

Zhuo Wei Li v Cui

2019 NY Slip Op 31780(U)

June 19, 2019

Supreme Court, New York County

Docket Number: 805086/14

Judge: Joan A. Madden

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

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ZHUO WEI LI and YAN HUA WANG,

INDEX NO. 805086/14

Plaintiffs,

-against-

JAMES J. CUI M.D. aka JIAN CUI M.D., JAMES J. CUI
DERMATOLOGY P.C., METRO TRUE CARE MEDICAL
P.C., JOHN DOE DEFENDANTS MDS 1-10, and JANE
DOE R.N. DEFENDANTS 1-10,

Defendants.

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JOAN A. MADDEN, J.:

In this action for medical malpractice, defendants Jian Cui, M.D. s/h/a James J. Cui M.D. aka Jian Cui M.D. and Jian Cui, Dermatology, P.C. s/h/a James J. Cui Dermatology, P.C. (collectively "defendants"), move for an order pursuant to CPLR 3212 granting summary judgment dismissing the action as against them. Plaintiffs oppose the motion.

On September 29, 2011, plaintiff Zhuo Wei Li ("plaintiff"), who was 51 years old at the time, saw Dr. Jian Cui, a dermatologist, for treatment of warts. Dr. Cui diagnosed 15 inflamed warts on both hands and recommended removal by a cryosurgery procedure in which liquid nitrogen is sprayed on the warts. Dr. Cui's physician's assistant Keyan Tang performed the procedure that day, and sprayed liquid nitrogen on all 15 warts. Plaintiff testified that after the procedure, he complained to P.A. Tang and the employees at the front desk, that the treatment was "very painful," he "didn't feel well" and was dizzy. Plaintiff testified that when he left Dr. Cui's office, which is located on the fourth floor, he was feeling pain, discomfort and weakness. Plaintiff entered the elevator to leave the building, and while riding in the elevator, he fainted,

fell and hit his head, sustaining a serious neck injury.

Plaintiff was taken via ambulance to Bellevue Hospital Center. The admission notes state that after “cryo treatment to remove warts . . . he was in significant pain and then felt lightheaded and syncopized, striking his head on the elevator wall/floor” and “[i]mmediately after the fall, patient noticed neck pain and bilateral hand weakness.” Plaintiff remained in the hospital until October 7, 2011, and was in rehabilitation from October 7 to 26, 2011. He was hospitalized again at Bellevue Hospital from November 14 -16, 2011, for dizziness, lightheadedness, decreased oral intake and epigastric pain. On January 10, 2012, plaintiff underwent an anterior cervical discectomy and fusion at Mount Sinai Medical Center.

On March 14, 2014, plaintiffs commenced the instant action, asserting claims for medical malpractice, negligent hiring, lack of informed consent and a derivative claim for loss of services. Plaintiffs’ expert opines that the pain from the cryosurgery procedure triggered a vasovagal reaction, in which the heartbeat slows and blood pressure drops, and as a result plaintiff fainted (synopal episode) in the elevator. The expert opines that defendants departed from the standard of care by failing to: 1) obtain, document and heed plaintiff’s vital signs prior to the procedure; 2) properly assess and monitor plaintiff after the procedure; 3) timely and appropriately respond to plaintiff’s complaints of pain, dizziness and weakness after the procedure; 4) timely diagnose and respond to plaintiff’s vasovagal reaction to the procedure; and 5) prevent him from falling. Plaintiff’s expert opines that such departures caused plaintiff to sustain severe injuries, including a cervical fracture, traumatic spinal cord injury, severe paralysis in his upper extremities, weakness in his lower extremities, central cord syndrome and cervical myelopathy.

A defendant moving for summary judgment in a medical 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 medical practice or that any departure was not the proximate cause of the injuries alleged.” Roques v. Nobel, 73 AD3d 204, 206 (1st Dept 2010). To satisfy the burden, defendant must present expert opinion testimony that is supported by the facts in the record, addresses the essential allegations in the complaint or the bill of particulars, and is detailed, specific and factual in nature. Id.; see Joyner-Pack v. Sykes, 54 AD3d 727, 729 (2nd Dept 2008). Expert opinion must be based on facts in the record or those personally known to the expert, and the opinion of defendant’s expert should specify “in what way” the patient’s treatment was proper and “elucidate the standard of care.” Ocasio-Gary v. Lawrence Hospital, 69 AD3d 403, 404 (1st Dept 2010). Defendant’s expert opinion must “explain ‘what defendant did and why.’” Id. (quoting Wasserman v. Carella, 307 AD2d 225, 226 [1st Dept 2003]).

