

Pineda v Davie

2014 NY Slip Op 30701(U)

March 18, 2014

Sup Ct, NY County

Docket Number: 805073/13

Judge: Alice Schlesinger

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

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MARNI PINEDA, as Administrator of the Estate of
ISEL PINEDA, deceased,

Plaintiff,

Index No. 805073/13
Motion Seq. No. 002

-against-

OLEG DAVIE, M.D.,

Defendant.

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SCHLESINGER, J.:

Isel Pineda, age 51, died on May 10, 2012. She had just undergone an elective SmartLipo procedure by Dr. Oleg Davie in Dr. Davie's office. Without having made any complaints after the procedure was completed at about 11:00 a.m., Ms. Pineda collapsed at about 1:45 p.m. while drinking a glass of water and waiting for her boyfriend to come and get her. After CPR was given by the doctor and his assistant, after EMS came to take Ms. Pineda to Coney Island Hospital, where she arrived at 2:26 p.m., she was pronounced dead at the hospital at 3:10 p.m.

Dr. Davie's life also was affected by this event, though not nearly as drastically. On November 30, 2012, based on this tragic death and on an earlier liposuction that Dr. Davie had performed on January 20, 2011, wherein during that procedure the patient had suffered a significant vascular trauma resulting in the loss of four units of blood, he voluntarily surrendered his medical license (Plaintiff's Motion, Exh A).

Further, pursuant to this tragic death, Dr. Davie was indicted in Kings County for Manslaughter in the Second Degree and other lesser crimes.

It should also be noted, and could be relevant and admissible at a trial, that at the time of these events, Dr. Davie was on probation. This probation resulted from a Consent Agreement and Order that he had entered into on July 27, 2011 with the Department of Health State Board for Professional Medical Conduct based on charges accusing the doctor of "committing professional misconduct" and "practicing the profession of medicine with negligence on more than one occasion ..." (Exh F).

Significantly, the penalty included a fine of \$100,000, together with a limitation on the doctor's practice restricting him to the performance of only the following non-invasive procedures: Botox injections, the removal of benign skin tumors, and the treatment of abscesses. This limitation was for a three-year period. Ms. Pineda's death occurred less than one year after the Agreement was signed.

There has been no discovery in this wrongful death action sounding in medical malpractice. In fact, this Court, in a decision and order dated June 26, 2013, granted defendant's motion and stayed "defendant's obligation to answer and/or engage in any discovery as provided herein" (Exh C to Opposition). Despite this stay of discovery, counsel for plaintiff stated at oral argument that he wished to proceed with a motion for summary judgment on liability. It was made clear that Dr. Davie would not be deposed before plaintiff so moved. I allowed counsel for Ms. Pineda's Estate to go ahead with such a motion, as I failed to discern prejudice to Dr. Davie or any compromise of his Fifth Amendment rights.

Before me now is that motion. Moving counsel argues that liability for Ms. Pineda's death has been clearly shown with its submission of an affirmation from Dr. Richard Skolnik, a board certified plastic and reconstructive surgeon who has reviewed the records

and opines on the issues (Exh B to Motion). Counsel has also submitted Dr. Davie's request to surrender his medical license, which it is urged contains an admission by Dr. Davie that he could not successfully defend against the charges which were, in part, that a liposuction procedure was contraindicated for Ms. Pineda as her medical history included the fact that she had undergone a heart transplant about eight years earlier.¹

Further, counsel submits the death certificate and autopsy report, both signed by Dr. Irini Scordi-Bello, a Medical Examiner (Exh D). An Amended Autopsy Report (Exh E) states the following:

Cause of Death:

Cardiac Arrhythmia Following Abdominal
Liposuction (Smart-Lipo) Performed Under Local
Anesthesia With Lidocaine And Epinephrine

Manner of Death:

Homicide (Physician Negligence)

The Amended Report is dated February 1, 2013, although Dr. Scordi-Bello performed the autopsy on May 12, 2012, the date of Ms. Pineda's death. A supplemental report prepared and signed by Dr. Scordi-Bello also on February 1 explains this fact (Opp, Exh E). She points out that on the original report, under "Manner of Death", she had written "Undetermined". But she changed that conclusion to "Homicide" after talking with two Assistant District Attorneys from the Kings County District Attorney's office on

¹Moving counsel, I believe, is wrong that this surrender contains an admission that Dr. Davie was negligent in these circumstances. Since another incident was included, one could not absolutely conclude that the doctor's comment, about not being able to defend, applied to the Pineda event as opposed to the other liposuction. Defense counsel points this out.

