

**Giffords v Melone**

2020 NY Slip Op 31848(U)

June 12, 2020

Supreme Court, New York County

Docket Number: 805450/16

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 11

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RUTH LESLIE GIFFORDS and FREDERIC V. GIFFORDS,

Plaintiffs,

INDEX NO. 805450/16

-against-

CHARLES P. MELONE, JR., MD,

Defendant.

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JOAN A. MADDEN, J.:

In this action for damages for medical malpractice and lack of informed consent, defendant Dr. Charles P. Melone, Jr. moves for summary judgment and plaintiffs oppose.

On January 30, 2014, Dr. Melone performed surgery on plaintiff Ruth Giffords' right hand, which involved the removal of the knuckles/joints from her right index and middle fingers, and replacing them with silicone prosthetic implants. Plaintiffs' expert hand surgeon opines that Dr. Melone departed from the standard of care in the manner in which he performed the surgery, by failing to properly align the prostheses, which left the underlying structures in a misaligned position, resulting in the need for three additional surgeries to improve the function of Ms. Giffords' right hand.<sup>1</sup> Plaintiffs also allege that Dr. Melone failed to fully inform Ms. Giffords of the risks and benefits of and the alternatives to the surgery.

Plaintiff Ruth Giffords first saw Dr. Melone on April 15, 2013 with complaints of swelling, pain and weakness in the index and middle fingers of her right hand. She presented

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<sup>1</sup>The name of plaintiffs' expert is redacted from the affirmation, but plaintiffs have provided the Court with un-redacted copy.

with a history of Dupuytren's disease and arthritis in her right hand.<sup>2</sup> On May 9, 2011, Dr. Melone performed a fasciectomy of her right palm, to address the Dupuytren's contractures. That surgery is not the subject of this action.<sup>3</sup>

On January 30, 2014, Dr. Melone performed a second surgery to address Ms. Giffords' end stage osteoarthritis of the metacarpophalangeal ("MCP") joints/knuckles of her right index and middle fingers. The surgery involved the removal of cartilage and bone, and the insertion of silicone implants/protheses in the joint space. Over the next year, until her last visit in March 2015, Ms. Giffords returned to Dr. Melone for follow-up examinations and continued to complain of discomfort, weakness and inability to grasp fine objects with her right hand. Dr. Melone prescribed occupational therapy and assured plaintiff that she would continue to improve with time.

On November 10, 2015, non-party Dr. Otis Barron examined Ms. Giffords and took x-rays of her right hand, which showed that the middle joint implant was in "good position and parallel joint surfaces," but the index joint implant "looks malpositioned with nonparallel surfaces consistent with patient's pain and swelling and dysfunction." Dr. Barron subsequently performed three separate surgeries on Ms. Giffords' right hand. In December 2015, he replaced the index finger MCP prosthesis with a smaller size than the prosthesis used by Dr. Melone; in

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<sup>2</sup>According to defendant's expert, Dupuytren's disease is a progressive and incurable condition that affects the layer of tissue under the skin of the palm, known as the fascia; knots of tissue form under the skin and create a thick cord that pulls one or more fingers into a bent or contracted position; and a fasciectomy can alleviate symptoms and correct the contractures, and has the lowest probability of recurrence.

<sup>3</sup>Plaintiffs' expert states that he agrees the May 9, 2013 fasciectomy surgery "conformed to proper standards."

March 2016 he performed a joint release surgery; and in February 2017, he replaced the middle finger MCP prosthesis.

On November 18, 2016, plaintiffs commenced the instant action against Dr. Melone, asserting claims for medical malpractice and lack of informed consent. Dr. Melone is now moving for summary judgment.

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 (1<sup>st</sup> Dept 2010). To satisfy this 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 (2<sup>nd</sup> 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 (1<sup>st</sup> Dept 2010). Defendant’s expert opinion must “explain ‘what defendant did and why.’” Id. (quoting Wasserman v. Carella, 307 AD2d 225, 226 [1<sup>st</sup> 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. If 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 (1<sup>st</sup> Dept 2009); Cruz v. St Barnabas Hospital, 50 AD3d 382 (1<sup>st</sup> Dept 2008).