“[T]o avert summary judgment, plaintiff must demonstrate that the defendant did in fact commit malpractice and that the malpractice was the proximate cause of the plaintiff’s injuries.” Roques v. Nobel, supra at 207. To meet this burden, “plaintiff must submit an affidavit from a medical doctor attesting that the defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged.” Id. Where the parties’ conflicting expert opinions are adequately supported by the record, summary judgment must be denied. See Frye v. Montefiore Medical Center, 70 AD3d 15 (1st Dept 2009); Cruz v. St Barnabas Hospital, 50 AD3d 382 (1st Dept 2008).

Defendants have established prima facie entitlement to judgment as a matter of law based on the expert affirmation of Dr. John F. Romano, M.D., a board certified dermatologist, who reviewed the bills of particulars, the depositions, and medical records from Cui Dermatology and Bellevue Hospital. Dr. Romano opines that there is no standard of care to “suggest” that 15 warts were “too many” to treat in one visit, and it is “routine” for a dermatologist to try to treat all warts in a single visit, since multiple treatments may be needed to eliminate the warts successfully.

Dr. Romano also opines that it is within the standard of care for a physician’s assistant to perform cryotherapy treatment for warts, and a “written consent form from the patient prior to cyotherapy treatment for 15 warts located on the hands and bilateral fingers is not the standard of care.” He avers that the standard of care is to “explain” the treatment to the patient and that “pain and discomfort would be involved in the procedure.”

Dr. Romano further opines that P.A. Tang under the “supervision of Dr. Cui properly and appropriately performed” the procedure, and that a “vasovagal reaction, if indeed that is what caused Mr. Li’s fall in the elevator, is unusual after cryotherapy but can occur after various procedures, including those that involve needle sticks.” He opines that a “post procedure discussion was held with Mr. Li, including the fact that blisters may form and if so, Mr. Li was to keep the area clean.”

Dr. Romano opines that a patient’s vital signs, including blood pressure are “not routinely” taken following cryotherapy for 15 warts unless the patient “makes some sort of complaint of not feeling well to the medical practitioner.” He opines that “pain from freezing of warts, may last for several minutes,” but the pain “always begins during the treatment, never a

minute or two later.” He states that “while the early signs and symptoms of a syncopal episode may last for seconds to one or two minutes, plaintiff’s episode “appears to have commenced well after he made a further appointment and left the office to wait for an elevator and enter the elevator . . . a period of time considerably more than a few minutes.” He opines that even if plaintiff had a “pain induced” synopal episode, “given the fact that Mr. Li did not communicate any signs or symptoms or prior medical history to anyone” at Dr. Cui’s practice, defendants cannot be held responsible for “claims that Mr. Li fainted after he left the practice.”

Dr. Romano further opines that plaintiff was “properly informed” that cryotherapy would “involve pain and/or discomfort,” he “did not ask for the procedure to stop nor make any complaints during the procedure” or when he was in the “procedure room,” and he did not ask for “any assistance” when he was making the follow-up appointment with Dr. Cui’s staff. He opines that it was “totally unforeseen to Dr. Cui or to his employees that Mr. Li would afterwards have a syncopal episode,” and that they acted within the standard of care in “their professional involvement” with plaintiff, and that such “involvement neither caused nor contributed to nor was proximately related to the injuries alleged in the Bills of Particulars.”

In opposition, plaintiff submits a name-redacted affirmation from a physician who is board certified in internal medicine, endocrinology/metabolism and emergency medicine, and who states that as a “practicing physician, I am very familiar with the standards of care that apply to vasovagal reactions and to vasovagal syncope, including the prevention of, signs and symptoms of, and proper responses to, the same.” Plaintiff’s expert reviewed Dr. Cui’s medical records, the Bellevue Hospital and Mount Sinai Medical Center records, the bills of particulars, the depositions, and the affirmation of defendants’ expert.

