Henry v Purohit
2021 NY Slip Op 30426(U)
February 11, 2021
Supreme Court, New York County
Docket Number: 805321/2015
Judge: Judith Reeves McMahon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JUDITH REEVES MCMAHON** **PART** **IAS MOTION 30**

Justice

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ROBERT HENRY, SARAH HENRY,

Plaintiff,

- v -

RAJVEER PUROHIT, RAJVEER PUROHIT MD P.C.,JERRY BLAIVAS, JERRY G. BLAIVAS, M.D., P.C.,NEW YORK CITY UROLOGY, PLLC,THE URO CENTER OF NEW YORK, DUANE READE INC.,JOHN AND/OR JANE DOES NOS. 1-20

Defendant.

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INDEX NO. 805321/2015

MOTION DATE 02/10/2021, 02/10/2021

MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 188, 189, 190, 191

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

Upon the foregoing documents,

Defendant Duane Reade Inc.'s motion (sequence #002) for an Order, pursuant to CPLR §3212, seeking summary judgment and dismissal of Plaintiffs' complaint against Duane Reade is denied.

Plaintiffs' motion (sequence #003) for an Order, pursuant to CPLR § 3212, granting Plaintiffs Robert L. Henry and Sarah C. Henry summary judgment on the issue of liability against Defendants Rajveer Singh Purohit, M.D., Rajveer Singh Purohit, M.D. P.C., New York City Urology, PLLC (collectively the "UROLOGISTS") and Duane Reade is granted in part and denied in part as detailed herein.

This is an action for medical malpractice wherein Plaintiffs allege multiple departures from the standards of good and accepted medical practice, including: (1) the failure of Defendant

Purohit, individually, and acting through Defendant P.C., to properly treat Plaintiff Robert Henry between January 24, 2013 and October 10, 2013; and (2) the failure of Defendant NYC Urology's employees to exercise due care in the course of their employment on January 24, 2013 and March 17, 2013 in issuing erroneous prescriptions to Plaintiff Robert Henry.

This action further alleges negligence on the part of Defendant Duane Reade in dispensing medication in connection with the erroneous prescriptions between January 24, 2013 and March 17, 2013.

As a result of Defendants' negligence, Plaintiff Robert Henry was mis-prescribed and dispensed an excessive daily dosage of 200mg of Clomid for over four-months. Plaintiffs allege this excessive dosage caused or provoked a deadly condition of deep vein thrombosis (DVT) or blood clotting in his left lower leg.

Defendant Duane Reade now moves for summary judgment to dismiss Plaintiffs' allegations and Plaintiffs now move for summary judgment on the issue of liability against all Defendants.

"To sustain a cause of action for medical malpractice, a plaintiff must prove two essential elements: (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of plaintiff's injury." *Frye v. Montefiore Med. Ctr.*, 70 A.D.3d 15, 888 N.Y.S.2d 479 (N.Y.A.D. 1st Dept. 2009).

"Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions." *Rosario v. Our Lady of Consolation Nursing & Rehab. Care Ctr.*, 186 A.D.3d 1426, 128 N.Y.S.3d 906 (N.Y.A.D. 2nd Dept. 2020).

Plaintiffs sought to establish a prima facie entitlement to judgment via the Affirmations of Dr. Biree Andemariam and Pharmacist Jonathan Shaatal. *See Bartolacci-Meir v. Sassoon*, 149 A.D.3d 567, 50 N.Y.S.3d 395 (N.Y.A.D. 1st Dept. 2017); *See also Stukas v. Streiter*, 83 A.D.3d 18, (N.Y.A.D. 2nd Dept. 2011); *See also Joyner-Pack v. Sykes*, 54 A.D.3d 727, (N.Y.A.D. 2nd Dept. 2008).

In support of Plaintiffs' motion, Dr. Andemariam stated, "The records and testimony reveal that the defendant Rajveer Singh Purohit, M.D. intended to prescribe 50mg of Clomid daily to the patient Robert Henry. The records and testimony also confirm that rather than prescribing Clomid 50mg once per day, the actual prescription and refills provided for the patient were for 50mg of Clomid, 4 times per day, 30 tablets. While the testimony suggests that the error in preparing the prescription was caused by an unknown medical assistant, it is also undisputed that the unknown medical assistant signed the prescription on behalf of the defendant Purohit and that defendant Purohit did not review the prescription prior to providing it for the patient."

