

Clark v Russo

2020 NY Slip Op 35752(U)

May 5, 2020

Supreme Court, Westchester County

Docket Number: Index No. 52111/2017

Judge: Terry Jane Ruderman

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 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.

-----X

NICOLE CLARK,

DECISION and ORDER

Plaintiff,

Motion Sequence No. 3

-against-

Index No. 52111/2017

JEFFREY S. DELLO RUSSO, M.D., GREGORY
J. PAMEL, M.D., individually and d/b/a PAMEL
VISION AND LASER GROUP, and GREGORY
J. PAMEL, M.D., P.C.,

Defendants.

-----X

RUDERMAN, J.

The following papers were considered in connection with the motion of defendants Gregory J. Pamel, M.D. individually and d/b/a Pamel Vision and Laser Group, and Gregory J. Pamel, M.D., P.C. for an order pursuant to CPLR 4404 (a) setting aside the jury verdict rendered in favor of plaintiff Nicole Clark and against the moving defendants, and permitting entry of judgment dismissing the complaint:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation, Exhibits A - Q	1
Affirmation in Opposition	2
Reply Affirmation	3

This is a medical malpractice action arising from the care and treatment provided to plaintiff Nicole Clark by defendants following LASIK surgery performed on her by defendant Dr. Jeffrey Dello Russo on September 9, 2014. Plaintiff's claim against both Dr. Dello Russo and Dr. Pamel was that they failed to diagnose and treat, in a proper and timely manner, the infection that developed in her right eye after the LASIK surgery in a proper and timely manner,

so that by the time the infection was diagnosed by a third physician, Dr. Gerald Zaidman, it had already caused permanent damage to her cornea and she required further invasive treatment, including a corneal transplant in October 2015. At trial, the jury rejected plaintiff's claims of malpractice as against Dr. Dello Russo, finding that it was not a departure from the standard of care for Dr. Dello Russo to fail to perform a culture on plaintiff Clark's right eye on October 23, 2014, or to lift and irrigate the flap with two antibiotics at that visit. However, although it found no departure in Dr. Pamel's failure on October 31, 2014 to lift and irrigate the flap with antibiotics that target microbacterial organisms, the jury found that it was a departure for Dr. Pamel to fail to perform a culture on Clark's right eye at that time, and that the departure was a proximate cause of Clark's injuries.

The relevant trial evidence on plaintiff's case against Dr. Pamel consisted of the trial testimony of plaintiff and of her medical expert, Dr. John Sheppard, along with medical records. Plaintiff testified that after the LASIK surgery, she continued to see Dr. Dello Russo for post-surgical treatment until October 23, 2014, when he referred her to a corneal expert, defendant Dr. Gregory Pamel, due to plaintiff's continuing complaints of eye pain, light sensitivity, blurriness, itching and discomfort in her right eye; her visual acuity also deteriorated during this time. Dr. Pamel first treated plaintiff on October 27, 2014 and his treatment of her continued through November 17, 2014. The complaints and symptoms plaintiff experienced during her treatment with Dr. Dello Russo continued during Dr. Pamel's treatment.

Plaintiff explained that in November 2014, she asked Dr. Dello Russo to refer her to another corneal expert, both because she was losing faith in Dr. Pamel, and because the trip to Dr. Pamel's New York City office was too difficult, especially because her impaired eyesight made it necessary for her to be accompanied by a companion. Dr. Dello Russo referred

plaintiff to Dr. Zaidman, a corneal expert with offices in Westchester County.

Plaintiff's first appointment with Dr. Zaidman took place on November 18, 2014; she saw him for additional visits on November 24, 2014, December 1, 2014, December 5, 2014, and thereafter. At the first visit, according to his notes, Dr. Zaidman suspected the presence of an infection, and performed a culture of plaintiff's right eye. The initial culture was negative for common fast-growing infection agents like staph aureus. On December 1, 2014, Dr. Zaidman made the clinical diagnosis of infectious keratitis. On December 5, 2014 Dr. Zaidman performed a second culture and prescribed an array of medications, including a new antibiotic, gentamicin. The results of the second culture, obtained on December 11, 2014, disclosed the presence of acid-fast-bacilli, known as mycobacterium abscessus. The gentamicin Dr. Zaidman prescribed on December 5, 2014 had already effectively treated that infection by the time those test results were obtained. Although the infection was eradicated by this treatment, permanent damage was caused to Clark's right eye due to the delay in diagnosis and effective treatment, and a corneal transplant was needed.

