

Isserman v I fa Ym
2012 NY Slip Op 33090(U)
December 20, 2012
Supreme Court, New York County
Docket Number: 102389/10
Judge: Joan B. Lobis
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOBIS
Justice

PART 6

ISSELMAN, TARA Z.

INDEX NO. 102389/10

WILLIAM F. URMAY, M.D.,
ETAL.

MOTION DATE 9/11/12

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

The following papers, numbered 1 to 62 were read on this motion to/for summary judgment.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1-15

Answering Affidavits — Exhibits _____

16-31

Replying Affidavits _____

32-62

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this **UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

Dated: 12/20/12

JUAN B. LOBIS 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
TARA Z. ISSERMAN,

Plaintiff,

Index No. 102389/10

-against-

Decision, Order and Judgment

WILLIAM F. URMEY, M.D., JEFFREY Y. NGEOW,
M.D., ANDREW D. PEARLE, M.D., HOSPITAL FOR
SPECIAL SURGERY, WEILL CORNELL MEDICAL
COLLEGE, THE NEW YORK AND PRESBYTERIAN
HOSPITAL, EAST RIVER MEDICAL
ANESTHESIOLOGY, P.C., JEFFREY Y.F. NGEOW,
PHYSICIAN, P.C., and ANDREW D. PEARLE, M.D.,
P.C.,

Defendants.

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

This medical malpractice case arises out of knee surgery performed on Tara Isserman. Isserman sues, alleging, in pertinent part, medical negligence against Defendants. Defendants move for summary judgment pursuant to C.P.L.R. Rule 3212. For the following reasons that motion is granted as to the surgical anesthesiologist, William F. UrmeY, M.D., and denied in all other respects.

Plaintiff, Tara Z. Isserman, has cerebral palsy. Compounding plaintiff's medical condition, in 1995, following several orthopedic surgeries over the course of the previous fifteen years, she was diagnosed as having Reflex Sympathy Dystrophy (RSD), also known as Complex Regional Pain Syndrome (CRPS). That condition is a chronic pain syndrome caused by overstimulation of the sympathetic nervous system. It is characterized by regional pain that is generally intense and burning.

Defendant Jeffrey Y.F. Ngeow is a specialist in pain management. He diagnosed Ms. Isserman's RSD in 1995 using a Lumbar Sympathetic Block. He had been treating her RSD intermittently since then using a series of these blocks. He also provided pain management for several of her surgeries using epidurals, which were employed over extended periods due to Ms. Isserman's RSD.

As a chronic disease, Ms. Isserman's RSD at most went into remission for periods of time. It has reactivated at different times since her diagnosis. For example, following a 1999 surgery the symptoms recurred. Plaintiff had a sensation of burning and increased sensitivity in her leg. The symptoms went into remission following treatment by Dr. Ngeow with a series of lumbar sympathetic blocks. From 2002 until 2008, Plaintiff's RSD symptoms were in remission.

In the summer of 2008, Plaintiff, consulted Defendant, Andrew D. Pearle, M.D., an orthopedic surgeon at the Hospital for Special Surgery (the Hospital), regarding surgery for her right knee. Dr. Pearle recommended arthroscopy to relieve pain that he opined was caused by scarring from prior surgeries in that area. Prior to the surgery, Ms. Isserman met with Dr. Ngeow. His medical notes regarding Ms. Isserman's RSD indicate that Plaintiff was experiencing "some hypersensitivity to light brushing of clothes in upper leg and intolerance to cold wind in lower leg at times." In his notes he directed an "overnight epidural," which wording he now describes as "poor," in light of Plaintiff's allegations that the preemptive analgesia was among other things administered for too short a time.

Dr. Pearle operated on Ms. Isserman's right knee on the afternoon of September 22,

2008. Defendant, William F. Urney, M.D., who is employed by East River Anesthesiology, served as anesthesiologist. Dr. Urney testified that he had not received any special instructions relating to Ms. Isserman other than the epidural was to remain following surgery. He used a standard order applicable for any patient who has patient controlled analgesia after surgery. Following the surgery, a consultation was sought of the Hospital's Acute Pain Service. A post-operative epidural drip was begun.

Ms. Isserman's pain worsened later that afternoon. An attending anesthesiologist gave her a bolus of the epidural solution. She was also given oral narcotics. That evening she was transferred to the regular floor with her epidural catheter.

The next morning, DeLoretta Lawrence, who is a nurse practitioner in the Hospital's Chronic Pain Service, noted that Ms. Isserman was experiencing increased pain on her right side, including burning pain with sensory changes. The epidural was found to be no longer effective on the right side and was readjusted. Ms. Isserman could not tolerate the touch of a sheet or bandage. Notwithstanding, Nurse Lawrence proceeded to reduce Plaintiff's epidural drip. Nurse Lawrence testified that she had been informed that Ms. Isserman had a history of RSD but that it was in remission. She claimed she had not been given any specific instructions to address that condition, nor did she have independent knowledge of any specific care relating to that condition.