January 15, 2013 and receiving what she believes was:

convincing evidence that Dr. Davie was aware of the decedent's surgical history, specifically her cardiac transplantation, but willfully disregarded and proceeded with the liposuction [and] by doing so, he acted in a negligent manner that resulted in her death.

This doctor also discussed the above with the Medical Examiner's First Deputy Chief, Barbara Sampson.

Dr. Skolnik, in support of the motion, first provides his background and credentials. He is now an Associate Clinical Professor at the Mt. Sinai School of Medicine in the Department of Surgery, Division of Plastic Surgery. He then details the items that he has reviewed. These include Dr. Davie's consent orders, both before and after May 12, 2012, and the Autopsy Report. At the outset Dr. Skolnik explains that SmartLipo is a liposuction procedure that uses a laser to remove fat. The laser breaks down the fat cells, which are then removed through a small incision in the skin. He says that the procedure "is considered invasive" (¶6) but can be performed while the patient is awake, which Ms. Pineda was, or under a regional or general anesthesia.

Dr. Skolnik then points out that Dr. Davie evaluated Ms. Pineda as a "good candidate for SmartLipo". He made no mention of her heart transplant history. Nor, when he noted that there was an old scar in her mid-chest, did he think to inquire as to its cause. Rather, he assumed it was from skin surgery involving the removal of a lipoma.

The subject of the defendant's medical records is then discussed. At an April 18, 2012 consultation, it appears that the decedent completed a cosmetic consultation and medical history form (Exh C). There, Ms. Pineda pointed out her significant medical

history of heart disease, cardiomyopathy and congestive heart failure, which had led to a surgical decision to perform a cardiac transplant in 2004. Further, since that time, Ms. Pineda recounted, she had been on the anti-rejection medication Cellcept and Prednisone. But these forms do not appear in Dr. Davie's records,.

Dr. Skolnik then very briefly describes how the liposuction was performed by using Dr. Davie's intra-procedure log, which showed how much tumescent fluid (a mixture of lidocaine for pain and epinephrine as a vasoconstrictor) was given, as well as normal saline. The patient was administered 1500 cc of the fluid during the two hours that the procedure took. This expert continues narrating the events until Ms. Pineda's death was pronounced at 3:10 p.m.

Dr. Skolnik then proceeds to give his opinions as to the liability of Dr. Davie. On the issue of whether the defendant departed from good and accepted medical practice, he states that he did. This expert essentially opines as to two categories of departures. The first, in all of its manifestations, concerns whether Ms. Pineda was ever a proper candidate for liposuction.

In this regard, Dr. Skolnik begins (at ¶19) by making a general statement that:

as a basic fundamental principle, performing an elective cosmetic procedure on a patient who has a history of a heart transplant in an ambulatory facility is a deviation from the standard of care.

Dr. Skolnik then breaks this point down and finds a separate departure for Dr. Davie's not having properly interpreted the scar on Ms. Pineda's chest as one associated with an open chest procedure. He was obligated to make such a finding and then follow up by cancelling the liposuction as contraindicated. An additional departure by Dr. Davie was his failing to talk to Ms. Pineda's cardiologist before subjecting her to this procedure.

The second category of departures concerns where and how the SmartLipo was performed. It is Dr. Skolnik's opinion that performing this procedure, an elective one, in a doctor's office on a person with a heart transplant in her history, without an anesthesiologist present during the procedure, was a departure from accepted standards of medicine and surgery. These opinions are somewhat short on specifics, and there is one opinion that he provides without any real explanation, which is because of the patient's heart transplant history, she should have been classified as an "ASA IV for anesthetic complications" (¶24):

Dr. Skolnik, in the relatively brief remainder of his affirmation, then deals with the subject of causation. As with departures, he begins (¶26) with the general statement:

My review of the records reveals that the surgical procedure, to a reasonable degree of medical probability, was a substantial factor in the cause of Ms. Pineda's death.

He adds (¶28):

Moreover, it is my opinion that had this procedure been avoided, Ms. Pineda would not have suffered a cardiac event on May 12, 2012 which caused her death.

This opinion does find support in the Amended Autopsy Report. His conclusory paragraphs are simply general restatements of his earlier expressed opinions.