At trial, both Dr. Dello Russo and Dr. Pamel testified to their understanding, during the time plaintiff was under their care, that her complaints and symptoms were not caused by an infection, but rather, by an inflammatory process known as Defuse Lamellar Keratitis, also known as DLK. Based on his erroneous assumption, Dr. Pamel treated the perceived inflammation with anti-inflammatories and prophylactic antibiotics that failed to cure plaintiff's condition.

The evidence with regard to defendants' departures was provided by Dr. Sheppard. When asked to explain why Dr. Pamel's failure to perform a culture on October 31, 2014 was a deviation, he testified, "The diagnosis of exclusion, the primary obligation incumbent upon the

managing doctor, is to rule out, diagnose, and treat an infection in this case.” Dr. Sheppard testified that Dr. Pamel had a golden opportunity to diagnose this infection on October 31, 2014, when he lifted and irrigated under the flap, but because he failed to culture the eye at that time, the opportunity to diagnose and properly treat plaintiff’s condition was lost:

“Q: And, Dr. Pamel testified yesterday that in his opinion the gold standard that would be used to diagnose an infection would be a culture. Do you agree with that?

“A: Yes.

“Q: Okay. And would you agree that this was perfect time to do the culture inasmuch as he had already lifted the flap?

“A: It's an ideal opportunity to - - to find a diagnosis by obtaining a culture and render treatment by removing bacteria, debris, white blood cells, and intensive inside-the-flap and the interface double antibiotic therapy. It was the golden opportunity. Preferably earlier but that was a golden opportunity, as you asked, on the 31st.”

Dr. Sheppard explained that Dr. Dello Russo and Dr. Pamel had treated plaintiff prophylactically with antibiotics from the fluoroquinolone family, along with a broad-spectrum anti-microbial called Polytrim, which he described as often used for staph infections; however, lacking knowledge of the infective agent, neither of them prescribed an aminoglycoside, the category of antibiotics which is effective against mycobacteria.

In moving to set aside the jury’s verdict against him, Dr. Pamel contends that plaintiff failed to present evidence on the issue of causation. He focuses on a particular point during the testimony of plaintiff’s medical expert, Dr. Sheppard, in which he was asked about Dr. Pamel’s

failure to perform a culture:

“Q. Was the failure of Dr. Pamel to do a culture at any time, not only when he lifted the flap, but at any time did that... failure to culture the eye within a reasonable degree of medical certainty a deviation from the accepted standard of care?

“A. Yes.

“Q. And the failure to culture, was that a substantial factor in causing or contributing to the development of Nicole's eye complications, her loss of vision, and the need for a corneal transplant?

“A. No. The -- just obtaining the culture itself is not therapeutic. It's diagnostic. However, when you obtain a culture, you're also removing debris and necrotic corneal tissue and white blood cells and bacteria. So although the culture itself is not therapeutic, the act of obtaining the culture is part of the cleaning process.

“Q. All right. So the results of the culture would tell you whether or not there was certainly an infection and how to treat it?

“A. Correct, but you don't have time to wait for the culture. You gotta treat it when you get the culture and then use the culture to guide you down the road if you're not getting better.”

The present motion highlights the single word “No” in Dr. Sheppard’s response to the second quoted question above. Defendants argue that by answering in the negative the question of whether Dr. Pamel’s failure to culture was a substantial factor in causing the development of plaintiff’s injuries, Dr. Sheppard failed to provide the necessary evidentiary support to establish that the one departure found by the jury -- a failure by Dr. Pamel to perform a culture -- was a

proximate cause of plaintiff's injury. Essentially, defendants contend that there was no expert testimony at trial causally linking Dr. Pamel's negligence with injury to plaintiff.

In response, plaintiff maintains that review of Dr. Sheppard's testimony as a whole reflects that he provided sufficient support for the claim that Dr. Pamel's failure to perform a culture was a proximate cause of plaintiff's injuries. According to plaintiff, the "no" answer on which Dr. Pamel focuses should be understood as a misguided professorial effort to teach his listeners that taking a culture is not therapeutic, but diagnostic, and that the non-performance of a diagnostic test does not cause injuries that are already present, but merely prevents proper treatment. Plaintiff suggests that when the entirety of Dr. Sheppard's testimony was considered by the jury, including the answer given by Dr. Sheppard in response to the proximate cause question as it related to Dr. Dello Russo, there was sufficient evidence to support the finding that Dr. Pamel's failure to culture was a substantial factor in causing injury to plaintiff.¹

Discussion

"The essential elements of medical malpractice are (1) a deviation or departure from accepted medical practice and (2) evidence that such departure was a proximate cause of injury" (*Hayden v Gordon*, 91 AD3d 819, 820 [2d Dept 2012], quoting *DiMitri v Monsouri*, 302 AD2d 420, 421 [2d Dept 2003]). "[A] plaintiff must establish that the physician's actions deviated from accepted medical practice and that such deviation proximately caused his or her injuries"

¹Plaintiff also implies that Dr. Pamel's counsel in effect strategically orchestrated this issue by convincing plaintiff's counsel that the verdict sheet did not need to list all the departures he initially sought to include on the verdict sheet, but could instead leave out some of his proposed questions, such as whether Dr. Pamel was negligent in failing to consider infection as a diagnosis during his treatment of Clark. However, the accusation cannot inform the decision here. Regardless of whether the jury would have found another departure if other questions had been included on the verdict sheet, the only issue this Court can address here is whether the jury verdict, as it was rendered, is sufficiently supported by the evidence.

