr. Strauss testified that the cement had nothing to do with the wound and that it was a coincidence that the wound formed in the area where the cement was eventually removed. On February 6, 2008, Dr. Silver performed a flap transfer and skin graft. Plaintiff was discharged on February 15, 2008, with pain medication and instructions to follow up with Dr. Silver. On March 18, 2008, plaintiff was seen by Dr. Silver and Dr. Strauss at the same time. Dr. Strauss's note from that day indicates that the skin graft was well healed.

Plaintiff alleges that Dr. Strauss negligently rendered medical care and departed from good and accepted standards of medical practice in that Dr. Strauss's improper surgical technique caused methyl methacrylate to extravasate and burn her. Plaintiff sets forth in her bill of particulars that her injuries are of the type, nature, and extent that would not have otherwise occurred but for defendant's negligence and malpractice, and as such, she will be relying on the doctrine of res ipsa loquitur.

Res ipsa loquitur is not a separate cause of action nor an element of a cause of action. Indeed, even a failure to specifically plead res ipsa will not bar a plaintiff from relying on the theory at trial, if the facts so warrant. Weeden v. Armor Elevator Co., Inc., 97 A.D.2d 197, 201-02 (2d Dep't 1983). "Res ipsa is merely an evidentiary rule allowing the jury to infer negligence from circumstances when the event would not ordinarily occur in the absence of negligence." Nesbit v. New York City Transit Auth., 170 A.D.2d 92, 99 (1st Dep't 1991). If, at trial, plaintiff's proof establishes that the event does not ordinarily occur in the absence of someone else's negligence, that it was "caused by an agency or instrumentality within the exclusive control of the defendant," and that it could not have been caused by plaintiff's "voluntary action or contribution," then "a prima facie case of negligence exists and plaintiff is entitled to have res ipsa loquitur charged to the jury." Kambat v. St. Francis Hosp., 89 N.Y.2d 489, 494 (1997). In the context of medical malpractice cases,

> the doctrine may be applicable where an inference exonerating the physician is improbable as a matter of fact. Thus, where an unexplained injury occurred in an area remote from the operative site while the patient was anesthetized, the doctrine of res ipsa loquitur has been applied. Additionally, where a foreign object is left in the body of a patient after an operative procedure is completed, a charge with respect to res ipsa loquitur would be warranted.

Abbott v. New Rochelle Hosp. Med. Ctr., 141 A.D.2d 589, 590 (2d Dep't 1988) (internal quotations and citations omitted).

Here, defendants move for summary judgment as to plaintiff's contention in her bill of particulars that she will be relying on the theory of res ipsa loquitur. A summary judgment motion is a device to lay bare one's proof that a cause of action has no merit (C.P.L.R. Rule 3212[b]). In

this court's opinion, a motion for summary judgment is not the proper vehicle to preclude a party's use of an evidentiary rule at trial. Although defendants move for summary judgment here, they are really seeking to strike from the bill of particulars the language that plaintiff will rely on the theory of res ipsa loquitur, and/or preclude plaintiff from relying on the theory at trial.

Nevertheless, defendants argue that res ipsa is inapplicable to the circumstances here because plaintiff's injuries are the type that could have occurred absent negligence or malpractice. Defendants argue that extravasation of prosthetic cement can and does occur in the absence of negligence, and that a blister at the distal tibia following revision knee arthroplasty can and does occur in the absence of negligence. Therefore, defendants maintain that plaintiff is unable to demonstrate that the event causing her blister/burn is not the kind of event that ordinarily occurs in the absence of someone else's negligence. Kambat v. St. Francis Hosp., 89 N.Y.2d at 494.

In support of their motion, defendants submit an expert affirmation from Russell Windsor, M.D., who sets forth that he is a physician licensed to practice in the State of New York and board certified in orthopedic surgery. Dr. Windsor explains that in this type of procedure, cement can sometimes seep out, but if the seepage amount is small and the location of the seepage is not easily reachable, no further steps are taken as the cement is not considered to be harmful to the patient and the procedure to remove the leaked cement would be far riskier than leaving it alone. Dr. Windsor further avers that, as occurred in this case, extravasation of the cement to the tibia is "not surprising and is certainly not remote from the surgical site." He contends that a cement leakage to an adjacent location is not the same as a surgical sponge left behind in a patient's body

after an operation, because the sponge is intended for use during surgery only and the sponge can cause infection or other complications if left behind. In contrast, cement is inserted to stay in the body and extrusion of the cement to adjacent tissue is understood to occur, is not injurious, and can be (and is) left in place. Dr. Windsor also concludes that Dr. Strauss appropriately attributed plaintiff's postoperative sore on her shin to irritation from the knee immobilizer, and that there was no reason for Dr. Strauss to suspect that the sore was related to the cement extravasation, as such extravasation is known to occur and is not commonly associated with any complications or skin lesions. He states, "[i]t is incorrect to assert that [plaintiff's leg sore] could only occur with negligent care as . . . patients are prone to such sores in the post-operative period because they are susceptible to swelling of the leg, but require immobilization and restriction in the area prone to swelling . . . [and] [t]hese sores do . . . develop in the absence of negligence."

Rather than eliminating all material issues of fact, defendants' submissions do little more than establish that they have a "competing theory" that plaintiff's injury could have happened in the absence of negligence. Kambat, 89 N.Y.2d at 497. At trial, a plaintiff is not required to eliminate every alternative explanation for the event in establishing the three elements of res ipsa; therefore, at this point defendants' competing theory of liability is simply an alternative inference that a jury could consider, not an establishment that the charge of res ipsa is inapplicable as a matter of law. See Kambat, 89 N.Y.2d at 497. The issue of the application of the doctrine is left to the trial court to determine whether plaintiff is entitled to a charge of res ipsa. Aside from a conclusory introductory statement in Dr. Windsor's affirmation that Dr. Strauss adhered to the standard of care, Dr. Windsor provided no expert opinion as to the standard of care, any alleged departures therefrom,

or proximate cause,[1] so the burden never shifted to plaintiff to demonstrate that a material issue of fact exists to warrant proceeding to trial. See Roques v. Noble, 73 A.D.3d 204, 206-07 (1st Dep't 2010). Accordingly, it is hereby

ORDERED that defendants' motion for partial summary judgment is denied; and it is further

ORDERED that the parties shall appear for their previously scheduled pre-trial conference on May 3, 2011, at 10:00.

Dated: March 21, 2011

JOAN B. LOBIS, J.S.C.

[1] Indeed, even a comparison of Dr. Strauss's deposition testimony to the medical records demonstrates sharp issues of fact in dispute about the cause of and type of injury plaintiff alleges; Dr. Strauss repeatedly testified that he believed that the sore was a pressure sore caused by the knee immobilizer, unrelated and completely coincidental to the extravasated cement underneath the sore, while the medical records directly indicate that the wound was caused by leaked cement at the wound site that burned the tissue while setting.