

**Smith v Cooper**

2019 NY Slip Op 34315(U)

December 4, 2019

Supreme Court, Westchester County

Docket Number: Index No. 56422/2017

Judge: William J. Giacomo

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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  
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.**

----- x  
JACK SMITH and MARILYN SMITH,  
Plaintiffs,

– against –

Index No. 56422/2017

HOWARD A. COOPER, M.D., and WESTCHESTER  
MEDICAL CENTER,  
Defendants.

**DECISION & ORDER**

----- x  
In an action to recover damages for medical malpractice, the defendant Howard A. Cooper, M.D. moves for summary judgment dismissing the complaint, pursuant to CPLR 3212, and for sanctions pursuant to 22 NYCRR Part 130-1.1:

**Papers Considered**

1. Notice of Motion/Affirmation of Thomas M. Grove Esq./Exhibits A-N;
2. Affirmation in Opposition of Mitchell J. Sassower, Esq./Exhibit A;
3. Reply Affirmation of Thomas M. Grove, Esq.

**Factual and Procedural Background**

Plaintiffs commenced this action against Howard A. Cooper, M.D. and Westchester Medical Center (“WMC”) for medical malpractice, lack of informed consent, and loss of consortium, with the filing of a summons and complaint on April 28, 2017.

The complaint alleges that on October 30, 2015, while plaintiff Jack Smith was a patient at WMC, he underwent the draining of a pericardial effusion by pericardiocentesis during which his heart was punctured requiring an emergency sternotomy and repair of the right ventricle on October 31, 2015.

In an order dated January 11, 2018, this Court granted WMC’s motion to dismiss the complaint insofar as asserted against it on the ground that plaintiffs failed to file a timely notice of claim pursuant to General Municipal Law 50-d and 50-e.

Dr. Cooper now moves for summary judgment dismissing the complaint. Dr. Cooper argues that while plaintiff’s injuries stem from the performance of the pericardiocentesis, he did not perform that procedure. Dr. Cooper further argues that the supplemental bill of particulars, served after the note of issue, alleging belated claims

Smith v. Cooper, M.D., Index No. 56422/2017

regarding the care and treatment actually rendered by him should be disregarded. In any event, Dr. Cooper argues that the medical care rendered by him did not depart from the accepted standard of care and did not proximately cause any of the plaintiff's injuries.

Dr. Cooper also moves for sanctions arguing that plaintiff's counsel sued the wrong physician and has refused to discontinue the case against him despite documentary evidence that he did not perform the pericardiocentesis.

In support of the motion, Dr. Cooper submits an affidavit attesting that he did not perform, supervise, or participate in the performance of the plaintiff's pericardiocentesis. He further states that he has not performed a pericardiocentesis in the cardiac catheterization lab of WMC because interventional cardiologists perform that type of procedure in the lab. He further attests that he had no input into the decision to proceed with the pericardiocentesis.

Defendant also submits an affidavit of Susan Bartolomucci, R.N. and Sylvia Davis, R.N., who both state that they were present in the procedure room during the performance of a pericardiocentesis on plaintiff on October 30, 2015, and that Dr. Cooper did not perform the procedure.

Defendant further submits the expert affirmation of Edward Katz, M.D. Dr. Katz is board certified in cardiovascular diseases and adult comprehensive echocardiography. Dr. Katz opines, with a reasonable degree of medical certainty, that the care provided by Dr. Cooper to plaintiff was consistent with accepted standards of medical practice and did not cause any of plaintiff's alleged injuries.

Dr. Katz avers that when plaintiff presented to WMC on October 30, 2015, an echocardiogram revealed a large pericardial effusion. Plaintiff was taken to the cardiac catheterization lab to undergo a pericardiocentesis. The medical records establish that Dr. Cooper played no role in the decision to perform the pericardiocentesis and that he did not perform the pericardiocentesis. The medical records establish that Dr. Hasan Ahmad performed the procedure. Dr. Katz avers that Dr. Cooper could not have caused or exacerbated an injury because he did not perform the procedure on plaintiff.