Plaintiff's expert explains that the vagus nerve is the "longest and most complex cranial nerve in the body," running from the "brain stem to the abdomen and has both sensory and motor functions," and that it helps to "regulate many critical aspects of human physiology, including heart rate and blood pressure." He explains that a vasovagal reaction occurs when the "vagus nerve overreacts to stimuli, causing a sudden drop in both heart rate and blood pressure. . . . [and] the resulting lack of blood to the brain can cause syncope (fainting)." The expert states that vasovagal reactions are commonly triggered in medical offices by "severe pain and needle sticks," and the signs and symptoms include a decrease in heart rate and blood pressure, pallor, lightheadedness, weakness, dizziness, pain and discomfort. The expert opines that once those signs and symptoms appear, the standard of care requires the medical professional to instruct the patient to "immediately sit or lie down in a safe place, give the patient water, monitor the patient's condition including his vital signs, and have the patient remain in place until the symptoms subside." He opines that vasovagal syncope or fainting can be "very dangerous and even life threatening, because as was the case with Mr. Li, syncopal patients can fall and sustain serious injuries."

Plaintiff's expert opines that in view of the "particular sensitivity of the hands," the removal of 15 hand warts "at once can be extremely painful." The expert opines that after the procedure, plaintiff "experienced pain, dizziness, discomfort and weakness – symptoms which Dr. Cui and P.A. Tang both acknowledged are signs and symptom of vasovagal reaction," and that [b]ased on these factors . . . Mr. Li suffered a vasovagal reaction as a result of the pain of the cryosurgery." He further opines that defendants and their employees "should have recognized Mr. Li's complaints as signs and symptoms of a vasovagal reaction and that their failure to timely

do so” deviated from the standard of care. Plaintiff’s expert notes that defendants’ expert, Dr. Romano, offers no “alternative medical explanation” for plaintiff’s syncopal event, and asserts only that the “syncopal episode appears to have commenced well after” he left Dr. Cui’s office. Plaintiff’s expert emphasizes that Dr. Romano “completely ignores” plaintiff’s testimony about the complaints he made before leaving Dr. Cui’s office and that he continued to feel pain, discomfort, and weakness while waiting for the elevator.

Plaintiff’s expert opines that defendants and their employees further deviated from the standard of care in failing to obtain and record plaintiff’s vital signs, and that the failure to do so “proximately contributed to their failure to timely diagnose and respond to Mr. Li’s vasovagal reaction and thus contributed to his fall.” The expert opines that in 2011, the standard of care required medical practices to obtain “basic vital signs (blood pressure, pulse rate, temperature and respiration rate) for all new patients . . . [and] for all patients for whom medical procedure was to be performed,” so as to set a “baseline” to properly assess the patient’s condition and direct treatment,” and to monitor a patient before and after treatment to insure the patient is “safe and in fact stable after a procedure.” The expert opines that it was “particularly important” for Dr. Cui and his practice to obtain plaintiff’s vital sign given his complaints of pain, dizziness and discomfort after the procedure, and had defendants done so, “they would more likely than not have found that Mr. Li’s heart rate and blood pressure had dropped dramatically and would have confirmed that vasovagal interventions were urgently required.”

Plaintiff’s expert addresses Dr. Romano’s opinion that for cryosurgery of 15 warts, a patient’s vital signs are not “routinely taken unless the patient makes some sort of complaint of not feeling well to the medical practitioner.” Plaintiff’s expert points out that the “record

evidence” establishes that plaintiff “did make complaints of not feeling well after the cryosurgery,” as he complained to the office staff that his hands were “very painful,” and he had discomfort and weakness, felt dizzy and “did not feel well.” Plaintiff’s expert concludes that Dr. Romano therefore “agrees with my opinion that defendants should have obtained” plaintiff’s vital signs after the procedure. Plaintiff’s expert also states that Dr. Romano’s opinion that there was no foreseeability on defendants’ part that plaintiff would faint, is based on the same “erroneous assertion” that plaintiff made no complaints “consistent with a vasovagal reaction” after the procedure. Plaintiff’s expert states that defendants’ denial that plaintiff made those complaints is “belied by the fact” that plaintiff “did faint and was ultimately diagnosed with a vasovagal reaction and the fact that defendants’ expert has not offered any alternative medical explanation.” Plaintiff’s expert opines that in view of the complaints plaintiff communicated before he left defendants’ office, plaintiff’s syncopal event was foreseeable to defendants.