Dr. Andemariam opined "that prescribing 50mg of Clomid 4 times a day to the patient Robert Henry was a departure from good and accepted medical care. The failure of defendant Purohit to review the prescription prior to giving it to the patient was a departure from good and accepted medical care. Allowing a medical assistant to sign the prescription was a departure from good and accepted medical care."

Dr. Andemariam further opined that, "It is also my opinion that these numerous departures from good and accepted medical care were a substantial factor in causing harm to the patient. The high dose of Clomid given to the patient caused the patient to suffer left lower extremity deep vein thrombosis or DVT for which he was treated at Weill Cornell Medical Center and which required anitcoagulant treatment at its Coumadin Clinic. The onset of the DVT required extensive treatment and caused the patient to endure significant long-term effects. In addition, once the patient suffered the DVT, he was placed on the antigoagulant Warfarin, but developed side effects. The patient will be required to take anticoagulant medication for the rest of his life. In addition, the patient will be at increased risk of DVT."

In support of Plaintiffs' motion, Pharmacist Shaatal stated, "It is my expert opinion, with a reasonable degree of certainty, that the defendant Duane Reade Inc. by and through its pharmacist Helen Andros was negligent and departed from good and accepted pharmacy practice in the dispensing of the medication Clomiphene Citrate to the plaintiff. The defendant Duane Reade Inc. by and through its pharmacist Helen Andros exercised independent judgment in changing the number of tablets dispensed and also in accumulating the extra tablets and dispensing them as an additional partial refill of the prescription to plaintiff Robert L. Henry. In addition, the prescription as written, which was admittedly erroneous, was so contraindicated on

its face that ordinary prudence required additional measures before dispensing the medication, including contacting the prescribing physician for clarification."

Pharmacist Shaatal further opined that "The standard of care in New York State requires counseling with the patient for new prescriptions. Counseling of the patient should have included advising the patient of the high dosage and the extra tablets."

Defendants the UROLOGISTS, submitted an Affirmation from a doctor board certified in Urology in Opposition to Plaintiffs' motion. The UROLOGISTS' Opposition to Plaintiffs' motion focused solely on the issue of proximate cause. The UROLOGISTS' Opposition argued that Plaintiffs' Experts' opinions regarding causation are conclusory and fail to offer a basis for concluding that the prescribed overdose of Clomid was a substantial factor in causing Plaintiff's injuries.

The UROLOGISTS' Expert opined that "It is my opinion with reasonable medical certainty that plaintiff's experts failed to consider the plaintiff's medical condition as a whole in giving their opinions. As such, I disagree with plaintiff's experts that the prescription of Clomid, without considering other risk factors present in the plaintiff, was the proximate cause of plaintiff's alleged injuries."

The UROLOGISTS' Expert stated that, "The records reviewed indicate the presence of several risk factors for DVT in the plaintiff specifically, age, polycythemia, prolonged periods of immobility, and dehydration. It is my opinion with a reasonable degree of medical certainty, that these risk factors combined to cause or provoke plaintiff's DVT. I disagree with plaintiff's expert, Dr. Andemariam, who offers the opinion that the prescription of Clomid caused the patient to sustain deep vein thrombosis, without considering and addressing other risk factors for DVT that existed in plaintiff independent of the prescription of Clomid, and whether these risk factors were the proximate cause of plaintiff's DVT."

The UROLOGISTS' Expert concluded that, "given that Mr. Henry had multiple risk factors, it is my opinion with a reasonable degree of medical certainty that it cannot be said that Clomid singularly was the proximate cause of the plaintiffs DVT. It is further my opinion with a reasonable degree of medical certainty, that the records and testimony indicate the presence of

several risk factors for DVT in plaintiff, unrelated to the use of Clomid, which combined to cause plaintiffs DVT and related injuries as alleged herein."

Defendant Duane Reade, in support of their own motion and in opposition to Plaintiffs' motion, submitted an Affirmation from a Pharmacist, Donna M. Horn, as well as re-submitted a copy of the UROLOGISTS' Expert's Affirmation.