Dr. Cooper did not become involved in plaintiff's treatment until October 31, 2015. Dr. Katz opines that on that day, Dr. Cooper appropriately and properly performed additional drainage and determined that plaintiff must have been bleeding from his heart into the pericardial space through a perforation of the heart. Dr. Cooper properly discussed his findings with the cardiac surgeon Dr. Kai who decided to perform surgery.

Dr. Katz opines that the care and treatment provided by Dr. Cooper was not causally related to any of plaintiff's injuries. All of plaintiff's alleged injuries were due to the injury sustained during the pericardiocentesis procedure including punctures to the heart which subsequently required sternotomy and repair of the right ventricle, dialysis, penetrating injuries to the myocardium, pain at sternotomy site, weakness, and scarring.

Smith v. Cooper, M.D., Index No. 56422/2017

Dr. Katz avers that Dr. Cooper had no involvement in the decision to perform the pericardiocentesis and did not perform the procedure.

Dr. Katz further states that once the injury occurred during the pericardiocentesis, plaintiff was a surgical candidate. Dr. Cooper diagnosed the heart injury, however, it was incumbent upon a surgeon, not Dr. Cooper, to determine the type of surgery to be performed as Dr. Cooper is not a surgeon. Dr. Katz opines that any injuries involving the repair of the right ventricle and sternotomy are not causally related to Dr. Cooper's care and treatment.

In opposition, plaintiff argues that triable issues of fact exist as to the extent of Dr. Cooper's involvement in the pericardiocentesis. Notably, plaintiff does submit an expert affidavit in opposition.

### Discussion

"In order to establish liability for medical malpractice, a plaintiff must prove that the defendant deviated or departed from accepted community standards of practice and that such departure was a proximate cause of the plaintiff's injuries" (*Leavy v Merriam*, 133 AD3d 636, 637 [2d Dep't 2015]). A physician moving for summary judgment in a medical malpractice action must establish, prima facie, either that there was no departure from accepted community standards of medical practice, or that any alleged departure was not a proximate cause of the plaintiff's injuries (see *Aronov v Soukkary*, 104 AD3d 623, 624 [2d Dep't 2013]; *DiGeronimo v Fuchs*, 101 AD3d 933, 936 [2d Dep't 2012]). Once a defendant has made such a showing, the burden shifts to the plaintiff to "submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

"Although physicians owe a general duty of care to their patients, that duty may be limited to those medical functions undertaken by the physician and relied on by the patient" (*Chulla v DiStefano*, 242 AD2d 657, 658 [2d Dept 2015]). Whether a physician owes a duty of care to the plaintiff is a question for the court, and is not an appropriate subject for expert opinion (*Matthis v Hall*, 173 AD3d 1162, 1163 [2d Dept 2019]).

Dr. Cooper demonstrated that he did not perform or supervise the pericardiocentesis and had no input into such procedure performed on plaintiff and therefore, is not liable to plaintiff for the injuries sustained as a result of that procedure (see *McAlwee v Westchester Health Assoc., PLLC*, 163 AD3d 549 [2d Dept 2018]). Dr. Cooper further established that the treatment and care he rendered to plaintiff did not depart from the standard of care and did not proximately cause plaintiff's injuries.

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff argues that he positively identified Dr. Cooper during his deposition as having performed the pericardiocentesis. However, plaintiff also testified about Dr. Cooper, "I know he was involved, something was going on with me, but I don't know what he did or didn't do. I don't know the names of the people that did it" ... "I heard the name a couple of times


Smith v. Cooper, M.D., Index No. 56422/2017

during the operation, Dr. Cooper wanted this, or he wanted this test done. I mean, I don't know what he did, I don't know what he didn't do, I don't know who was doing what" (J. Smith 50-h: 183, 184). Moreover, contrary to plaintiffs' contention, the deposition testimony of plaintiff Marilyn Smith fails to raise an issue of fact that Dr. Cooper performed the pericardiocentesis.

The Court declines the defendant's request for sanctions pursuant 22 NYCRR Part 130-1.1.

Accordingly, the motion of the defendant Howard A. Cooper, M.D. for summary judgment dismissing the complaint is **GRANTED** and the complaint is dismissed.

Dated: White Plains, New York  
December 4, 2019



HON. WILLIAM J. GIACOMO, J.S.C.