

**Milroy v Cushner**

2016 NY Slip Op 31453(U)

July 15, 2016

Supreme Court, New York County

Docket Number: 805174/2014

Judge: Joan B. Lobis

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

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MELISSAH MILROY and MARK MILROY,

Plaintiffs,

-against-

Index No. 805174/2014

**Decision and Order**

FRED CUSHNER, M.D., INSALL SCOTT KELLY  
INSTITUTE FOR ORTHOPAEDICS AND SPORTS  
MEDICINES, THE JOHN N. INSALL FOUNDATION  
FOR ORTHOPAEDICS, INC., and LENOX HILL  
HOSPITAL,

Defendants.

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In this action, plaintiffs have discontinued against defendants Insall Scott Kelly Institute for Orthopaedics and Sports Medicines and the John N. Insall Foundation for Orthopaedics, Inc. In addition, in motion sequence number one, this Court granted defendant Lenox Hill Hospital's unopposed motion for dismissal. Thus, the only remaining defendant is Fred Cushner, M.D. Before the Court is Dr. Cushner's motion for summary judgment, which the Court denies in part for the reasons below.

Ms. Milroy first presented to Dr. Cushner on March 15, 2012. She was thirty-two years old at the time. Previously, she had a history of right knee problems and, among other things, had undergone four surgeries. Moreover, Ms. Milroy stated at deposition, she took pain medications as prescribed by East Coast Pain Management, and she continued to take medication for pain throughout the period in question. After obtaining x-rays during her March 29, 2012 appointment, Dr. Cushner suggested an evaluative arthroscopy and a biological resurfacing of the

knee as the first step in Ms. Milroy's treatment. Ms. Milroy underwent the procedure on May 8, 2012.

At her May 29 follow-up appointment, Ms. Milroy complained of pain. Dr. Cushner's notes state he told her she had severe arthritis in the right knee and would benefit from a total knee replacement (TKR). Dr. Cushner performed the TKR on November 2, 2012 at Lenox Hill. Ms. Milroy participated in physical therapy and, in addition, had monthly appointments with Dr. Cushner through February 12, 2013.

Ms. Milroy did not treat with Dr. Cushner again until May 14, 2013, when she presented with complaints of a constant, sharp pain in her knee. Dr. Cushner noted that Ms. Milroy's pain was disproportionately high given her physical state. He opined that her sensitization to her pain medication might be the reason for her disproportionate pain. As Ms. Milroy was four months pregnant, he noted, the best course of action was continued physical therapy and continued treatment with East Coast Pain Management. On June 20, 2013 Dr. Cushner prescribed additional physical therapy and noted that after Ms. Milroy's baby was born he would prescribe x-rays and evaluate treatment options.

Instead of returning to Dr. Cushner, Ms. Milroy presented to Dr. Howard Luks for treatment on September 16, 2013. Dr. Luks noted that the patient was not doing well following her November 2012 knee replacement, as she continued to suffer from instability and pain. Because of her pregnancy, he scheduled a follow-up appointment in November. At this appointment, Dr. Luks noted that there had been no improvement and that a potential option was an operation for

revision of her tibial tray and rebalancing of her polyethylene prosthetic. At her February 2014 appointment, Ms. Milroy stated she wanted to undergo the procedure. The operation took place on March 26, 2014.<sup>1</sup> Ms. Milroy's condition apparently improved somewhat though her dependence on pain medications remained a significant problem.

In this lawsuit, plaintiffs contend Dr. Cushner negligently performed the November 2012 knee replacement surgery in that he misaligned the tibial tray at greater than a four-degree angle, and negligently used a polyethylene spacer that was too small for Ms. Milroy's knee. As a result, plaintiffs state, the corrective surgery on March 26, 2014 was required and Ms. Milroy likely will need to undergo further revisions. In addition, the lawsuit asserts that due to Dr. Cushner's malpractice Ms. Milroy has developed an addiction to pain medications.

In his motion, Dr. Cushner states he did not deviate from the standard of care. He states that Ms. Milroy's knee problems began long before he treated her and her ongoing pain is not attributable to his actions. He says that he is not responsible for Ms. Milroy's dependence on pain medication as she began taking them long before she treated with him. He contends that he performed the arthroscopic surgery properly and provided adequate post-operative care. He states that though Dr. Luks called the procedure he performed a revision surgery, there was no revision or misalignment. Instead, he replaced the nine millimeter polyethylene spacer with a thirteen millimeter spacer because due to Ms. Milroy's pregnancy her ligament had loosened.

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<sup>1</sup> It appears that defendant mistakenly submitted the Hospital for Special Surgery's records from Ms. Milroy's 2012 operation at Exhibit S, which allegedly contains the records from the 2014 surgery.