In support of Duane Reade's own motion and in Opposition to Plaintiffs' motion, Pharmacist Horn stated that, "In the incident matter, it is not in dispute, nor does Mr. Shaatal dispute that Ms. Andros dispensed the correct medication, with the correct warning sheets, in the exact strength and form prescribed by Dr. Purohit. This is the exact standard of care that is at issue, whether or not the prescription was filled as written, and he does not dispute that it was actually filled as written."

Pharmacist Horn opined that, "It would, therefore, not have been a violation of the standard of care to fill [Plaintiff's] prescriptions without calling the physician, as there is no agreement on the best dosage or duration of clomiphene for treating infertility in males."

This Court disagrees with Pharmacist Horn's characterization of Pharmacist Shaatal's opinions, Plaintiffs' allegations, as well as the facts in evidence.

In support of Plaintiffs' motion and in Opposition to Defendant Duane Reade's motion, Pharmacist Shaatal opined "that the prescription for an initial dosage of Clomid 50mg po qid or 200mg per day was not within medically acceptable ranges and was contraindicated under the circumstances and that the pharmacist departed from good and accepted pharmacy practice in failing to review the prescription, contact the provider for clarification, or otherwise confirm the dosage."

Pharmacist Shaatal also stated that, "The defendant Duane Reade dispensed 28 tablets initially and then as multiple six weekly refills. The action of the pharmacist to accumulate the extra 2 tablets (14 in total) as a partial refill was a departure from good and accepted pharmacy practice and **a failure to dispense as written**."

Pharmacist Shaatal also stated that, "The [Duane Reade] pharmacist indicated that the pharmacy system alerted her to a suspected issue with the medication. As a result; a drug utilization review should have occurred, but the alert was overridden by the pharmacist. The failure to research the issue, request another pharmacist to review, or contact the provider was a departure from good and accepted pharmacy practice and procedure."

Finally, Pharmacist Shaatal stated that, "The pharmacist did not dispense the prescription as written, because she withheld 2 tablets which she accumulated and dispensed as a partial refill beyond the prescribed number of refills. In so doing, the pharmacist undertook to exercise independent judgment in filling and dispensing the prescription. In addition, the prescription as written was so clearly contraindicated because it was **not within medically acceptable ranges under the circumstances** that ordinary prudence required the pharmacist to take additional measures before dispensing the medication."

"There is no merit to the…defendants' categorical contention that a pharmacist's duty will never extend beyond accurately filling a prescription… when a pharmacist has demonstrated that he or she did not undertake to exercise any independent professional judgment in filling and dispensing prescription medication, that pharmacist cannot be held liable for negligence in the absence of evidence that he or she failed to fill the prescription precisely as directed by the prescribing physician or that the prescription was so clearly contraindicated that ordinary prudence required the pharmacist to take additional measures before dispensing the medication." *Abrams v. Bute*, 138 A.D.3d 179, 27 N.Y.S.3d 58 (N.Y.A.D. 2nd Dept. 2016).

Pharmacist Horn's opinions that the pharmacist filled the prescription exactly as written and that there is no agreement as to the best dosage fails to address Plaintiffs' Expert's opinion that the prescription was not in fact filled exactly as written, but more importantly was beyond what could be considered an appropriate dose for an off label use of the drug such that Duane Reade's computer system warned the Pharmacist that there was potentially an error in the prescription she was about to dispense, and the Pharmacist, in her independent judgment, overrode that warning and dispensed the overdose to Plaintiff on multiple occasions without taking any actions. Pharmacist Horn's opinions stating that the prescription was filled precisely as directed, that there is no recommended dosage so there can be no dosage considered contraindicated, and that Duane Reade exercised no independent judgment are conclusory.

An expert opinion offered in opposition to a motion for summary judgment that is not responsive to the movant's expert's opinions and is conclusory is insufficient to create a triable issue of fact. *See Roques v. Noble*, 73 A.D.3d 204, 899 N.Y.S.2d 193 (N.Y.A.D. 1st Dept. 2010)*See Dolan v. Halpern*, 73 A.D.3d 1117, 902 N.Y.S.2d 585 (N.Y.A.D. 2nd Dept. 2010); *See also Cregan v. Sachs*, 65 A.D.3d 101, 879 N.Y.S.2d 440 (N.Y.A.D. 1st Dept. 2009); *See also Kaplan v. Hamilton Med. Assocs., P.C.*, 262 A.D.2d 609, 692 N.Y.S.2d 674 (N.Y.A.D. 2nd Dept. 1999).

