

Eckholm v Perrone

2017 NY Slip Op 32285(U)

October 24, 2017

Supreme Court, New York County

Docket Number: 805314/14

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS PART 11

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CARA ECKHOLM,

INDEX NO. 805314/14

Plaintiff

-against-

GIL G. PERRONE, DDS,

Defendant.

-----X

JOAN A. MADDEN, J.:

In this action seeking damages for alleged dental malpractice, defendant Gil G. Perrone, DDS moves for summary judgment dismissing the complaint against him. Plaintiff opposes the motion.

Background

This action, sounding in dental malpractice, res ipsa loquitur and lack of informed consent, concerns Dr. Perrone’s extraction of the left wisdom teeth of then 20 year-old Cara Eckholm (“Ms. Eckholm” or plaintiff) on March 16, 2012. Dr. Perrone’s extraction allegedly resulted in nerve damage, numbness, loss of taste, and perpetual dryness on the left side of plaintiff’s tongue. Plaintiff contends that Dr. Perrone departed from accepted dental and oral and maxillofacial standards of care in the treatment of plaintiff by (1) extracting her left wisdom teeth when they were clinically and radiographically asymptomatic; (2) improperly extracting her left mandibular third molar, thereby causing a lingual nerve injury, an injury that allegedly does not ordinarily occur in the absence of malpractice; (3) failing to diagnose her with a severed lingual nerve and to timely refer her to a specialist. In addition, plaintiff alleges that Dr. Perrone failed to obtain her informed consent prior to removing her left wisdom teeth including by

failing to disclose that the removal of her wisdom teeth could result in permanent nerve damage, and to inform her alternative treatment options were available to her, such as observation.

Plaintiff had a consultation with Dr. Perrone on March 16, 2012, for the extraction of her left side wisdom teeth (#16 and #17) (Motion, Ex. I). Dr. Perrone testified that plaintiff's visit was a straightforward referral to remove the two remaining wisdom teeth from a prescription requiring the removal of all four (Perrone EBT, at 13). According to Dr. Perrone, at the consultation, he gave Ms. Eckholm the choice of removing the wisdom teeth or not removing the teeth (Id., at 72). He also testified that he went through the risks of removal "line by line" on the consent form, and that he believed both parents were present when the consent form was discussed with plaintiff (Id.).

Dr. Perrone noted that according to plaintiff's chart, plaintiff had her right wisdom teeth removed a year and a half earlier by non-party Dr. Todd Berman, and the removal had resulted in "major complications" including "pain over a one and a half year period and bleeding once a week" (Id., at 17). According to Dr. Perrone, in view of this "prior bad experience," he "overly emphasized" the portion of the consent form discussing "swelling, bruising, discomfort in the area..." and circled "numbness and altered sensations in the teeth" (Id., at 74). Dr. Perrone also testified that he gave plaintiff the option of removal or non-removal (Id., at 72). Plaintiff testified that she believed the items he circled on the consent form were "the ones we discussed the most" (Plaintiff EBT, at 37). She also testified, however, that when Dr. Perrone discussed number six of the form, which discussed "permanent numbness" he said "don't worry this does not actually happen" (Id., at 38).

Plaintiff's father, Erik Eckholm, testified that he accompanied his daughter to the March

16, 2012 appointment with Dr. Perrone. He testified that there was no discussion of treatment options. (Eckholm EBT, at 10). When asked if there was discussion about the potential risks of wisdom teeth extraction, Mr. Eckholm responded it was “very routine and quick... he asked her to read a list of possible side effects and then went ahead. It was no extensive discussion.” (Id., at 11). He also testified that there was “no discussion of permanent damage being a risk.” (Id., at 12). As for the length of their conversation with Dr. Perrone, Mr. Eckholm stated that “[i]t couldn’t have been more than a few minutes” (Id., at 13). He also testified that he read the consent form and did not ask any questions (Id., at 12).

After plaintiff signed the consent form and a panorex x-ray was taken, Dr. Perrone administered sedation to plaintiff at 9:15 am and proceeded with the extraction procedures. There were no complications during the procedure (Perrone EBT at 89-90; Motion Exh. I). The sedation ended at 10:00 am and plaintiff was discharged at 10:45 am and was “awake and oriented” (Perrone EBT at 89-90).