Plaintiff’s expert also opines that “record evidence” shows that defendants and their staff departed from the standard of care in failing to properly assess and monitor plaintiff after the procedure, in failing to timely diagnose and respond to his vasovagal reaction and in failing to prevent his fall. The expert avers that in 2011, the standard of care required medical providers to “assess, monitor and document a patient’s condition after a cryosurgery procedure before permitting the patient to leave the office to ensure that the patient was not suffering any aftereffects of the procedures,” and if a patient made complaints consistent with a vasovagal reaction such as lightheadedness, weakness, dizziness, pain, or discomfort, the standard of care required medical providers to immediately” intervene and “instruct the patient to sit or lie down in a safe place, giving the patient water, monitoring the patient’s condition (including his vital

signs), and having the patient remain in place until the symptoms subside.” The expert points out that defendants’ witnesses did not testify that they performed an assessment of plaintiff’s after the procedure, or ask him any questions about his complaints, and that Dr. Cui testified that he did not have a custom and practice of asking patients whether they were in pain after a cryosurgery procedure.

Based on the foregoing, plaintiff has made a sufficient showing to raise triable issues of fact. The opinions of defendants’ expert are premised on the assumption that plaintiff did not tell P.A. Tang or defendants’ employees that he was pain, lightheaded and dizzy, and therefore they had were not aware that he was suffering from a vasovagal reaction. On the other hand, the opinions of plaintiff’s expert are based on the assumption that plaintiff did communicate those complaints to defendants and their employees, and their failure to recognize and respond to the symptoms and signs of a vasovagal episode resulted in plaintiff’s fainting in the elevator. The experts’ conflicting assumptions are based the parties’ conflicting testimony. Specifically, defendants’ witnesses testified that plaintiff made no complaints after the procedure. Plaintiff, however, testified that he complained to P.A. Tang and the employees at the front desk that the treatment was “very painful” and he had “discomfort,” “didn’t feel well” and was dizzy. The experts likewise offer differing opinions as to whether the standard of care required defendants to take plaintiff’s vital signs before and/or after the procedure, and whether the removal of 15 inflamed warts from plaintiff’s hands in one cryosurgery treatment departed from the standard of care. Thus, given the parties’ conflicting testimony, as well as the conflicting expert opinions, defendants are not entitled to summary judgment. See Vega v. Restani Construction Corp, 18 NY3d 499 (2012); Evans v. Acosta, 169 AD3d 438 (1st Dept 2019).

In reply, defendants object that plaintiffs' expert is not qualified to render an opinion as to a dermatological procedure. "[A] physician need not be a specialist in a particular field if he nevertheless possesses the requisite knowledge necessary to make a determination on the issues presented." Joswick v. Lenox Hill Hospital, 161 AD2d 352 (1st Dept 1990); see Robertson v. Greenstein, 308 AD2d 381 (1st Dept 2003). Even though plaintiff's medical expert is not a dermatologist, in light of the expert's credentials as an internist and endocrinologist, and his/her experience in emergency medicine and knowledge acquired through his/her practice with the standards of care that apply to vasovagal reactions and the proper responses to vasovagal episodes, a sufficient foundational basis exists for the expert to offer an opinion as to the propriety of defendants' care of plaintiff. See Williams -Simmons v. Golden, 71 AD3d 413 (1st Dept 2010); Robertson v. Greenstein, 308 AD2d 381 (1st Dept 2003), lv app dism 2 NY3d 759 (2004); Joswick v. Lenox Hill Hospital, *supra*.

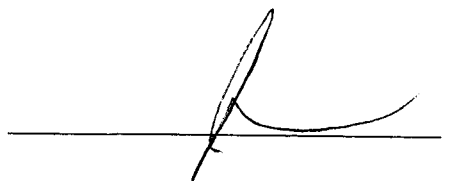
Accordingly, it is

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

ORDERED that the parties shall appear for a pre-trial conference on July 25, 2019 at 11 a.m. in Part 11, Room 351 at 60 Centre Street.

DATED: June 19, 2019

ENTER:


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