That afternoon Ms. Isserman was started on Lyrica, which treats RSD symptoms. She demanded to see Dr. Ngeow because she claimed that the epidural was still only working on the left side. Dr. Ngeow first saw Ms. Isserman at 4:45 pm that day. In testifying in this case, Dr. Ngeow

did not recall discussing with staff to look out for RSD symptoms.

On the morning of September 25, Ms. Isserman was still complaining of burning pain in her lower right extremity. Dr. Brandon Harris, a Chronic Pain Service Fellow, attended her. He noted her RSD symptoms and gave her another bolus of anesthetic. He wrote in his notes that if Ms. Isserman did not get relief, the epidural catheter was to be replaced. Instead the catheter was removed in the early afternoon, following Dr. Harris' consultation with Dr. Ngeow. Dr. Harris proceeded to perform a right lumbar plexus block on Ms. Isserman. She was given oral narcotics and was discharged the next day.

One week after the surgery, Ms. Isserman continued to experience burning and hypersensitivity in her right leg. She could not tolerate clothing touching the leg from the thigh down to the foot. Dr. Ngeow treated her symptoms with blocks, until Plaintiff stopped treatment with the doctor on January 30, 2009.

Ms. Isserman sued for medical negligence in February 2010. In pertinent part she alleges that Defendants caused a recurrence of her RSD during her orthopedic procedure and post-operative care.

In moving for summary judgment, Defendants aver that there are no material issues of fact. They claim that Dr. Pearle as the orthopedic surgeon had no duty of care for Plaintiff's pain management. They further claim that Defendants did not deviate from accepted standards of medical care. Nor did their conduct cause Plaintiff's injuries. They submit two expert opinions opining that

RSD is unpredictable and that Defendants' conduct did not proximately cause Ms. Isserman's injuries. The expert opinions include one from Dr. Roger Levy, a board certified orthopedic surgeon, and Dr. James Rathmell, a board certified anesthesiologist and pain management specialist. Dr. Levy opines as to Defendants Pearle and the Hospital. He has operated on patients with RSD. Dr. Rathmell attests that RSD is "[p]oorly understood by patients and health care professionals alike." He attests that "[i]n my review of the record in this matter, it would be impossible to distinguish what, if anything caused or even contributed to" Ms. Isserman's RSD flare.

In opposing Defendants' motion, Plaintiff contends that the record shows that Defendants failed to formulate and carry out a sufficient plan of pre-emptive analgesia for her surgery and that Defendants' conduct was a substantial factor in causing her severe and advanced RSD symptoms. Plaintiff argues that Defendants' experts relied on incomplete or disputed facts and failed to address proximate cause in a non-conclusory fashion. She offers expert opinion by a doctor who is licensed to practice in New York and has a private practice in Pain Management and Anesthesiology, including treatment of many patients with RSD. The expert is board certified in those fields and has worked with pain management physicians and orthopedic surgeons in managing the expert's patients. The expert opines that RSD is managed by quieting the sympathetic nervous system. The expert states that orthopedic invasive procedures are a known trigger for recurrence of RSD symptoms in patients with a history of RSD. Plaintiff's expert details key occurrences in the course of Plaintiff's treatment in this case, from consultations, to surgical preparation and execution, to post-operative pain management. In the expert's opinion, Defendants departed from good and accepted practice in numerous ways. The expert claims that the epidural was not implemented for a sufficient length of time or at a sufficient strength or rate of delivery. The expert compares the

epidural drip used in this instance with those employed in earlier procedures, which had been performed at the Hospital, and criticizes Defendants for not consulting those earlier records.

The expert further opines that Defendants departed in failing to instruct and supervise staff. The expert notes that Dr. Pearle testified that he knew of the need for pain management to prevent the recurrence of RSD and should have known that elective surgery required pre-operative steps that were not taken to quiet Plaintiff's sympathetic nervous system. Dr. Pearle himself testified that "[w]e were going to have a very detailed pain management plan if we were going" to operate. Dr. Pearle testified that Dr. Ngeow would oversee that.

In reply Defendants note that Plaintiff's opposition does not dispute their claim that Dr. Urney on this record did not depart from medically accepted standards. They dispute Plaintiff's expert's claims of departures relating to the sufficiency of the preemptive analgesia and instruction and supervision of staff. They allege the opposition misstates and omits facts. They contend that causation of RSD is "completely unpredictable." Defendants claim that there are no genuine issues of material fact and that they are entitled to summary judgment as a matter of law.

It is "a cornerstone of New York jurisprudence that the proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that [the movant] is entitled to judgment as a matter of law." Ostrov v. Rozbruch, 91 A.D.3d 147, 152 (1st Dep't 2012), citing Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). In a medical malpractice case, to establish entitlement to summary judgment, a physician must demonstrate that he did not depart from accepted standards of practice or that, even if he did, he did

not proximately cause injury to the patient. Roques v. Noble, 73 A.D.3d 204, 206 (1st Dep't 2010) (citations omitted). If the movant meets this burden, then the opposing party must proffer evidence sufficient to establish the existence of a material issue of fact requiring a trial. Ostrov, 91 A.D.3d at 152, citing Alvarez, 68 N.Y.2d 320, 324 (1986).