Plaintiff returned to Dr. Perrone’s office on April 6, 2012, for a post-operative visit. Plaintiff’s sutures were removed and she was healing well without signs of infection (Motion, Exh. I). According to Dr. Perrone’s records, plaintiff’s left lateral border of the tongue was still numb and all options were discussed, including “[to] wait an monitor situation [and] microsurgical consult/intervention” (Id.). However, plaintiff testified that at the visit, Dr. Perrone did not discuss seeing a microsurgeon, and told her “not to worry and that the feeling would come back,” and “that it’s not possible that I wasn’t tasting anything, and that I should just wait and everything would feel normal soon” (Plaintiff EBT, at 52). She also testified that Dr. Perrone was “very insistent that nothing was wrong” (Id.).

Plaintiff returned to see Dr. Perrone on May 29, 2012, which was two and a half months after the surgery and still had complaints of numbness (Plaintiff EBT at 53). Plaintiff testified that Dr. Perrone once again told her that nothing was wrong and that she should wait, but later referred plaintiff to Dr. Richard Elias for a microsurgical consult (Id. at 56). Plaintiff saw Dr. Elias and Dr. Salvatore Russiolo for microsurgical consultations (Motion, Exhs. K and L). Both Dr. Elias and Dr. Russiolo confirmed plaintiff's complaints were consistent with lingual nerve injury. According to plaintiff's father, when Dr. Elias said that "the lingual nerve was severed, Cara (i.e. plaintiff) and I were both kind of in a state of shock because we never imagined something like that could be involved in this, getting her wisdom teeth out, and Dr. Perrone had never hinted that this was a possibility. So this was the first time I have ever heard of that." (Eckholm EBT at 21).

Plaintiff testified that her understanding regarding the timing of the microsurgery from Dr. Elias was that "if I opted to have [the surgery], I should try to do it within the six month window following the surgery, preferably sooner." (Plaintiff EBT at 52). She also testified that Dr. Ruggiero told her that she "should have been sent to see a specialist sooner and Dr. Perrone should have advised her that way." (Id., at 75). Plaintiff opted not to undergo corrective surgery after discussing with Dr. Ruggiero the possible results of the surgery, including that there "was only a 70 percent chance of restoring protective sensation in her tongue, not full sensation", and "a 40 percent chance to restore some taste, [which] might not be the same taste that [she has] on the other side of [her] tongue." (Id., at 65). She also testified that she did not undergo the surgery because "one of the risks is perpetual pain" and due to her bad experiences with surgery (Id). Plaintiff testified that she still experiences numbness, lack of taste, and dryness on a day-to-

day basis.

In support of his summary judgment motion, Dr Perrone submits the expert affidavit of a dentist licensed to practice in the State of New York, who completed post-graduate training in oral and maxillofacial surgery whose name has been redacted (hereinafter “defendant’s expert”).

After reviewing the Bill of Particulars, the deposition transcripts, and Dr. Perrone’s records and all other relevant medical records, the expert opines, to a reasonable degree of dental and oral maxillofacial surgery certainty, that Dr. Perrone “performed the extraction of teeth #16 and #17 properly” (Defendant’s Expert Aff. ¶’s 4, 10). He also states that the extraction of the left side wisdom teeth upon referral from plaintiff’s orthodontist was “entirely appropriate...despite them being asymptomatic” (Id. ¶ 3).

Defendant’s expert further opines that “taking a cone beam CT scan, ultrasound, or other radiologic study would not have been useful in identifying the lingual nerve,” and that “plaintiff’s claimed injuries to the left side of her tongue could not have been caused by the negligence of Dr. Perrone during the procedure” (Id. ¶’s 5, 6). He also opines that “there are multiple non-negligent reasons why permanent lingual nerve damage can occur during an extraction procedure, including the extraction of the tooth itself because of its proximity to the nerve and the positioning of the lingual nerve [and that] [t]he lingual nerve is sometimes located in a position that is anatomically uncommon and even in the same person is not identical on the left and right sides” (Id. ¶ 7).

Defendant’s expert also states that “[p]ermanent tongue numbness is a known risk of the procedure, which is noted in the written consent and does not suggest negligence on the part of Dr. Perrone [and that he] did not see anything on the xray, chart or testimony to indicate any

departure from standard and accepted practice.” The expert further opines that it was appropriate for Dr. Perrone to wait before he referred plaintiff to a specialist for lingual paresthesia (i.e. tingling and/or numbness). The expert notes that according to the physical examination performed by defendant’s doctor, Dr. Jay Goldsmith (Motion, Exh. G), plaintiff had a “partial tongue paresthesia” and that the time frame for referral to a specialist was three to six months of the procedure, and that plaintiff saw Dr. Elias on May 30, 2012 and Dr. Ruggiero on June 1, 2012, or about 2.5 months after the procedure.