The expert affirmation of Dr. Joseph Bosco, a New York licensed physician who is board certified in orthopedic surgery, supports Dr. Cushner's motion. He affirms, to a reasonable degree of medical certainty, that Dr. Cushner comported to the standard of care at all times and that his treatment did not cause or exacerbate Ms. Milroy's injuries. He states that the components he used were proper and his placement technique consistent was consistent with the standard of care. He adds that Dr. Cushner checked periodically throughout the procedure to ensure rotation was correct and flexion and extension gaps were balanced. He stresses that there is no evidence the doctor used the wrong-sized spacer and no evidence of misalignment in the post-operative x-rays. He argues that Dr. Luks surgery, performed sixteen months after Ms. Milroy's TKR, did not realign the prosthetics but replaced the spacer with a larger one; and he says neither the four millimeter difference in the spacer size nor the increased thickness of the second spacer is significant, and the change was necessitated by Ms. Milroy's pregnancy and delivery. He claims Dr. Cushner's acts did not cause or exacerbate Ms. Milroy's ongoing knee problems or her pain. Though she "had an imperfect result of her total knee replacement," *Bosco Aff.*, ¶ 53, this was not the result of any negligence. He alleges her pain is "likely most attributable to her ongoing addiction to opioid pain medications." *Id.*, ¶ 55.

Plaintiffs dispute Dr. Cushner's characterization of the incidents at issue. They point out that at deposition Dr. Cushner testified that Ms. Milroy's prior knee surgeries did not make the surgeries that he performed more complicated. They state that Dr. Luks did not want to remove Ms. Milroy's tibial component because of her age and his concern about bone preservation but that he noted a right rotational mismatch.

In support, they submit the expert affirmation of a doctor whose name has been redacted. The expert is licensed in New York, is board certified in orthopedic medicine, and is a practicing orthopedic surgeon. According to the expert, Dr. Cushner departed from the accepted medical standards and negligently performed the November 2, 2012 arthroplasty, and his departures contributed to Ms. Milroy's injuries and caused both the need for the March 26, 2014 "corrective surgery" and "the premature loosening of the tibial component which will require revision surgery." Exp. Aff. ¶ 5. The expert stresses that in a TKR, "it is important for proper alignment to be achieved with all of the components, so that the knee has good post-operative range of motion, stability, and proper alignment," *id.* ¶ 16, and that, contrary to Dr. Cushner's statements, the post-operative x-rays among other pertinent records show that the varus was more than four degrees – a deviation which contributed to Ms. Milroy's need for further surgery. The expert points out that at Ms. Milroy's January 20, 2014 appointment, Dr. Luks noted that her instability was still significant. The expert characterizes the March 26, 2014 surgery as a revision, and that the clicking of which Ms. Milroy persistently complained was likely due to the right rotational mismatch of the tibial component, which Dr. Luks noted in his operative report. Moreover, the fact that Dr. Luks had to replace Ms. Milroy's tibial spacer with a larger one, the expert states, indicates that Dr. Cushner did not test Ms. Milroy's knee for function and stability after he performed the November 2, 2012 TKR. This, the expert opines, is a deviation which and was a substantial factor in the need for revision surgery. The only reasons Dr. Luks did not remove the tibial component as well, the expert states, were Ms. Milroy's age and her need for future revision surgeries. The expert opines that Ms. Milroy will need two to three knee replacements in the future, and that absent Dr. Cushner's negligence she would have needed only one.

In reply, Dr. Cushner argues that because the expert failed to consider whether Ms. Milroy's pregnancy was the reason she needed a larger spacer, the expert's reasoning is fatally flawed. He states that because Dr. Bosco, his expert, stated that a five-degree varus was acceptable, plaintiff's expert's comment that the varus was more than four degrees does not point to a deviation. He argues that plaintiff's expert did not consider Ms. Milroy's prior knee surgeries and drug dependency in considering her injuries and ongoing pain, and therefore the expert's analysis is not credible. He states that plaintiff's expert's affidavit is conclusory and should be disregarded.

In considering a motion for summary judgment this Court reviews the record in the light most favorable to the non-moving party. E.g., Dallas-Stephenson v. Waisman, 39 A.D.3d 303, 308 (1st Dep't 2007). This Court may grant the motion if, upon all the papers and proof submitted, the Court is warranted as a matter of law in directing judgment. CPLR § 3212(b). For a defendant to establish entitlement to summary judgment in a medical malpractice case, 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). In making this claim, the movant must provide an expert opinion that is detailed, specific and factual in nature. E.g., Joyner-Pack v. Sykes, 54 A.D.3d 727, 729 (2d Dep't 2008). 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). Once a movant makes a prima facie showing, the burden shifts to the non-moving party "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). In particular, a plaintiff must submit a physician's affidavit stating the defendant departed from


accepted dental practice and this departure proximately caused the alleged injuries. See Roques, 73 AD.3d at 207. Where opposing experts disagree, courts deny summary judgment. Frye v. Montefiore Med. Ctr., 70 AD.3d 15, 25 (1st Dep't 2009).

The Court denies summary judgment as there are disputed issues of fact. As plaintiffs assert, questions of fact exist, primarily whether it was a deviation to use a nine millimeter spacer, what the varus was and whether it was a deviation, and whether Dr. Cushner's actions exacerbated Ms. Milroy's knee problems and will increase the number of surgeries she will need in the future. Dr. Cushner's attacks on plaintiff's expert affirmation go to the affirmation's weight and credibility. Plaintiffs do not contest Dr. Cushner's argument that he did not cause Ms. Milroy to become dependent on pain medications, however, and there is no evidence of this in the parties' submissions. The Court has considered the parties' remaining arguments and they do not alter its conclusion. Accordingly, it is

ORDERED that the motion is denied except to the extent of severing and dismissing the claim relating to Ms. Milroy's drug dependency.

Dated: *July 15, 2016.*

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JOAN B. LOBIS, J.S.C.