

**Sacknoff v Moser**

2020 NY Slip Op 34223(U)

November 5, 2020

Supreme Court, New York County

Docket Number: 805046/18

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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JULIA SACKNOFF,

INDEX NO. 805046/18

Plaintiff,

-against-

DR. MARK MOSER,

Defendant.

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JOAN A. MADDEN, J.:

In this medical malpractice action, defendant Dr. Mark Moser (“Dr. Moser” or “defendant”) moves for summary judgment dismissing the complaint and all cross claims against him. Plaintiff Julia Sacknoff (“Ms. Sacknoff” and “plaintiff”) opposes the motion.

Background

This action seeks damages in connection with allegations of medical malpractice and lack of informed consent arising out of surgeries performed by Dr. Moser, a podiatrist, on plaintiff’s feet in 2015 and 2016. Specifically, it is alleged that Dr. Moser negligently treated plaintiff for plantar fasciitis and “inserted screws (HyProCure implants) into plaintiff’s feet which were too large” and that the surgeries were unnecessary, and that Dr. Moser did not obtain Ms. Sacknoff’s informed consent to the surgeries.

Dr. Moser first saw plaintiff, who was then 22 years-old, for a surgical consultation in his office on January 6, 2015, for complaints of pain in the soles of both feet when walking and standing, after receiving a referral from non-party podiatrist Dr. Andrew Birch. The record indicates Dr. Birch’s prior treatments, included stretching and steroid injections, non-steroidal anti-inflammatories, and orthotics did not relieve the pain. Plaintiff was given referral for an MRI to rule out a plantar fascial tear, and the MRI was performed on January 15, 2015. The

impression in the MRI report stated “no evidence of plantar fasci fasciitis or tarsal tunnel syndrome.”

On January 28, 2015, Dr. Moser performed bilateral endoscopic plantar fascia release and tarsal tunnel release on plaintiff. Following the surgery plaintiff followed up with Dr. Birch and by March 10, 2015, she was able to resume her normal activities. On May 18, 2016, Ms. Sacknoff returned to Dr. Birch who documented that she had recurrent pain in both heels for approximately one month, and Dr. Birch diagnosed her with planter fasciitis and pes planus (flat feet) bilaterally.

On June 14, 2016, Dr. Birch counseled plaintiff regarding the possible need for HyProCure implants to control her symptoms associated with pes planus (flat feet), as she did not wear her orthotics on a regular basis. On November 16, 2016, Dr. Moser surgically inserted a HyProCure implant in Ms. Sacknoff’s right foot, and on December 7, 2016, he inserted the implant in her left foot. Following surgery, x-rays showed that both implants were properly seated, and on January 10, 2017, plaintiff reported resuming her activities and improved symptoms. On July 25, 2017, plaintiff was seen by Dr. Birch and reported pain in the area of implant insertion. X-rays showed some backing out of the implants.

After the completion of discovery, plaintiff filed the note of issue. Defendant now moves for summary judgment, arguing that Dr. Moser treated plaintiff within the accepted standard of care and appropriately diagnosed her, recommended appropriate treatment options for her symptoms and complaints and properly performed indicated surgical interventions, and that the evidence establishes that Dr. Moser properly obtained informed consent and gave plaintiff adequate information.

In support of his motion, defendant submits the affirmation of Dr. Edwin W. Wolf, a board certified podiatrist, who states his opinions, which are within a reasonable degree of medical certainty, are based on his review of the pleadings, deposition transcripts of the parties, the medical records regarding the care and treatment provided to plaintiff and relevant photographs, and his education and training. Dr. Wolf opines that bilateral endoscopic plantar fascia release and tarsal tunnel release performed by Dr. Moser on January 28, 2015 “was indicated based on the clinical diagnosis of plantar fasciitis, based on [plaintiff’s] symptoms and complaints consistent with that diagnosis, despite the fact that the January 15, 2015 MRI did not reveal gross pathology in the plantar fascia...[and that] [p]lantar fasciitis is often a clinical diagnosis based on the patient’s symptoms and not an MRI finding...[and that] the negative MRI does not meant that the patient does not have plantar fasciitis.”

In this connection, he states that “[p]lantar fasciitis is an inflammation of the thick band of tissue that stretches from the heel to each toe in the foot. The strain and inflammation of the plantar fascia, which supports the arch of the foot and acts as a shock absorber during walking or running, causes a dull or severe pain in the heel [and that][w]hen the plantar fascia is excessively stretched, micro-tears can occur, which causes swelling and pain, including sharp pain in the center of the heel [and that][t]he records and testimony document that [Ms. Sacknoff ] had symptoms consistent with plantar fasciitis [and that] a classic sign of [the condition] is when the pain is worse during the first steps in the morning [and] Ms. Sacknoff had this very complaint.”

Moreover, Dr. Wolf opines that while it was appropriate to treat plaintiff’s plantar fasciitis conservatively with orthotics, such treatment did not relieve her complaints and “there was no indication for Dr. Moser to recommend additional orthotics, as the treatment did not alleviate her symptoms or complaints.” With regard to the performance of the operation in

January 2015, Dr. Wolf opines that “[t]he operative reports documents that the procedure was appropriately performed and post-operative instructions given.”