As for informed consent, defendant’s expert opines that based on Dr. Perrone’s deposition testimony, the risks and benefits of the procedure were discussed, and that “plaintiff was appropriately advised of risks of the procedure and did not lack informed consent” (Id ¶ 4). He also notes that plaintiff “signed a written consent to undergo the procedure and it was certainly reasonable for plaintiff to undergo this procedure” (Id. ¶ 10).

In opposition, plaintiff relies on the affidavit of an expert whose name has been redacted (hereinafter, “plaintiff’s expert”), and who states that he is a dentist licensed to practice in the State of New York; completed a residency in oral surgery in 1971 and is a Diplomate of the American Board of Oral and Maxillofacial surgery since 1974. He states that his opinion is based upon his review of the relevant medical records, the reports of Dr. Jay Goldsmith, and the affidavit of the dental expert and panoramic x-rays of Ms. Eckholm. He opines that it is his opinion to a reasonable degree of dental and oral maxillofacial certainty that, Dr. Perrone departed from the applicable standard of care “by extracting plaintiff’s left wisdom teeth inasmuch as the teeth were clinically and radiographically asymptomatic” (Plaintiff’s Expert Aff. ¶ 6(i)). Specifically, he states that “[s]urgical extraction of wisdom teeth is indicated if the

teeth are causing symptoms such as recurrent pain, swelling, infection or a relapse of prior orthodontic treatment [and] ...is only indicated if there is some positive clinical or radiographic finding” (Id. ¶11). The expert notes that “when Ms. Eckholm presented to Dr. Perrone for evaluation, her left wisdom teeth were asymptomatic [and]... were not causing her any pain or swelling... [n]or was there any clinical or radiographic evidence that her impacted wisdom teeth were causing her recurrent infections or a relapse of any prior orthodontic treatment” (Id. ¶12).

With respect to the next departure, the expert opines that to a reasonable degree of certainty that Dr. Perrone “departed from good and accepted dental and oral and maxillofacial standards of care by injuring plaintiff’s lingual nerve during the course of extracting her wisdom teeth,” and that “injury to the lingual nerve does not ordinarily occur in the absence of malpractice” (Id. ¶ 13). He further states that “[i]n order to avoid injury to the lingual nerve, an oral surgeon must limit the field of surgery to the buccal (cheek) side of the alveolar crest (the top portion of the bone containing tooth sockets) and not place any sharp instrumentation on the lingual (tongue) half of the alveolar crest or lingual plate of bone,¹ [and] the surgeon must carefully extract the tooth using controlled force so as not to damage any of the adjacent structures” (Id.).

He opines that “injury to the lingual nerve does not ordinarily occur in the absence of malpractice,” and that injury to the lingual nerve “occurs if the oral surgeon places instruments outside the field of surgery, uses excessive force in the removal of the tooth or fails to protect the lingual plate adjacent to the impacted tooth.” He notes that “[i]njury to Ms. Eckholm’s lingual nerve is conclusive evidence that Dr. Perrone deviated for the accepted standard of care in one of

¹ The lingual plate is the side of the lower jaw tooth socket nearest the tongue.

these respects, i.e. by either placing surgical instrumentation outside the field of surgery, using excessive force in the removal of the left wisdom teeth or perforating the lingual plate.” He further notes that defendant’s expert failed to provide evidence that Ms. Eckholm’s lingual nerve was located in an anatomically abnormal location to support his statement that injury to the lingual nerve can occur due to the positioning of the nerve (Id. ¶14).

As for informed consent, plaintiff’s expert further opines to a reasonable degree of oral and maxillofacial certainty, that Dr. Perrone failed to obtain Ms. Eckholm’s informed consent inasmuch as he failed to disclose that the extractions were elective and that alternative treatments were available to the patient (Id. ¶15). Plaintiff’s expert also states that “[a]lthough paragraph six of Dr. Perrone’s Consent for Anesthesia and Extraction of Teeth form disclosed the risk of tongue numbness and altered sensation, it did not advise Ms. Eckholm that she could take a wait-and-see approach without increasing her surgical risk, an alternative treatment option that was available to her.” He further opines that “a reasonably prudent patient in Ms. Eckholm’s position would not have elected to have her asymptomatic left wisdom teeth removed if given appropriate information,” but rather, “if informed that there is no objective medical indication to remove one’s wisdom teeth and that observation is an available treatment option, a reasonable prudent patient will elect observation instead of surgery” (Id. ¶ 16).

