

**Massy v Bardaro**

2011 NY Slip Op 31308(U)

May 18, 2011

Supreme Court, New York County

Docket Number: 103058/2009

Judge: Joan B. Lobis

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

PRESENT: Joan B. Lobi's  
*Justice*

PART 6

Index Number : 103058/2009  
**MASSY, ELSA**  
vs.  
**BARDARO, SERGIO J.**  
SEQUENCE NUMBER : 001  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE 3/1/11  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED  
1-13  
14-17  
18-19  
Sur reply: 20

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

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

**FILED**

MAY 18 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 5/17/11

[Signature]  
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

-----X  
ESLA MASSY,

Plaintiff,

Index No.: 103058/2009

- against -

Decision and Order

SERGIO J. BARDARO, M.D., and  
NEW YORK PRESBYTERIAN HOSPITAL,

**FILED**

**MAY 18 2011**

Defendants.

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

NEW YORK  
COUNTY CLERK'S OFFICE

Defendant New York Presbyterian Hospital ("NYPH") moves for an order, pursuant to C.P.L.R. Rule 3212, granting it summary judgment dismissing this matter in its entirety<sup>1</sup> or, in the alternative, setting the matter down for a Frye hearing (Frye v. United States, 293 F. 1013 [DC Cir. 1923]), requiring plaintiff to establish the admissibility of expected expert testimony. For the reasons discussed below, the motion is granted to the limited extent of dismissing plaintiff's lack of informed consent claim.

This action sounding in medical malpractice and lack of informed consent concerns the management of plaintiff's hematuria (blood in the urine) with a triple-lumen catheter. On July 7, 2008, plaintiff presented to Harlem Hospital with gross hematuria and blood clots in her bladder. That same day she was transferred to NYPH, where her nephrologist was an attending physician. Plaintiff had a significant medical history, including kidney disease (she had received a kidney transplant in April 2006), diabetes, hypertension, systemic lupus erythematosus ("SLE"), and antiphospholipid antibody syndrome ("APLS"), an abnormal increased propensity for blood clotting. Plaintiff was also on a regiment of anti-

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<sup>1</sup> On or about July 14, 2010, the parties executed a stipulation of discontinuance, discontinuing the action against Dr. Bardaro with prejudice.

coagulant medication, a blood thinner to treat her APLS, and steroids. About two weeks prior to her admission, plaintiff had undergone a biopsy to investigate the decreased functioning of her transplanted kidney. Several days after the biopsy she resumed her medication.

Upon her admission to NYPH, plaintiff was placed on continuous bladder irrigation ("CBI") at the direction of her nephrologist. The CBI was accomplished by the insertion of a triple-lumen "French 22" size catheter into plaintiff's bladder. The triple-lumen catheter is used to create a closed irrigation system to wash out blood clots. The catheter has three lumens, or channels. One lumen inflates a small balloon inside the bladder in order to secure the device inside. A second lumen infuses the bladder with saline solution to allow for the evacuation of the blood clots. The third lumen carries the saline solution out of the bladder along with any accumulated urine, blood, and blood clots.

By July 9, 2008, plaintiff's urine was clear. The catheter was removed the next day. She remained in NYPH, however, for continued investigation of her kidney and other health problems. Anti-coagulant treatment was initiated on or about July 18, 2008. Gross hematuria returned on July 21, 2008. A urology resident reinserted the CBI with a triple-lumen catheter. The gross hematuria persisted, but, according to the nursing notes, the CBI was working properly from July 22 through July 24. On July 28, 2008, at approximately 1:30 a.m., plaintiff complained of abdominal pain. Morphine and a belladonna suppository to treat bladder spasms were administered; the CBI was clamped; and a CT scan was ordered for a suspected bladder perforation. NYPH confirmed that plaintiff had a perforated bladder and an exploratory laparotomy was ordered. Menachim Shemtov, M.D., performed the surgery at 6:00 a.m. on July 28. After the surgery, the CBI was continued until July 29, 2008. Thereafter, her recovery was

uneventful and she was discharged on August 3, 2008.

Plaintiff commenced this action with the filing of a summons and complaint on or about March 5, 2009, alleging medical malpractice and lack of informed consent. In her bill of particulars, plaintiff alleges, inter alia, that NYPH improperly placed and used the triple-lumen catheter to administer CBI; failed to monitor her urine; and failed to obtain her informed consent for the CBI with the triple-lumen catheter. Plaintiff alleges that NYPH's malpractice and failure to obtain her informed consent caused her injury.

A defendant moving for summary judgment in a medical malpractice action must make a prima facie showing of entitlement to judgment as a matter of law by showing "that in treating the plaintiff there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged." Roques v. Nobel, 73 A.D.3d 204, 206 (1st Dep't 2010) (citations omitted). To satisfy the burden, a defendant in a medical malpractice action must present expert opinion testimony that is supported by the facts in the record and addresses the essential allegations in the bill of particulars. Id. If the movant makes a prima facie showing, the burden shifts to the party opposing the motion "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986) (citation omitted). Specifically, in a medical malpractice action, a plaintiff opposing a summary judgment motion

must demonstrate that the defendant did in fact commit malpractice and that the malpractice was the proximate cause of the plaintiff's injuries. . . . In order to meet the required burden, the plaintiff must submit an affidavit from

a medical doctor attesting that the defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged.

Rogues, 73 A.D.3d at 207 (internal citations omitted). A defendant moving for summary judgment on a lack of informed consent claim must demonstrate that the plaintiff was indisputably informed of the foreseeable risks, benefits, and alternatives of the treatment rendered, and “that a reasonably prudent patient would not have declined to undergo the [procedure] if he or she had been informed of the potential complications[.]” Koi Hou Chan v. Yeung, 66 A.D.3d 642, 643 (2d Dep’t 2009); see also Public Health Law § 2805-d(1).