As for the HyProCure implant procedures (also known as arthroereisis) performed in November and December of 2016 for flat feet and plantar fasciitis, Dr. Wolf opines that Dr. Moser appropriately used these procedures to correct Ms. Sacknoff’s flat feet and that [the procedure] ... was appropriate treatment for this young woman who has pain and was not able to wear heels because of her flat feet...” Dr. Wolf opines that “even where a HyProCure implant is correctly sized for the patient and correctly inserted at the time of surgery it is possible for it to shift or displace, as the device is only pushed into the sinus tarsi; it is not drilled or cemented.” He further opines that “[a]ccepted standards of care recognize that the HyProCure implant works in some patients and that some patients do very well with them [and that][a]lthough the HyProCure implants did not work for Ms. Sacknoff...they did not cause her any damage and there is no evidence Dr. Moser departed from any accepted standards of medical care in treating this patient.”

With respect to the allegations that the surgeries were unnecessary, Dr. Wolf opines that there is “no merit” to these allegations and that “Dr. Moser performed the indicated procedures, in an appropriate manner and within accepted standard of medical care, in an attempt to resolve Ms. Sacknoff’s complaints [and that][t]he initial plantar fascia release did not resolve her symptoms despite being indicated and properly performed [and that]... when her symptoms returned, Dr. Moser properly recommended and inserted the HyProCure implants, which was appropriate and within the standard of care.”

With regard to causation, Dr. Wolf opines that “there is nothing that Dr. Moser did or did not do that caused or contributed to plaintiff’s injuries as alleged in the pleadings.”

In opposition, plaintiff submits the affidavit of a board certified podiatrist who is licensed to practice podiatric medicine in New York State and whose identity is redacted. Plaintiff's expert states the opinions are based on a review of the relevant records concerning the surgeries and the parties' depositions, Bill of Particulars and relevant office notes of the referring doctors, and the examination of plaintiff.

Plaintiff's expert opines that "to a reasonable degree of professional certainty defendant departed from good and accepted practice in his surgery of January 28, 2018 by performing plantar fascia release due to planter fasciitis and additional tarsal tunnel release because according to the MRI results, these medical conditions did not exist in plaintiff." With respect to the MRI results, the expert states that the MRI taken on January 15, 2015 on both ankle and heel showed "[n]o thickening of plantar fascia on either foot. No evidence of mass within tarsal tunnel. Impression was 'Unremarkable Examination.'" The expert also states that "[n]o plantar fasciitis or effusion a the facial-calcaneal junction was noted on the MRI" and opines that "[p]lantar fasciitis and tarsal tunnel impingement would be seen on MRI findings if it existed."

The expert further opines that "the treatment given to plaintiff for foot pain by doctors who referred plaintiff to Dr. Moser performed was sub optimal during the pre-operative four weeks before referral surgery and not within normal podiatric standard of care [and][t]herefore it cannot be assumed that even clinically, plaintiff had the plantar fasciitis condition for which surgery was performed."

The expert also opines that the plantar fasciitis surgery "was unnecessary because there was no evidence that plaintiff's heel pain was caused by plantar fasciitis [and there] ...is no evidence that there was a tarsal tunnel impingement and no reason was given as to why a tarsal tunnel release was performed. Surgery performed before proper diagnosis for heel pain was

found and should not have been done without cause. Additional there is no documentation of consideration of a differential diagnosis of tarsal tunnel syndrome and no examination of the same.” With regard to causation, the expert, who conducted a physical examination of plaintiff, opines that plaintiff’s “neurological defect-lack of planter reflex, slight foot drop on right and feeling of sharp rocks when she walks which is causing an unstable gait is due to complication[s] of the tarsal tunnel surgery...[and that] the initial unnecessary surgery was the proximal cause of the plaintiff’s foot pain and permanent disability.”

As for the November 2016 and December 2016 insertion of HyProCure implants, the expert opines that such surgeries “caused plaintiff to stay home from work for an extended period of time due to the pain and caused her loss of income...[and that] [p]laintiff also experiences pain on the non-displaced implant at this time and that implant may have to be removed or replaced.”

In reply, Dr. Moser asserts that plaintiff’s expert affidavit is insufficient and conclusory and should be rejected as the expert fails to address the opinions in Dr. Wolf’s affirmation. Dr. Moser also argues that the expert does not opine as to any departures with respect to the insertion of the HyProCure implants or rebut Dr. Wolf’s showing that informed consent was obtained.<sup>1</sup>

### Discussion

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

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<sup>1</sup> Defendant also argues that the plaintiff’s expert’s opinion that the tarsal tunnel release done in connection with the January 28, 2015 surgery was a departure because plaintiff did not have that condition is a new theory not alleged in the Bill of Particulars. This argument is unavailing as it is alleged in the Bill of Particulars that the surgeries performed by Dr. Moser were contraindicated, and that the January 28, 2015 surgery involved both a plantar fascia release and tarsal tunnel release.

departure was not the proximate cause of the injuries alleged.” Roques v. Nobel, 73 AD3d 204, 206 (1st Dept. 2010). To satisfy this burden, a defendant must present expert opinion testimony that addresses the essential allegations in the Bill of Particulars. Id.