As for causation, plaintiff’s expert opines that “there is no question the surgical extraction of Ms. Eckholm’s left wisdom teeth was a substantial factor in causing her injury,” and that “Dr. Perrone’s failure to obtain informed consent was a substantial factor causing her injury.” He states that “[a]ccording to Dr. Ruggiero, Ms. Eckholm sustained a traumatic neuropathy of the lingual nerve. This was caused by the extraction of the left wisdom teeth and

is responsible for the numbness and loss of taste Ms. Eckholm presently experiences on her tongue” (Id. ¶ 17).

In reply, defendant submits a further affirmation from his expert who opines that “it is within the parameters of the standard of care for oral surgeons to extract asymptomatic wisdom teeth [noting] there are numerous articles supporting the practice of removing asymptomatic wisdom teeth”² (Defendant’s Reply Expert Aff. ¶ 4). He further notes that plaintiff’s expert failed to state that not removing the wisdom teeth could lead to problems later in life. He reiterates that there are multiple non-negligent reasons for the lingual nerve to be damaged during the procedure, including the extraction itself³ (Id. ¶ 8).

With respect to the issue of informed consent, he opines that plaintiff provided informed consent based on Dr. Perrone’s testimony that the risks and benefits of the procedure were discussed, including the option of non-removal of plaintiff’s wisdom teeth (Id. ¶9). He also opines that there “would be no reason for the wait-and-see approach alternative to be referenced in the consent form” because “at the time of the signing of the consent form, the patient had already chosen the surgery option” (Id. ¶10).

Discussion

A defendant moving for summary judgment in a dental 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 [dental] practice or that any

² In support of his opinion, defendant’s expert provided the article titled “Removal of Asymptomatic Third Molars: A Supporting View” by Louis K. Rafetto, DMD (Defendant’s Reply in Affirmation, Exhibit C).

³ In support of his opinion, defendant’s expert provided the article titled “The Relationship of the Lingual Nerve to the Mandibular Third Molar Region: An Anatomic Study” by M. Anthony Pogrel, Andrew Renaut, Brian Schmidt, and Awnie Anmar (Id., Exhibit B).

departure was not the proximate cause of the injuries alleged.” Roques v. Nobel, 73 AD3d 204, 206 (1st Dept 2010) (citations omitted). To satisfy the burden, a defendant 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 NY2d 320, 324 (1986) (citation omitted). Specifically, in a dental 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 [an expert in dental care] attesting that the defendant departed from accepted [dental] practice and that the departure was the proximate cause of the injuries alleged. Roques v. Nobel, 73 AD3d at 207 (internal citations omitted); see also Koss v. Bach, 74 AD3d 472, 472 (1st Dept 2010).

With respect to the first departure, related to extracting plaintiff’s left wisdom teeth when they were asymptomatic, the defendant met his burden based on his expert’s opinion that extracting asymptomatic teeth is within the parameters of the standard of care for oral surgeons. However, plaintiff has controverted this showing based on the opinion of her expert that extracting wisdom teeth is only appropriate when the teeth are symptomatic or when there is relapse of prior orthodontic treatment indicated by some positive clinical or radiographic finding, and that plaintiff’s injuries would not have occurred if there had been no extraction. Accordingly, there is a triable issue of fact as to the first departure.

With respect to the second departure, related to causing injury to plaintiff's lingual nerve, defendant's expert affidavit sufficiently establishes that defendant met the standard of care based on his expert's opinion that taking a CT scan is not required, and there are non-negligent reasons why permanent damage to the lingual nerve could occur during an extraction of wisdom teeth.

As to whether plaintiff has controverted this showing, it should be noted that while there is no direct proof of defendant's negligence here, the doctrine of *res ipsa loquitur*, has been applied to medical malpractice actions "to allow the factfinder to infer negligence from the mere happening of an event." States v. Lourdes-Hospital, 100 NY2d 208, 210-211 (2003). There are three prerequisites to invoking the doctrine. Kambat v. St Francis, 89 NY2d 489, 494 (1997). "First, the event must be of a kind that ordinarily does not occur in the absence of someone's negligence; second, it must be caused by an agency or instrumentality within the exclusive control of the defendant; and third and last, it must not have been due to any voluntary action or contribution on the part of the plaintiff." Id.; see also, James v. Wormuth, 21 NY3d 540 (2013).

Here, the doctrine is potentially applicable based on the plaintiff's expert's opinion that the injury to the lingual nerve does not ordinarily occur in the absence of malpractice and, in particular, that injury to the lingual nerve only occurs if the oral surgeon is negligent by placing instruments outside the field of surgery, uses excessive force, or fails to protect the lingual plate adjacent to the impacted tooth. See States v. Lourdes-Hospital, 100 NY2d at 212 (holding that expert evidence can be properly used to assist the factfinder "to reach a conclusion that the occurrence would not normally take place in the absence of negligence"). Moreover, the record is sufficient to at least raise an issue of fact as the exclusive control of the defendant, and there is no evidence that plaintiff's injuries were caused by her voluntary action. Accordingly, triable

issues of fact exist as to defendant's liability for causing injury to plaintiff's lingual nerve.

