

Parker v Reish

2019 NY Slip Op 34608(U)

September 27, 2019

Supreme Court, Nassau County

Docket Number: Index No. 603499/17

Judge: Jack L. Libert

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. JACK L. LIBERT,
Justice.

DAVID PARKER and DALE PARKER,

Plaintiffs,

-against-

**TIMOTHY G. REISH, M.D., FARAH SHAMS, M.D.,
INSALL SCOTT KELLY INSTITUTE FOR
ORTHOPEADICS & SPORTS, NORTH SHORE
INFECTIOUS DISEASE CONSULTANTS P.C.,**

Defendants.

**TRIAL PART 23
NASSAU COUNTY**

**MOTION # 02
INDEX # 603499/17
MOTION SUBMITTED:
JUNE 10, 2019**

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The following papers having been read on this motion:

- Notice of Motion/Order to Show Cause.....1**
- Cross Motion/Answering Affidavits.....2**
- Reply Affidavits.....3**

Defendants, Timothy G. Reish, M.D. and Insall Scott Kelly Institute for Orthopaedics & Sports move for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint with prejudice.

The instant action sounds in medical malpractice arising from the care and treatment of plaintiff David Parker. David initially treated with Dr. Reish in May 2013 and continued treatment with Dr. Reish through January 26, 2016. Following an unsuccessful arthroscopic shoulder procedure in May 2014, Dr. Reish recommended and performed total shoulder replacement on plaintiff. Prior to performing the surgery, Dr. Reish required David to obtain medical clearance from his primary care physician, who had treated plaintiff for blood clot and pulmonary embolism issues in the past. On October 28, 2014, the primary care doctor (Dr. Robert Hirschberg) cleared

plaintiff for the proposed surgery by a written report which was faxed to Dr. Reish' office.

The surgical clearance informed Dr. Reish that David had a history of pulmonary embolism and recommended that David be given Lovenox post-operatively as prophylaxis against deep vein thrombosis (DVT). Dr. Reish did not prescribe Lovenox instead prescribing aspirin, which was already part of David's daily regimen . Dr. Reish testified that he was unaware of the Lovenox recommendation because part of the faxed copy of Dr. Hirschberg's report was illegible. Dr. Reish did not confer with Dr. Hirschberg to get clarification on the portion of the fax he could not read.

Plaintiffs allege that these acts were departures from the standard of care, which resulted in the plaintiff developing injuries including bilateral pulmonary emboli, hematoma and recurrent joint infections at the surgical site. Specifically, plaintiffs allege that as a result of the failure of Dr. Reisch to prescribe Lovenox as recommended by Dr. Hirschberg, David developed a post-surgical hematoma which became infected. As a result of the infection, the shoulder replacement had to be removed. Dr. Reish implanted another shoulder replacement and this second replacement had to be replaced again after treatment of a second infection. Plaintiffs also allege a lack of informed consent.

Moving defendants submitted the expert affirmations of Dr. William Mandell and Dr. Richard Savino. Mandell and Savino both conclude that Dr. Reish's treatment was wholly appropriate and within the standard of care and that Dr. Reish appropriately properly exercised his clinical judgment when prescribing aspirin rather than Lovenox.

Dr. Savino offers following opinion: Dr. Reish engaged in an appropriate risk/benefit analysis when deciding on the type of anticoagulants to use following the surgery of November 19, 2014. The decision to put the plaintiff on aspirin rather than Lovenox following the surgery was a clinical decision to be made by the operating surgeon. Dr. Reish did not depart from the standard of orthopedic care by not following the recommendation of Dr. Hirschberg. There are no clear-cut

standards of care with respect to anticoagulation medicine in patients undergoing shoulder replacement surgery. The surgeon must engage in a risk benefit analysis in determining the type of anticoagulants to use. This analysis includes the type of procedure, the patient's history and medical condition, the risk of bleeding, the risk of developing a DVT and the risk of other complications. 100 mg of aspirin is the dosage needed to interrupt platelet activity that leads to DVT. Prior to the surgery the plaintiff was on a daily regimen of two 81 mg tablets. In a patient with a remote history of DVT who is undergoing upper extremity surgery, continuing this dosage was sufficient prophylaxis. Additionally, compression devices were placed on plaintiff while he was inpatient at St. Francis following the surgery. These devices are additional methods of DVT prophylaxis.

Plaintiff's expert, Richard Matza, M.D., opines that Dr. Reish departed from the standard of care by failing to prescribe Lovenox for plaintiff following the shoulder replacement surgery as recommended by Dr. Hirschberg and by failing to consult with Dr. Hirschberg to the extent that Dr. Reish was unable to read Dr. Hirschberg's post-operative recommendations. Dr. Matza further opined that these departures caused David's related post-operative complications which gave rise to the repeat surgeries. Dr. Matza explains that the standard of care requires a surgeon to follow the recommendation of the physician who gave surgical clearance with regard to a patient's medication. If for some reason the surgeon is in disagreement with those recommendations, the surgeon is required to contact the clearing physician to discuss his concerns so that the treating doctors can come to a shared decision. Dr. Matza also opined that if a surgeon is unable to read a pre-operative clearance he has a duty to clarify what is written and not just ignore it.