As an initial matter this Court finds that the parties do not dispute that Dr. Urmev did not depart from medically acceptable standards of care. This record shows that as anesthesiologist for Plaintiff's orthopedic surgery, Dr. Urmev administered the type and level of anesthesia that is standard for this type of surgery. Since it is undisputed that there were no special instructions countering that dosage, the record shows he properly administered Plaintiff's anesthesia as instructed. Accordingly, summary judgment is appropriate for this Defendant.

This Court rejects Defendants' claim that the record further shows no liability for East River Medical Anesthesiology, P.C., however. That Defendant, along with the Hospital, jointly employed Dr. Kahn, who was attending physician in the Pain Service on the day of Plaintiff's surgery as well as the next day, and whose conduct as staff is challenged as negligent. Based on Plaintiff's allegation of vicarious liability, Defendant East River Medical Anesthesiology has not shown entitlement to summary judgment at this time as genuine issues of material fact remain regarding Dr. Kahn's, among others, treatment of Plaintiff.

This Court next considers Defendants' claim that Dr. Pearle does not have a duty of care to Ms. Isserman for her pain management. Defendants' assertion is unsupported. The cases cited by Defendants in support of their argument do not apply to the facts in this instance. None of

them involved surgeons whose conduct failed to address adequately their patients post-operative pain.

Nor does this Court find that summary judgment is warranted for the remaining Defendants. First, this Court is not persuaded that Defendants have established a prima facie case of entitlement to summary judgment. Expert opinion must be based on the facts in the record or those personally known to the expert. Roques, 73 A.D.3d at 195. The expert cannot make conclusions by assuming material facts not supported by record evidence. Id. Defense expert opinion should specify “in what way” a patient’s treatment was proper and “elucidate the standard of care.” Ocasio-Gary v. Lawrence Hosp., 69 A.D.3d 403, 404 (1st Dep’t 2010). A defendant’s expert opinion must “explain ‘what defendant did and why’” Id. (quoting Wasserman v. Carella, 307 A.D.2d 225, 226 (1st Dep’t 2003)). Conclusory medical affirmations fail to establish prima facie entitlement to summary judgment. 73 A.D.3d at 195. Expert opinion that fails to address a plaintiff’s essential factual allegations fails to establish prima facie entitlement to summary judgment as a matter of law. Id.

This Court finds that the defense expert affirmations submitted in this case are conclusory. Notwithstanding their distinct specializations, the defense experts offer almost verbatim opinions. The chronology included in those opinions misstates post-operative dates. In the affirmation of Dr. Roger Levy, the opinion states “[i]t is not a departure from accepted medical practice to perform a right knee arthroscopy on a patient who has been previously diagnosed with RSD or CRPS.” That statement, however, fails to address Ms. Isserman’s essential factual

allegations challenging the manner in which that procedure was performed and post-operative pain management. Those issues are unaddressed by Dr. Levy other than the inclusion of the conclusory statement later in the opinion that “RSD is an inflammatory and unpredictable disease that can flare and have periods of dormancy, despite the best medical care.” Dr. Levy fails to address whether the care in this case departed from standards of care relating to patients with RSD. Later in the opinion, he states that “all of the physicians’ orders were appropriately carried out and, in all respects, the hospital staff and pain fellows acted appropriately and within the standard of medical practice. Also I find no acts of negligence or any evidence of causation” as to the institutional defendants. He does not support how or why that conduct was appropriate.

Dr. Rathmell’s expert medical affidavit is similarly deficient. Like Dr. Levy’s, it misstates the dates in the factual chronology and omits discussing the facts pertinent to Plaintiff’s essential factual allegations challenging the adequacy of the preemptive analgesia in this case. In fewer than a handful of paragraphs, Dr. Rathmell proclaims that Ms. Isserman’s pain and muscle spasm following surgery was “routine.” He does not address those symptoms specific to her RSD. He repeats the same conclusion as Dr. Levy regarding physician orders being properly implemented as well as the conclusion that there is no causation. He dismisses outright Plaintiff’s claim that any care was improper.

Even if Defendants were to have made out a prima facie case for summary judgment this Court would find that Plaintiff has rebutted that presumption. In contrast to the defense experts’ perfunctory opinions, expert for the Plaintiff lengthily details the record support for Plaintiff’s claims that Defendants departed from standards of care regarding preemptive analgesia, including

supervision and instruction to staff. Given the numerous genuine issues of material facts that remain in this case, summary judgment is not appropriate for any Defendants other than Dr. Urmev.

Accordingly, it is

ORDERED that Defendants' motion for summary judgment is granted to the extent of granting summary judgment for Defendant Urmev; the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the action shall continue as to all remaining Defendants; and it is further

ORDERED that counsel appear for a status conference on January 29, 2013, at 9:30 am.

Dated: December 20, 2012

ENTER:



JOAN B. LOBIS, J.S.C.