Gasparre v Northern Westchester Hosp. Ctr. Found., Inc.
2014 NY Slip Op 32809(U)
July 7, 2014
Supreme Court, Westchester County
Docket Number: 55435/2011
Judge: James W. Hubert

To commence the statutory time period for appeals as of right (CPLR §5513[a]), you are advised to serve a copy of this order, with notice of entry upon all parties

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------x

JOAN ANN GASPARRE and LOUIS GASPARRE,

Plaintiffs,

-against-

NORTHERN WESTCHESTER HOSPITAL CENTER FOUNDATION, INC., NORTHERN WESTCHESTER HOSPITAL ASSOCIATION and JANE DOE, a fictitious name of an individual described herein, and NORTHERN WESTCHESTER HOSPITAL,

Defendants.

----------x

DECISION & ORDER

Index No. 55435/2011

Motion Seq. 002, 003

Hubert, A.J.S.C.

In this action for medical malpractice and negligence, Plaintiff Louis Gasparre alleges that he was burned on October 3, 2010, after staff at Northern Westchester Hospital in Mt. Kisco, New York, applied a heat pack to his back in order to alleviate back pain he was experiencing. Plaintiff alleges that the heat pack was excessively hot and caused a second degree burn to his back. Plaintiff and his wife, Joan Ann Gasparre, commenced this action on September 14, 2011, against Defendants alleging medical malpractice, negligence, battery, and loss of consortium on behalf of Joan Ann Gasparre. The Amended Complaint alleges that Defendants acted "intentionally, deliberately, and were negligent and acted with reckless disregard" for plaintiff, and seeks punitive damages in addition to compensatory relief.

In the motions presently before the Court, Plaintiffs move for an order pursuant to CPLR § 3212 granting partial summary judgment on the issue of liability pursuant to the doctrine of res

ipsa loquitur. Plaintiffs also seeks a ruling from this Court as to whether Plaintiffs must present expert testimony with respect to the issue of liability. Defendants move to dismiss Plaintiffs' claims for punitive damages and civil battery, and move to preclude Plaintiffs' engineering expert from testifying at trial. For the reasons explained below, Plaintiffs' motion is denied, and Defendants' motion is granted in part and denied in part.[1]

According to the deposition testimony and medical records submitted in this case, Louis Gasparre was admitted to Northern Westchester Hospital on or about September 27, 2010, with severe back pain. The physician attending to Gasparre ordered a moist "heat pack," as needed, to alleviate his pain. Hospital staff generally prepares moist heat packs by warming up a washcloth or small towel with running water and placing the towel into a plastic bag and/or another towel before applying it to a patient. Gasparre was lying on his side when a Patient Care Associate applied a heat pack to his back.[2] At the time, several of his family members, including his wife, were present in his room. Gasparre's wife subsequently notified the hospital staff that the heat pack was too hot. Hospital records from October 3, 2010, indicate that the compress may have been heated unevenly; that Gasparre's back had a small area of skin desquamation, and the alleged burn was treated with a dressing.

In order to prevail on a motion for summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence

---

[1]The Court notes that the parties consented to e-file in this case pursuant to 22 NYCRR § 202.5-b. On these motions, the Court has read and considered all of the papers, including exhibits, filed electronically and denominated as Motion # 002 and Motion # 003 by the clerk.

[2]The individual Patient Care Associate who prepared the heat pack and applied it to Gasparre passed away before depositions occurred in this case.

to demonstrate the absence of any material issues of fact." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923 (1986)(citations omitted). Issue finding, rather than issue determination, is the role of the court in deciding a motion for summary judgment. *Vega v Restani Constr. Corp.*, 18 N.Y.3d 499, 942 N.Y.S.2d 13 (2012)(internal citations omitted). Once the moving party makes a prima facie showing, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact" on which the party rests his or her claim, or must demonstrate an "acceptable excuse" for having failed to do so. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 560, 427 N.Y.S.2d 595 (1981); *see also Alvarez v. Prospect Hosp.*, 68 N.Y.2d at 324.