Defendants argue that Dr. Reish exercised proper clinical judgment and did order Lomenox because of his concerns about the risk of bleeding following shoulder surgery. Dr. Reish evaluated those concerns in light of David's history of DVT and prescribed aspirin rather than Lomenox. Defendants argue that simply because a different physician disagreed with Dr. Reish does not mean

that Dr. Reish departed from the standard of care.

“On a motion for summary judgment in a medical malpractice action, a defendant doctor has the burden of establishing the absence of any departure from good and accepted medical practice, or that the plaintiff was not injured thereby” (*Germaine v. Yu*, 49 A.D.3d 685, 686, 854 N.Y.S.2d 730, quoting *Shahid v. New York City Health & Hosp. Corp.*, 47 A.D.3d 800, 801, 850 N.Y.S.2d 519). If the defendant doctor sustains this burden, in order to defeat summary judgment “a plaintiff must submit a physician's affidavit of merit attesting to a departure from accepted practice and containing the attesting doctor's opinion that the defendant's omissions or departures were a competent producing cause of the injury” (*Domaradzki v. Glen Cove Ob/Gyn Assoc.*, 242 A.D.2d 282, 660 N.Y.S.2d 739; see *Holbrook v. United Hosp. Med. Ctr.*, 248 A.D.2d 358, 359, 669 N.Y.S.2d 631). “Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. Such credibility issues can only be resolved by a jury” (*Wexelbaum v. Jean*, 80 AD3d 756).

In the case at bar there are conflicting medical expert opinions regarding whether Dr. Reish departed from the standard of care by failing to prescribe Lovenox postoperatively (as recommended by Dr. Hirschberg) and whether Dr. Reish breached the standard of care by failing to consult with Dr. Hirschberg to the extent that Dr. Reish was unable to read Dr. Hirschberg's faxed surgical clearance. Summary judgment on liability is not warranted.

To establish a cause of action to recover damages based on lack of informed consent, a plaintiff “must prove (1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed

consent is a proximate cause of the injury” (*Walker v. Saint Vincent Catholic Med. Ctrs.*, 114 A.D.3d 669, 670, 979 N.Y.S.2d 697, quoting *Spano v. Bertocci*, 299 A.D.2d 335, 337–338, 749 N.Y.S.2d 275; see *Khosrova v. Westermann*, 109 A.D.3d 965, 966, 971 N.Y.S.2d 565; *Gilmore v. Mihail*, 174 A.D.3d 686, 105 N.Y.S.3d 504, 507 [N.Y. App. Div. 2019]).

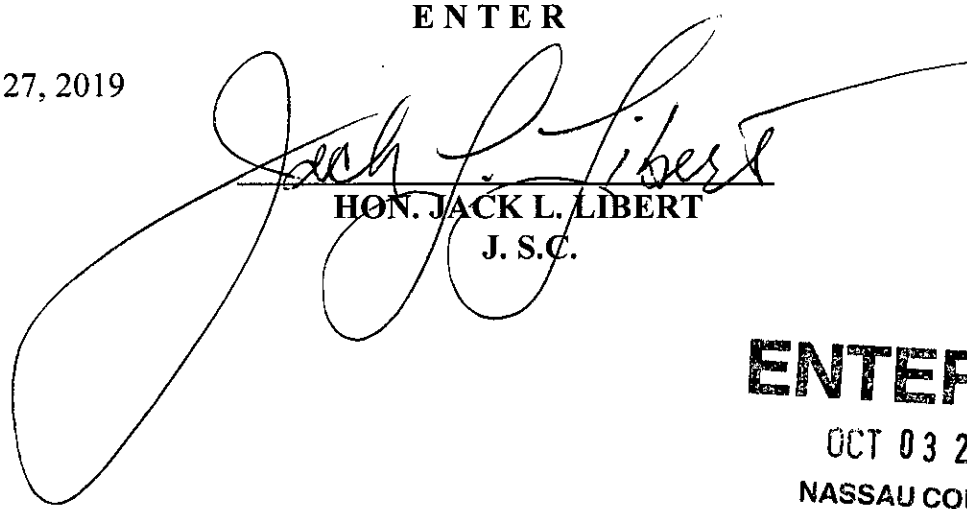
Dr. Reish testified that he had a discussion with David regarding the risks and benefits. Informed consent was also evidenced by the documents signed by David and contained in the St. Francis Hospital chart. Moving defendants demonstrated their *prima facie* entitlement to summary judgment on the issue of informed consent. Plaintiffs did not offer any evidence to refute this *prima facie* showing.

The motion is granted only to the extent that the second cause of action for lack of informed consent is dismissed.

This constitutes the decision and order of the court.

ENTER

DATED: September 27, 2019

A large, stylized handwritten signature in black ink, reading "Jack L. Libert". The signature is written over a horizontal line.

**HON. JACK L. LIBERT
J. S.C.**

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NASSAU COUNTY
COUNTY CLERK'S OFFICE