The opposition attacks on multiple fronts. Some are, in fact, effective enough to convince me that this is not the time for the Court to grant plaintiff summary judgment.

First, counsel argues that the motion is simply premature, although she points out that in my June 26, 2013 decision and order, I did give counsel for the decedent permission to move in this way. Perhaps I should not have, but I did not feel that the

bringing on of such a motion would compromise Dr. Davie's Fifth Amendment rights. I still believe that. It may have made the task more difficult to defend because of the absence of any discovery. However, with the submission of an affirmation from an expert, here from Dr. Sheldon Deluty, a board certified anesthesiologist, and reliance upon certain documents, Dr. Davie has been able to show the existence of legitimate factual issues on the issue of liability, certainly with regard to departures and to a lesser extent, causation.

Therefore, while it is true that a great deal of relevant information may still be exclusively in the control of plaintiff, such as the decedent's full medical history including not only the transplant but other past cosmetic procedures, and while certain family member depositions would seem to be necessary, the submission of the documents counsel did supply to the Court, along with the expert affirmation, are sufficient to defeat this motion.

Turning to the most significant of those submissions, Dr. Deluty's affirmation, he directly challenges Dr. Skolnik's opinion that this procedure was contraindicated because Ms. Pineda was a poor candidate for SmartLipo due to her history of a heart transplant some years earlier. Dr. Deluty says the procedure was not contraindicated. Further, he says the procedure was not a proximate cause of "the injuries alleged to have been sustained by plaintiff" (§13). I will deal with this later on. But the record should be clear. The plaintiff here is not Isel Pineda, but her relative Marni Pineda, who is the Administrator of her Estate. And the so-called "alleged injuries" are anything but. Ms. Pineda is dead. This happened a few hours after the liposuction and she was not hit by a car outside the doctor's office.

Dr. Deluty takes issue with Dr. Skolnik's opinion that as a matter of a "basic fundamental principle", performance of an elective cosmetic procedure on a patient with a history of a heart transplant in an ambulatory facility is a deviation from the standard of care. He describes the SmartLipo procedure (¶18) as:

a minor procedure that is not even an "Office Based Surgery" as defined by the New York State Department of Health given that it is a procedure that can be performed safely with minimum discomfort and where the likelihood of complications requiring hospitalization is minimal, where the procedure is performed with only unsupplemented local or topical anesthesia and where the fat removed by the liposuction is less than 500ml under unsupplemented local anesthesia.

With regard to this alleged deviation, which is at the core of plaintiff's accusations, I agree with defense counsel's characterization that the plaintiff's expert provides no real support for his opinion, at least not in the moving papers. Perhaps it is so basic that Dr. Skolnik saw no need to do that, but to a medically uneducated reader, as this Court is, I found that a serious omission.

Dr. Skolnik gave other opinions that similarly are not supported with explanations, such as the existence of a departure in failing to contact Ms. Pineda's cardiologist (¶22) and also that Ms. Pineda, "as a consequence of her heart transplant, was considered an ASA IV for anesthetic complications" (¶24). In fact, Dr. Skolnik does not even tell me what "ASA" stands for or what the "IV" designation is meant to communicate.

But Dr. Deluty, an anesthesiologist, does. According to him, the American Society of Anesthesiologists (ASA) has five descriptive categories that are used to assess a patient's physical status risk from an anesthesial perspective. The normal healthy patient

would be ASA 1, while a person who is close to death would be a ASA 5. As to Dr. Skolnik's assessment of Ms. Pineda as a ASA 4, Dr. Deluty says this "is just simply wrong and is unsupported by the well known criteria for ASA Physical Status risk classification" (¶14). He proceeds to set down the characteristics of each category and then explains why Ms. Pineda would have been classified an ASA II. He argues that only current morbidities are relevant and that therefore this patient's underlying heart problems were cured by the transplant.

In fact, in further explanation as to why he believes Ms. Pineda was a suitable candidate for the SmartLipo, Dr. Deluty discusses the findings of the doctors at New York Presbyterian Cardiac Clinic on January 31, 2012, where Ms. Pineda went for her annual cardiac evaluation. This evaluation included a right and left cardiac catheterization with endomyocardial biopsy to evaluate the patient's cardiac hemodynamics post transplant. Her preliminary blood work and panels were essentially normal. She also had given a history of feeling well without cardiac symptoms since her last evaluation in May 2010. Further, while the findings did show stenosis in three of her coronary arteries, as much as 60% in one, the summary stated "non-obstructive coronary artery disease. Normal hemodynamics".