Dr. Melone is not entitled to summary judgment on the medical malpractice claim, as the parties’ experts offer sharply diverging opinions as to whether the medical evidence in the record demonstrates that Dr. Melone departed from the standard of care by failing to properly place and align the joint implants during the January 2014 surgery. The experts disagree as to what is precisely shown in the intra-operative fluoroscopic images and the post-operative x-rays. Defendant’s expert, Dr. Jack Choueka, a board certified orthopaedic surgeon with a subspecialty certification in hand surgery, opines that the intra-operative fluoroscopic images and Dr. Melone’s post-operative x-rays all show that the index and middle MCP joint implants were properly placed and appropriately aligned. On the other hand, plaintiffs’ expert, a board certified surgeon with a subspecialty in hand surgery, opines that the misalignment of the joints can be seen on those same operative and post-operative imaging studies.

Plaintiffs’ expert also points to Dr. Melone’s deposition testimony acknowledging that the February 12, 2014 x-ray showed that the index implant was rotated a “little bit.” Dr. Choueka opines that despite Dr. Melone’s acknowledgment, it is more important that there was no dislocation of the MCP implant to indicate implant failure, and that silicone MCP implants are designed to move inside the joint and an x-ray is snapshot of the implant at that point in time.

Plaintiffs’ expert further points to Dr. Barron’s treatment of Ms. Giffords starting in November 2015, specifically, his November 2015 x-rays showing that the index joint implant

“looks malpositioned with nonparallel surfaces consistent with patient’s pain and swelling and dysfunction”; and Dr. Barron’s subsequent “remedial” or “revision” surgeries which replaced the index joint implant in December 2015 with a smaller size than Dr. Melone used, and the surgery in February 2017 replacing the middle joint implant. Plaintiff’s expert opines that if the joint is misaligned, the joint does not function properly and will not self-correct over time or with physical therapy, and is predisposed to getting worse over time resulting in poor function of the fingers and pain.

Defendant’s expert, Dr. Choueka, opines that the fact that one of Ms. Giffords’ implants needed to be replaced nearly two years later, and the other more than three years later, does not show that they were improperly placed at the outset. He opines that joint implants have a limited life span, generally require revision surgery at some point, and sometimes fail after surgery that was properly performed. He also opines that Dr. Melone appropriately used a size 40 silicone implant for the index finger joint space, as it is “often better” to place a larger size in the index finger since a larger implant increases stability in the index finger, where stability is “most important.” He further opines that Dr. Barron replaced the index finger implant with implant one size smaller to give Ms. Giffords more mobility in her finger at that time.

Thus, since the experts provide conflicting opinions as to the alleged departure, summary judgment is denied with respect to the malpractice claim. See Frye v. Montefiore Medical Center, supra; Cruz v. St Barnabas Hospital, supra.

Summary judgment is likewise denied as to the lack of informed consent claim. A defendant moving for summary judgment on a lack of informed consent claim must make a prima facie showing that plaintiff was informed of any foreseeable risks, benefits and

alternatives of the treatment rendered. See Orphan v. Pilnik, 66 AD3d 543 (1<sup>st</sup> Dept 2009), aff'd 15 NY3d 907 (2010); Chan v. Yeung, 66 AD3d 642 (2<sup>nd</sup> Dept 2009). The mere fact that plaintiff signed a consent form does not establish defendant's prima facie entitlement to judgment as a matter of law. See Godel v. Goldstein, 155 AD3d 939 (2<sup>nd</sup> Dept 2017); Santiago v. Filstein, 35 AD3d 184 (1<sup>st</sup> Dept 2006).