As noted above, Plaintiffs move for summary judgment on the issue of liability based on the doctrine of res ipsa loquitur. This doctrine permits a jury to infer negligence when no direct evidence of negligence has been introduced, *Morejon v. Rais Constr. Co.*, 7 N.Y.3d 203, 818 N.Y.S.2d 792 (2006), and typically applies to occurrences "where the actual or specific cause of an accident is unknown." *Kambat v. St. Francis Hosp.*, 89 N.Y.2d 489, 494, 655 N.Y.S.2d 844 (1997). The doctrine of res ipsa loquitur is generally insufficient to entitle a plaintiff to summary judgment, because it is a rule of evidence which merely provides a permissible inference of negligence, rather than a rebuttable presumption. *Shinshine Corp. v. Kinney Sys., Inc.*, 173 A.D.2d 293, 569 N.Y.S.2d 686, 687 (1st Dep't 1991). Moreover, it is typically for the jury to determine whether the inference is warranted. *Dermatossian v. New York City Tr. Auth.*, 67 N.Y.2.d 219, 501 N.Y.S.2d 784)(1986)("[t]he rule has the effect of creating a prima facie case of negligence sufficient for submission to the jury, and the jury may — but is not required to — draw the permissible inference").

As a general matter, the doctrine applies in medical malpractice cases when the injury is unexplained, the injury site is remote from the treatment site, and the plaintiff was anaesthetized when the alleged injury occurred. *Antoniato v. Long Is. Jewish Med. Ctr.*, 58 A.D.3d 652, 655, 871 N.Y.S.2d 659 (2d Dep't 2009); *Roura Rosales-Rosario v. Brookdale Univ. Hosp. & Med. Ctr.*, 1 A.D.3d. 496, 767 N.Y.S.2d 122 (2d Dep't 2003). Accordingly, "[o]nly in the rarest of res ipsa loquitur cases may a plaintiff win summary judgment or a directed verdict [. . .] even if the plaintiff's circumstantial evidence is unrefuted." *Morejon v. Rais Constr. Co.*, 7 N.Y.3d 203, 818 N.Y.S.2d 792 (2006)(noting that over the last century, the appellate division has determined that a plaintiff is entitled to summary judgment or a directed verdict on the basis of res ipsa loquitur in "barely more than a dozen" cases).

To rely on the doctrine, a plaintiff must show that (1) the injury does not ordinarily occur in the absence of negligence, (2) the instrumentality that caused the injury is within the defendant's exclusive control, and (3) the injury is not the result of any voluntary action by the plaintiff. *States v. Lourdes Hosp.*, 100 N.Y.2d 208, 211-13, 762 N.Y.S.2d 1 (2003); *Kambat v. St. Francis Hosp.*, 89 N.Y.2d 489, 494, 655 N.Y.S.2d 844, 846 (1997). Here, Plaintiffs argue that there is no dispute over what caused the alleged burn; a heat pack should not cause a burn in the absence of negligence; it was in Defendants' exclusive control; and inasmuch as Gasparre was lying on his side when the heat pack was applied by hospital staff, he was not responsible in any way for the alleged injury.

In opposition to Plaintiffs' motion, Defendants contend that (1) there was no deviation or departure from accepted standards of care; and (2) plaintiff was not burned, and if he was burned, the burn was not the result of negligence on the part of Defendants. In support, Defendants have

submitted an affirmation from Dr. John C. Bivona, a licensed physician, who states that the heat pack was applied pursuant to the proper order of a physician, and the application of a towel warmed with hot water from a sink is common practice and not a departure from accepted standards of practice. Defendants also argue that since the nursing staff was instructed to wring out the towel by hand, it could not have been excessively hot.

Based on these facts, the Court finds that Defendants have rebutted the inference of negligence for purposes of this motion. *See Smith v. Tabb*, 21 A.D.3d 1323, 801 N.Y.S.2d 652 (4th Dep't 2005)(partial summary judgment on issue of liability based on res ipsa loquitur denied where plaintiff's left knee was allegedly burned during operation on her left foot; hospital and surgeon rebutted inference of negligence by claiming they had not departed from accepted standards of care and plaintiff's knee was not burned); *cf. Thomas v. N.Y. Univ. Med. Ctr.*, 283 A.D.2d 316, 725 N.Y.S.2d 35 (1st Dep't 2001)(since "anesthetized patients do not fall from operating tables in the absence of negligence," it was incumbent upon defendants to explain their conduct in the operating room; their failure to do so mandates summary judgment). Accordingly, Plaintiffs' motion for summary judgment is denied.

With respect to Plaintiffs' motion for a ruling that an expert medical opinion is not required to prove negligence in this case, the Court notes that proof of medical malpractice ordinarily requires the submission of expert testimony, but such testimony is not required where a matter is "within the experience and observation of the ordinary jurymen from which they may draw their own conclusions and the facts are of such a nature as to require no special knowledge or skill." *Meiselman v. Crown Heights Hospital*, 285 N.Y. 389, 396, 34 N.E.2d 367, 370 (1941). Nevertheless, Plaintiffs have cited no legal basis for this Court to make an advance ruling on the

nature and quality of proof required in this case, and the Court declines to do so. The motion is therefore denied.