NYPH relies on the affirmation of Michael Grasso, M.D., a board certified urologist. Dr. Grasso opines that NYPH did not deviate from the standard of care. Dr. Grasso maintains that the triple-lumen catheter was a viable option for treating plaintiff’s hematuria. He asserts that the option of using a standard indwelling Foley catheter, or no indwelling catheter, was impractical for a patient like plaintiff. He further opines that the monitoring was proper. Dr. Grasso goes on to assert that plaintiff’s theory of malpractice that her long term use of steroids made her bladder more susceptible to perforation is unsupported. Although he seems to admit that “chronic steroid therapy can cause, theoretically, some decrease in the integrity of tissues in the body,” Dr. Grasso maintains that tissue damage to plaintiff’s bladder from steroid use “is not something that can be measured or assessed.” Additionally, according to Dr. Grasso, “[a]ny increased risk of bladder perforation is considered to be a contraindication to CBI, which is routinely used to treat patients on chronic steroid therapy.” Dr. Grasso further asserts that CBI is an acceptable and practical treatment for patients on chronic steroid medication. Dr. Grasso maintains

that the bladder perforation was identified and repaired quickly and plaintiff made a full recovery. Dr. Grasso maintains that it is unlikely that the insertion of the catheter caused the perforation. As to the informed consent claim, Dr. Grasso sets forth that CBI is a routine and safe part of in-patient management. Dr. Grasso maintains that bladder perforation is not a reasonably foreseeable risk of CBI. Therefore, the patient's consent is not required.

In opposition, plaintiff points to the examination before trial testimony of plaintiff's husband and her sons, during which they questioned the vigilance of NYPH's evening nursing staff in monitoring the catheter. Plaintiff also relies on the affirmation of a board certified urologist, whose name has been redacted. The expert maintains that clots were forming in the renal pelvis and, therefore, infusion with a triple-lumen catheter would not prevent them from traveling through the ureter. The expert further asserts that plaintiff's bladder tissue was very friable due to the steroid use and that the saline solution caused plaintiff's bladder to swell. The friable tissues, combined with the bladder's overdistention caused by the irrigating fluids, created a high risk for rupture. According to plaintiff's expert, the bladder injury will complicate any further pelvic surgery and increase the risk of failure of a further kidney transplant. Plaintiff's expert claims that NYPH should have warned plaintiff of her increased risk of bladder injury before the CBI commenced.

In reply, NYPH argues that plaintiff's family members are not competent to offer medical opinions and, therefore, cannot rebut NYPH's prima facie showing that plaintiff was adequately monitored. Additionally, Dr. Grasso seeks to clarify his affirmation in support of the motion where he states that the CBI was contraindicated, because long term steroid use can cause tissue damage and increased risk of

bladder perforation. He maintains that he inadvertently omitted the word “not” in the critical sentence and that it should read, “Any increased risk of bladder perforation is NOT considered to be a contraindication of CBI.” (emphasis in original). Dr. Grasso maintains that there is no support for the contention that steroid therapy can cause weakening of the bladder wall or that APLS is associated with any increased risk of bladder rupture.

NYPH has demonstrated a prima facie entitlement to summary judgment on plaintiff’s claim sounding in lack of informed consent. Since plaintiff does not adequately contest the assertion that CBI is considered patient management not requiring the specific consent of the patient and is relatively risk-free, the claim sounding in lack of informed consent is dismissed.

As to the medical malpractice claim, NYPH has also met its prima facie burden. Its expert sets forth that use of the triple-lumen catheter was proper and that the bladder perforation was not the result of negligence. Nevertheless, the affirmation of plaintiff’s expert adequately disputes this opinion, contending that the CBI with the use of a triple-lumen catheter was contraindicated by plaintiff’s medical history and the location of the clots. In light of the conflicting expert opinions, summary judgment is unwarranted. See Boston v. Weissbart, 62 A.D.3d 517, 518 (1st Dep’t 2009); Cruz v. St. Barnabas Hosp., 50 A.D.3d 382 (1st Dep’t 2008).

The request for a Frye hearing is denied. The purpose of a Frye hearing “is to determine whether the experts’ deductions are based on principles that are sufficiently established to have gained general acceptance as reliable.” Marsh v. Smyth, 12 A.D.3d 307, 308 (1st Dep’t 2004); see also Alston

v. Sunharbor Manor, LLC, 48 A.D.3d 600, 602 (2d Dep't 2008). Dr. Grasso concedes that there is a scientific theory that supports the conclusion that chronic steroid therapy can theoretically cause some decrease in the integrity of tissues in the body. Therefore, the principle that long term steroid use can cause tissue weakness is a sufficiently established theory allowing plaintiff's expert to deduce at trial that plaintiff's bladder was weakened by her steroid regimen. NYPH can attack the weight of plaintiff's expert's deductions as to the application of this principle with vigorous cross-examination as well as their own expert's testimony. Accordingly, it is hereby

ORDERED that the branch of the motion seeking summary judgment as to the claim for failure to obtain informed consent is granted and the cause of action for lack of informed consent is severed and dismissed as to NYPH; and it is further

ORDERED that the branch of the motion seeking summary judgment as to the cause of action sounding in medical malpractice and a  Frye  hearing is denied, and the remainder of the action shall continue; and it is further

ORDERED that the parties shall appear for a pre-trial conference on June 7, 2011 at 9:30 a.m.

Dated: May/8, 2011

  
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JOAN B. LOBIS, J.S.C.

**FILED**

**MAY 18 2011**

NEW YORK  
COUNTY CLERK'S OFFICE