Dr. Deluty opines that Ms. Pineda's treating physicians noted a "clinical status well within the range of normal which did not indicate clinically significant cardiovascular disease or warrant further intervention or therapy" (¶11). This doctor then takes a further step and opines that no diagnostic or clinical findings precluded this patient from undergoing "an elective minor cosmetic procedure" (¶11). Therefore, contrary to what Dr. Skolnik said, "the performance of said procedure was not contraindicated" (¶11).

Dr. Deluty then briefly discusses his disagreement with Dr. Skolnik's opinion that there was a departure in performing the SmartLipo in the doctor's office without the presence of an anesthesiologist. His disagreement relies on the fact that this procedure, in his opinion, is not considered an Office Based Surgery that mandates the presence of an anesthesiologist.

The expert then proceeds to discuss the subject of lidocaine usage during this procedure. While he acknowledges that excessive dosages of lidocaine can cause cardiovascular toxicity, he opines that that is not what happened here. He then proceeds to give a technical explanation of how one establishes a safe dosage. He concludes this discussion by saying that both results — post mortem of the therapeutic blood level of lidocaine and the dosage actually given to Ms. Pineda — “do not support the diagnosis of lidocaine toxicity secondary to overdose as the cause of death” (§§18).

Dr. Deluty then proffers what he believes caused Ms. Pineda's death. It was “due at least in part to fat embolism syndrome” (§§19). What follows is another technical description of the mechanism of this syndrome. Dr. Deluty relates that this syndrome, as well as lidocaine toxicity, have been recognized in the medical literature as causes of death following these liposuction procedures. He states that while the post-mortem toxicological analysis was not consistent with lidocaine toxicity, the anatomic and histologic findings in the autopsy report are consistent with fat embolism syndrome (§§20). On this subject, he concludes that the decedent's prior heart transplant “was irrelevant” to her sustaining a fatal outcome as a result of fat embolism syndrome. (§§21)

Finally, he states his belief, with the requisite medical certainty, that the Medical Examiner's conclusion that Ms. Pineda's cause of death was cardiac arrhythmia, “is incorrect and not based on medical or scientific principles” (§§22). He adds that the

amendment made to the report six months after the initial report was also “not based upon any medical or scientific evidence”.

I find that the opposition is an effective one. I also believe that the movant recognized it as such because the Reply is much stronger than the initial offering. In that Reply are two additional affirmations that refute most of Dr. Deluty’s statements and opinions. I will now briefly discuss them, but I believe that the clear difference in opinion of these doctors leads to the inevitable conclusion that issues of fact exist here at this very early stage of the proceedings.

The first affirmation (Exh B) is by Dr. Miles H. Dinner, a well-credentialed board certified Anesthesiologist. He begins by criticizing Dr. Deluty’s opinions as “not based upon the medical evidence before this Court” (¶4). This doctor then goes on to explain why a transplanted heart patient is not just someone with a new heart wherein all prior cardiac problems have been resolved. In other words, he points out that “Ms. Pineda was, by virtue of being a cardiac transplant patient, not in any way, size, shape or form an ordinary patient and as such warranted vigilance and recognition of the problems and considerations requisite to a transplant patient in accordance with the standard of care” (¶9). He then proceeds to give examples of the differences between transplanted patients and non-transplanted patients, one being that transplanted patients have an accelerated form of atherosclerosis. Here he points out that “on the post mortem exam, Ms. Pineda was found to have severe coronary disease ...” (¶11).

Dr. Dinner follows this discussion with a sharp dispute of Dr. Deluty’s opinion that this procedure was a minor one which did not qualify as an Office Based Surgery that mandates the presence of an anesthesiologist. Dr. Dinner then references two sections of the Public Health Law, §230-d(h) and §230-d(g) ,to show that under the circumstances

that existed here, including the patient's history and the doctor's intent to remove 1000cc of fat, even though he only removed 400cc, this was certainly a procedure that required the patient to be constantly monitored so as to be able to deal with a respiratory and/or cardiac emergency.

The subject of the accepted dose of lidocaine is then brought up and, again not surprisingly, Dr. Dinner sharply disagrees with Dr. Deluty. This is not the time to discuss the somewhat technical arguments each doctor presents, but at a minimum it should be noted that Dr. Dinner points out that the level of lidocaine found post mortem, which was well after the patient expired, was artificially low (¶18) and was attenuated and so did not reflect the level that would have been present at the time of her death (¶20).