The expert opinion relied on by defendant must be based on the facts in the record or those personally known to the expert. Defense expert opinion should specify “in what way” a patient’s treatment was proper and “elucidate the standard of care.” Ocasio-Gary v. Lawrence Hosp., 69 AD3d 403, 404 (1st Dept. 2010). A defendant’s expert opinion must also “explain what defendant did and why.” Id. (quoting Wasserman v. Carella, 307 AD2d 225, 226 (1st Dept. 2003)).

Under this standard, the court finds that based on the record and Dr. Wolf’s affirmation, defendant has met his burden of showing that Dr. Moser did not depart from the standard of care in performing the bilateral endoscopic plantar fascia release and tarsal tunnel release surgery on January 28, 2015, and in inserting that the HyProCure implants in November and December 2016, and that these alleged departures were not a proximate cause of plaintiff’s injuries.

As defendants have met their burden, to survive summary judgment, plaintiff must “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, 324-325 (1986). Specifically, in a medical malpractice action, this requires that a plaintiff opposing a defendant’s summary judgment motion to “submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact... General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the

essential elements of medical malpractice, are insufficient to defeat defendant[’s]... summary judgment motion.” Id.

In addition, a plaintiff’s expert’s opinion “must demonstrate the requisite nexus between the malpractice allegedly committed and the harm suffered.” Dallas-Stephenson v. Waisman, 39 AD3d 303, 307 (1<sup>st</sup> Dept 2007) (internal citations and quotations omitted). If “the expert’s ultimate assertions are speculative or unsupported by any evidentiary foundation... the opinion should be given no probative force and is insufficient to withstand summary judgment.” Diaz v. Downtown Hospital 99 NY2d 542, 544 (2002).

Here, plaintiff’s expert’s opinion is sufficient to rebut defendant’s showing with regard to allegations that Dr. Moser departed from the standard of care in performing the January 28, 2015 surgery involving plantar fascia release and additional tarsal tunnel release as the MRI results showed that these medical conditions did not exist in plaintiff. In addition, plaintiff’s expert adequately opines that the performance of the surgery was a proximate cause of plaintiff’s alleged injuries. Moreover, although plaintiff’s expert does not state that the opinion is based on a review of Dr. Wolf’s opinion, the opinion of plaintiff’s expert is sufficient to raise a triable issue of fact as it relies on medical records, and in particular the MRI results, and conflict with the Dr. Wolf’s opinion as to whether it was a departure to perform the January 28, 2015 surgery. See Boston v. Weissbart, 62 AD3d 517, 518 (1<sup>st</sup> Dept 2009)(holding that summary judgment is not warranted where “conflicting opinions of the parties’ experts raise triable issues of fact”); Ashton v. D. O.C.S. Continuum Medical Group, 68 AD3d 613 (1<sup>st</sup> Dept 2009)(plaintiff’s expert opinion “was not merely conclusory, as it relied on plaintiff’s medical records to draw conclusions”) Furthermore, plaintiff’s expert adequately opined as to a nexus between the alleged departure in performing the surgery when it was contraindicated and unnecessary and plaintiff’s injuries.

In contrast, plaintiff's expert fails to controvert defendant's showing that Dr. Moser did not depart from the standard of care by inserting the of HyProCure implants in November and December 2016, or that insertion of the implants was a proximate cause of any injury to plaintiff. Accordingly, defendant is entitled to summary judgment to the extent of dismissing that part of the medical malpractice claim against Dr. Moser arising out of the insertion of these implants.

As for plaintiff's claim for lack of informed consent, "[l]ack 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 (1<sup>st</sup> 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").

Defendant has met this burden based on the consent forms signed by plaintiff before the surgeries and the opinion of his expert Dr. Wolf, who opines that:

Dr. Moser appropriately obtained informed consent for all invasive procedures...[and that plaintiff] signed a consent for the bilateral endoscopic plantar fascia release and tarsal tunnel release. Additionally, on November 16, 2016 and December 7, 2016, Ms. Sacknoff signed Consent for Surgical Procedure forms, which authorized Dr. Moser to insert a HyProCure implant in her right and left foot, respectively. The consent forms both document that the

"nature, purpose, benefits, complications, risks, and alternatives have been explained," that she was "given the opportunity to ask questions and all of [her] questions have been answered fully and to [her] satisfaction." She acknowledged that no guarantees or assurances were made concerning the results intended from the procedure.

Once defendant's burden on claim based on the lack of informed consent is met, 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, as plaintiff's expert does not opine as to whether the sufficiency of the information provided by Dr. Moser to plaintiff, the claim for lack of informed consent must be dismissed.

#### Conclusion

In view of the above, it is

ORDERED that defendant's motion to summary judgment is granted to the extent of dismissing that part of plaintiff's medical malpractice claim based on departures related to the HyProCure implants and is otherwise denied; and it is further

ORDERED that a pre-trial conference shall be held on December 10, 2020 at 12:30 pm via Microsoft Teams.

DATED: November 5, 2020

J.S.C.

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