(*Shallash v New Island Hosp.*, 66 AD3d 988, [2d Dept 2009]). “Generally, expert testimony is required to prove these two elements” (*Manganiello v Ahmed*, 130 AD3d 583 [2d Dept 2015]).

“For a court to conclude as a matter of law that a jury verdict is not supported by sufficient evidence,... [i]t is necessary to first conclude that there is simply no valid line of reasoning and permissible inferences which could possibly lead rational men [or women] to the conclusion reached by the jury on the basis of the evidence presented at trial” (*Cohen v Hallmark Cards, Inc.*, 45 NY2d 493, 499 [1978]). Dr. Pamel contends that given Dr. Sheppard’s failure to answer “Yes” to a direct proximate cause question regarding Dr. Pamel’s departure, there is no valid line of reasoning which justifies the jury’s finding that his failure to perform a culture was a substantial factor in causing plaintiff’s injuries. His motion cites in support an array of cases in which the plaintiffs’ experts failed establish at trial that the asserted negligence was the proximate cause of injury to the plaintiff (*see e.g. Bryan v Staten Is. Univ. Hosp.*, 29 AD3d 842 [2d Dept 2006]); *Broadie v St. Francis Hosp.*, 25 AD3d 745 [2d Dept 2006]; *Falotico v Frankel*, 232 AD2d 607 [2d Dept 1996]; *Prete v Rafla-Demetrious*, 224 AD2d 674 [2d Dept 1996]).

However, the small portion of testimony in which Dr. Sheppard replied “no” may not be viewed in a vacuum. This Court must consider the entirety of Dr. Sheppard’s testimony to determine whether the evidence supports *any* valid line of reasoning and permissible inference which could possibly lead a rational jury to find that Dr. Pamel’s failure to perform a culture on October 31, 20014 was a proximate cause of plaintiff’s injuries. Considering all of Dr. Sheppard’s testimony, and allowing for all permissible inferences that could legitimately be drawn therefrom, a sufficient basis for the jury’s verdict can be found (*see Cohen v Hallmark Cards, Inc.*, 45 NY2d at 499).

Specifically, the jury could have properly understood Dr. Sheppard to be asserting that

the failures to perform a culture on plaintiff's right eye, on October 31, 2014 as well as on October 23, 2014, were a substantial factor in the failure to cure plaintiff's infection, resulting in the permanent injuries suffered by plaintiff, including scarring, tissue loss and necrosis.

Additionally, Dr. Sheppard's testimony that defendants should have simultaneously treated plaintiff for an infection and performed a culture in order to ensure that the patient was receiving the proper treatment, conveyed that due to Dr. Pamel's failure to perform a culture, he never discovered that plaintiff's condition was not being effectively treated, so that he left the infection to develop untreated. Combined with Dr. Sheppard's other testimony that untreated infection is a source of permanent damage, such as scarring and irregularities that can have significant deleterious effect on the vision, the jury could rationally conclude that Dr. Pamel's failure to perform a culture was a substantial factor in causing plaintiff's injuries.

Moreover, based on Dr. Sheppard's testimony that Dr. Dello Russo's failure to culture Clark's eye was a substantial factor in causing plaintiff's injuries, it would not be irrational for the jury to extrapolate, or draw an inference, that in Dr. Sheppard's view, Dr. Pamel's failure of the same nature must also have been a substantial factor in causing plaintiff's injuries. Indeed, there was no basis for drawing a distinction between the impact on plaintiff's condition of each doctor's failure. Even though the jury declined to find a departure by Dr. Dello Russo, it was entitled to treat Dr. Sheppard's testimony regarding the impact of the failure to culture as applicable to both defendants equally, and to rely on it to hold Dr. Pamel liable.

Accordingly, it is hereby

ORDERED that motion for an order setting aside the verdict as against Dr. Pamel pursuant to CPLR 4404 is denied.

This constitutes the decision and order of the Court.

Dated: White Plains, New York
May 5, 2020



HON. TERRY JANE RUDERMAN, J.S.C.