Finally, with regard to Dr. Deluty's opinion of the cause of death, a fat embolism syndrome, Dr. Dinner says this "is completely unsupported by the record [and] there is NO evidence contained within the autopsy report that Ms. Pineda's death was due to fat emboli" (¶21, emphasis in original). Dr. Dinner elaborates on this point. He also opines that the dosage of lidocaine used by Dr. Davie was sufficient to cause an arrhythmia here. He urges that the cause of death found by the Medical Examiner is completely consistent with the medical evidence (¶22).

The last point this expert makes is the all-inclusive one that the various departures by Dr. Davie "deprived the decedent of a chance of a cure at the time she became unresponsive, and were a substantial factor in causing her death" (¶27).

The second affirmation is from Dr. Charles V. Wetli (Exh C). It is the first time in this case that we hear from a board certified Anatomic and Clinical Pathology and Forensic Pathologist. He is also the former Chief Medical Examiner for Suffolk County, N.Y. In

preparation for giving his opinion, he reviewed the autopsy report, photographs, FDNY EMS records, Coney Island Hospital records, the defendant's records, and most importantly pathology slides, histological sections that included six sections from the general autopsy, seven from the heart and eight from the brain.

He concludes that the opinion of Dr. Deluty, whose affirmation he also read, as to Ms. Pineda's cause of death, is not based upon the medical evidence and is completely speculative. In paragraphs seven and eight of his affirmation, he says that the post mortem examination revealed severe coronary artery disease of two arterial vessels, in addition to extensive lymphocytic infiltrates and foci of interstitial fibrosis. This latter finding indicates either a chronic rejection process going on and/or "a smoldering chronic myocarditis" (§7). Further, on the other hand, "nowhere was there evidence of intravascular vacuoles typical for fat embolism" (§8).

Dr. Wetli concludes his statement with his belief that Ms. Pineda's sudden death was the result of her underlying cardiovascular condition exacerbated by the SmartLipo procedure. As to the levels of lidocaine in the decedent's blood, he opines, as did Dr. Dinner, that Dr. Skolnik's reliance on the levels found after death was misplaced and artificially low. He says, "It is widely known and generally accepted by forensic pathologists and the medical community that lidocaine redistributes into the tissues." (§12)

Conclusion

I must confess that at times during my reading of the motion papers, I felt as if I was present at a tennis game between skilled players, with each side hitting back and trying to defeat the opponent's last stroke. Perhaps a better way of putting this is that I felt as if I was present at a trial of this action, listening attentively to the direct examination of experts and eagerly awaiting cross-examination by the other side.

By the above, in no way do I mean to trivialize the tragic facts behind this case. However, it is clear to me that the plaintiff's motion must be denied. Though Dr. Deluty is roundly criticized by doctors opining on behalf of the Estate, he is nonetheless a well-credentialed anesthesiologist who is an Attending at Tisch University and Bellevue Hospitals, a Consultant in Anesthesiology for New York City's Medical Examiner, and an author of articles on the topic of cardiac arrest and death. He has also reviewed the records. His opinions are detailed and deserving of attention.

I also believe that Dr. Deluty's skepticism, with regard to the Amended Autopsy Report and its cause of death, has merit. The Court also has problems with this revision. It is difficult for me to give credence to a supposedly scientific report prepared by a neutral City Medical Examiner that relies in part on non-scientific hearsay information provided by a non-neutral party in a related homicide prosecution. One could argue that the integrity of this document, at least as to certain parts of it, has been compromised.

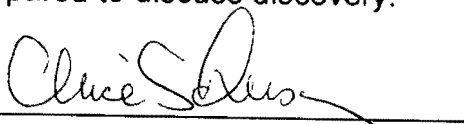
In any event, I believe there are issues of fact here delineated primarily by Dr. Deluty, who differs from Dr. Skolnik and presumably the Reply doctors, that put into question whether Dr. Davie's performance of the liposuction procedure in his office on this transplanted patient was a departure from accepted medical/surgical standards and if it was, was it causative of Ms. Pineda's death.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment is denied, and counsel shall appear in Room 222 on April 23, 2014 at 10:00 a.m. prepared to discuss discovery.

Dated: March 18, 2014

MAR 18 2014



J.S.C.
ALICE SCHLESINGER