Here, the conflicting expert opinions and the parties' conflicting testimony raise issues of fact and credibility as to whether Dr. Melone properly and adequately informed Ms. Giffords of the risks, benefits and alternatives of the implant surgery. See Ayers v. Mohan, 182 AD3d 479 (1<sup>st</sup> Dept 2020); Robinson v. Nelson, 172 AD3d 642 (1<sup>st</sup> Dept 2019); Bradley v. Soundview Healthcenter, 4 AD3d 194 (1<sup>st</sup> Dept 2004).

Defendant's expert, Dr. Choueka, opines that Dr. Melone's medical records and deposition testimony demonstrate that he discussed all appropriate risks, benefits and alternatives with Ms. Giffords at the September 9, 2013 visit and again on January 22, 2014, a week before surgery, and she signed an informed consent form on the day of surgery. He points to Dr. Melone's testimony that he advised Ms. Giffords that her arthritic pain would be alleviated and she should be able to do more things with her right hand; and his testimony that he spoke to Ms. Giffords in the holding area outside the operating room to ask if she had any questions and understood the procedure. Dr. Choueka opines that Dr. Melone's reassuring comments immediately prior to surgery were not a guarantee of a good outcome, and he did not make false promises nor tell Ms. Giffords, a patient with an incurable disease, that she would be as "good as new." He opines that a reasonably prudent patient with Dupuytren's disease would understand that it is incurable and recurrence is a known risk even with surgery performed within the

standard of care, and the fact that Ms. Giffords subsequently suffered a recurrence of her Dupuytren's contracture was a known risk of her disease that Dr. Melone discussed with her prior to surgery.

The opinions of plaintiffs' expert directly conflict with those of Dr. Choueka. Moreover, as pointed out by plaintiffs' expert, Ms. Giffords' testimony directly conflicts with that of Dr. Melone. Plaintiffs' expert points to the following notation in Dr. Melone's January 22, 2014 office notes: "thoroughly explained RBA, pt understands, requests surgery." Dr. Melone testified that the acronym "RBA" stands for "risks, benefits and alternatives." Plaintiffs' expert opines that despite this notation, Dr. Melone's medical records do not contain any details of that or any other discussion with Ms. Giffords regarding the risks, benefits and alternatives of the implant surgery. Plaintiffs' expert opines that Ms. Giffords was not made aware of the complexity of the case and the risks involved relative to the underlying Dupuytren's disease, specifically the likely progression and recurrence of Dupuytren's and its negative impact on the surgical outcome.

Notably, Ms. Giffords consistently and repeatedly testified that Dr. Melone simply told her that her right hand would be "normal" as a result of the surgery. She also testified that Dr. Melone told her the surgery would "get rid" of the arthritis in the knuckles of her index and middle fingers, and would alleviate the pain and swelling in her right hand. Ms. Giffords further testified that Dr. Melone did not discuss the risks of the surgery or give her any alternatives; he did not discuss any options regarding the type of implant; he did not tell what would happen if she did not go forward with the surgery; and he did not discuss the potential complications of the surgery. She testified that Dr. Melone told her the implants would last 10-15 years, which

contradicts Dr. Melone's testimony that he told Ms. Giffords the implants would last six years. While Ms. Giffords acknowledged that she signed the informed consent form on the day of the surgery, she testified that she did not see Dr. Melone on the day of the surgery and only saw nurses. Ms. Giffords' testimony again contradicts Dr. Melone's testimony that he spoke to Ms. Giffords in the holding area outside the operating room prior to surgery.

Thus, in view of the experts' conflicting opinions and the parties' conflicting testimony, issues of fact and credibility exist as to both the malpractice and lack of informed consent claims, which preclude summary judgment. See Ayers v. Mohan, supra; Robinson v. Nelson, supra; Frye v. Montefiore Medical Center, supra; Cruz v. St Barnabas Hospital, supra; Bradley v. Soundview Healthcenter, supra.

Accordingly, it is

ORDERED that the motion for summary judgment by defendant Charles P. Melone, Jr., M.D., is denied.

DATED: June 12, 2020

ENTER:

Joan  
Madden

Digitally signed by Joan Madden  
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Court, O=NYS Courts, CN=Joan  
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J.S.C.