Turning to Defendants' motion to dismiss, Defendants first argue that Plaintiffs' claim for punitive damages must be dismissed because there is no evidence in the record to support such a claim. This Court agrees. Punitive damages are available in a medical malpractice action where "a defendant manifest[s] evil or malicious conduct beyond any breach of professional duty." *Dupree v. Giugliano*, 20 N.Y.3d 921, 924, 958 N.Y.S.2d 312, 314 (2012). "There must be aggravation or outrage, such as spite or malice, or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton." *Id.* (citation and quotation omitted). Where punitive damages are "unavailable" as matter of law, summary judgment dismissing such claim may be granted. *Graham v. Columbia-Presbyterian Med. Ctr.*, 185 A.D.2d 753, 756 (1st Dep't 1992); *see also Anzolone v. Long Is. Care Ctr., Inc.*, 26 A.D.3d 449 (2d Dep't 2006).

Nothing in the record before the Court even remotely suggests that the incident complained of in this case "transcend[ed] mere carelessness" or demonstrated any "reckless indifference" to Gasparre's medical care or the "high degree of moral culpability" required to justify an award of punitive damages. *Rey v. Park View Nursing Home. Inc.*, 262 A.D.2d 624, 692 N.Y.S.2d 686, 689 (2d Dep't 1999). As noted above, when Gasparre complained that the heat pack was too hot, it was removed and the alleged injury was treated. There is no evidence of any "willful or wanton conduct" or "deliberate intention to harm." *Colombini v. Westchester County Health Care Corp.*, 244 A.D.3d 712 (2d Dep't 2005); *also see Rey v. Park View Nursing Home. Inc.*, 262 A.D.2d 624 ("[p]unitive damages are warranted

where the conduct of the party being held liable evidences a high degree of moral culpability or where the conduct is so flagrant as to transcend mere carelessness"); *Spinosa v Weinstein,* 168 A.D.2d 32, 42 (2d Dep't 1991)(noting that there has been "no medical malpractice action in this State where a judgment for punitive damages has been sustained"). Plaintiffs' claim for punitive damages is therefore dismissed.

Defendants next move to dismiss Plaintiffs' claim for battery. In order to recover damages for battery founded on bodily contact, a plaintiff must prove there was bodily contact, that the contact was offensive, and that the defendant intended to make the contact without the plaintiffs consent. *Cerilli v. Kezis*, 16 A.D.3d 363, 790 N.Y.S.2d 714 (2d Dep't 2005). "Although the injury may be unintended, accidental, or unforeseen a plaintiff seeking to establish a civil battery need only prove that the defendant intentionally touched his person without his or her consent." *Villanueva v. Comparetto*, 180 A.D.2d 627, 629, 580 N.Y.S.2d 30 (2d Dep't 1992). As Defendants argue, since Gasparre consented to application of the heat pack, which was applied pursuant to a doctor's order for the purpose of alleviating his back pain, the contact cannot be considered "offensive." Plaintiffs' claim that the hospital staff applied a heat pack that was excessively hot gives rise to a claim of negligence and/or medical malpractice, not battery. *See, e.g., Moricky v Beth Israel Medical Center*, 198 A.D.2d 33, 604 N.Y.S.2d 721 (1st Dep't 1993)(laminectomy at a level of the thoracic spine different from that consented to by the patient sets forth a cause of action for medical malpractice, not one for battery). Plaintiffs' cause of action for civil battery is thus dismissed.

Finally, Defendants move to preclude Ted Milo, Plaintiffs' expert engineer, as a witness on the grounds that he is not qualified to offer his opinion in this medical malpractice case. This

application is denied as premature with leave to renew before the trial judge as appropriate.

The Court has considered all of the remaining arguments raised by the parties, and to the extent not specifically discussed above, finds them to be moot or without merit.

Accordingly, it is hereby:

ORDERED, that Plaintiffs' motion for summary judgment is denied; and it is further

ORDERED, that Defendants' motion for summary judgment is granted only to the extent that Plaintiffs' claim for punitive damages and their case of action for civil battery are dismissed; and it is further

ORDERED, that Counsel shall appear for a Settlement Conference in the Settlement Part of this Court before the Honorable Joan B. Lefkowitz, at the Hon. Richard J. Daronco Westchester County Courthouse, 111 Dr. Martin Luther King, Jr. Boulevard, Courtroom 1600, White Plains, New York on the **19th day of August, 2014, at 9:15 a.m.**

Dated: White Plains, New York
July 7, 2014

James W. Hubert
Acting Supreme Court Justice