With respect to the third departure, related to defendant's alleged failure to timely diagnose the severed lingual nerve and to timely refer plaintiff to a specialist, defendant's expert sufficiently establishes that there are no departure in this regard, particularly as the record shows that plaintiff saw a specialist less than three months after the wisdom tooth extraction. Moreover, plaintiff's expert has failed to rebut this showing. In any event, as plaintiff decided not to have surgery, she cannot demonstrate that any alleged departure in this regard was a proximate cause of her injuries.

The court will next address plaintiff's claim of lack of informed consent, which is based on allegations that defendant (1) failed to warn her that the surgery could result in permanent nerve damage to her tongue, and (2) failed to inform her that as an alternative to removing her wisdom teeth, she could take a wait and see approach.

"Lack of informed consent means the failure of the person providing the professional treatment or diagnosis to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable ... dental ... practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation." Public Health Law § 2805-d(1). 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, or alternatives of the treatment rendered. Koi Hou Chan v. Yeung, 66 AD3d 642, 643 (2d Dept 2009); see also, Smith v. Cattani, 2 AD3d 259, 260 (1st Dept 2003)(defendant entitled to summary judgment where "documentary evidence establishes that before each of plaintiff's seven surgeries, defendant notified him of the

reasonably foreseeable risks and benefits of the surgery, as well as alternatives to the proposed treatment”).

Once defendant’s burden on claim based on the lack of informed consent, in order to make out a claim for lack of informed consent, plaintiff must demonstrate that (1) the defendant doctor failed to fully apprise her of the reasonably foreseeable risks of the procedure, (2) a reasonable person in plaintiff’s position, fully informed, would have opted against the procedure. Orphan v. Pilnik, 15 NY3d 907, 908 (2010), citing Public Health Law § 2805–d (1)(3); see Eppel v. Fredericks, 203 AD2d 152 (1st Dept.1994). “Expert medical testimony is required to prove the insufficiency of the information disclosed to the plaintiff.” Orphan v. Pilnik, 15 NY3d at 908.

Here, defendant has met his burden based on the opinion of his expert that the plaintiff was informed of the risks and alternatives to treatment as substantiated by the signed written consent form indicating the permanent numbness was a risk of the surgery which “in rare cases ...may be permanent,” defendant’s testimony that he advised plaintiff (and her father) of potential risks and overly emphasized certain risks, such as the risk of numbness and altered sensation, in light of plaintiff’s prior bad experience with the removal of her right wisdom teeth. Defendant also testified that he gave plaintiff the option of removal or non-removal of the wisdom teeth, although the court notes that “Alternate treatment” portion of the consent form is blank.

In opposition, plaintiff has submitted sufficient proof as supported by her expert affidavit, to controvert defendant’s showing with respect to that part of the lack of informed consent claim regarding the failure to advise plaintiff she could take a wait-and-see approach to

removing her left wisdom teeth without increasing her surgical risk. Moreover, the expert states that a reasonably prudent person in plaintiff's position would not have elected to remove asymptomatic left wisdom teeth without appropriate information. In contrast, plaintiff's expert acknowledges that the written consent form was sufficient to disclose the risk of permanent numbness and loss of sensation, and there is no evidence that had plaintiff been warned of this risk that she would not have had the surgery, defendant is entitled to summary judgment with respect to that aspect of the lack of informed consent claim.

Conclusion


In view of the above, it is

ORDERED that defendants' motion for summary judgment is granted only to the extent of dismissing (i) that part of plaintiff's medical malpractice claim based on the alleged departure relating to the failure to timely diagnose the severed lingual nerve and to timely refer plaintiff to a specialist, and (ii) that part of plaintiff's lack of informed consent claim which is based on the defendant's alleged failure to inform plaintiff that the surgery could result in permanent nerve damage to her tongue; and is further

ORDERED that the summary judgment motion is otherwise denied and the remainder of the action shall continue; and it is further

ORDERED that the parties shall appear in Part 11, room 351, 60 Centre Street, New York, NY on December 7, 2017 at 11:20 am for a pre-trial conference.

DATED: October 27, 2017



J.S.C.

HON. JOAN A. MADDEN
J.S.C.