"An expert opinion that is contradicted by the record cannot defeat summary judgment." *Bartolacci-Meir v. Sassoon*, 149 A.D.3d 567, 50 N.Y.S.3d 395 (N.Y.A.D. 1st Dept. 2017).

It must be noted that many supplemental expert opinions were submitted by the parties. In deciding the motions, this Court considered expert opinions only to the extent that they were offered in support of a party's moving papers or in opposition to issues raised by a moving party's experts. This Court disregarded all supplemental expert opinions that went beyond that standard, as the introduction of new testimony in reply is not proper.

In Reply to their motion, Plaintiffs disputed the arguments of the Opposition submitted by Defendants, specifically in regards to the issue of causation, as raised by the UROLOGISTS and their Urology Expert.

Plaintiffs argued that "the plaintiff's evidence may be deemed legally sufficient even if its expert cannot quantify the extent to which the defendant's act or omission . . . increased his injury, provided that evidence is presented from which the jury may infer that the defendant's conduct . . . increased his injury" quoting, *Barry v. Lee*, 180 A.D.3d 103 (N.Y.A.D. 1st Dept. 2019). Plaintiffs argued that the deposition testimony of Dr. Purohit, the medical record of New York Presbyterian-Weill Cornell, and the UROLOGISTS' Expert's statements regarding Dr. Purohit informing Plaintiff that blood clots was a known potential risk of taking Clomid constitute sufficient evidence on the issue of whether the prescribed overdose caused Plaintiff's injuries. This Court disagrees.

Although there are mentions of Clomid, none of the evidence cited by Plaintiffs explicitly states that Plaintiff's injuries were caused by the prescribed overdose. Plaintiffs' Expert does explicitly state that the prescribed overdose caused Plaintiff's injuries, but fails to point to facts

in evidence, offers no reasoning, nor cites to any studies to explain how they came to that conclusion regarding causation.

"To establish a prima facie case of medical malpractice, a plaintiff must show that the doctor deviated from accepted medical practice and also that the alleged deviation proximately caused her injury. A plaintiff's expert opinion must demonstrate the requisite nexus between the malpractice allegedly committed and the harm suffered." *Dallas-Stephenson v. Waisman*, 39 A.D.3d 303, 833 N.Y.S.2d 89 (N.Y.A.D. 1st Dept. 2007).

As a matter of law, this Court finds that Plaintiffs are entitled to summary judgment on the issues of the duty Defendants owed to Plaintiff and that said duty was breached by the issuance of the prescription(s) at issue.

However, this Court agrees with Defendants that Plaintiffs' Experts' opinions regarding causation are conclusory and therefore there is an issue of fact regarding proximate cause that must be decided by the trier of fact.

"The overarching principle governing determinations of proximate cause is that a defendant's negligence qualifies as a proximate cause where it is a substantial cause of the events which produced the injury." *Raldiris v. Enlarged City Sch. Dist. of Middletown*, 179 A.D.3d 1111, 118 N.Y.S.3d 696 (N.Y.A.D. 2nd Dept. 2020). "Proximate cause is established where the defendant's conduct was a "substantial factor" in bringing about the injury." *King v. St. Barnabas Hosp.*, 87 A.D.3d 238, 927 N.Y.S.2d 34 (N.Y.A.D. 1st Dept. 2011).

Plaintiffs' Experts' opinions offer no basis or foundation for the trier of fact to evaluate the conclusory statements regarding causation.

"Although the issue may be decided as a matter of law where only one conclusion may be drawn from the established facts, the question of proximate cause is generally to be decided by the finder of fact." *Designer Limousine, Inc. v. Auth. Transportation, Inc.*, 176 A.D.3d 670, 110 N.Y.S.3d 133 (N.Y.A.D. 2nd Dept. 2019); *See also Richardson v. Cablevision Sys. Corp.*, 173 A.D.3d 1083, 104 N.Y.S.3d 655 (N.Y.A.D. 2nd Dept. 2019); *Kante v. Tong Fei Chen*, 176 A.D.3d 928, 111 N.Y.S.3d 612 (N.Y.A.D. 2nd Dept. 2019); *M.M.T. v. Relyea*, 177 A.D.3d 1013, 114 N.Y.S.3d 385 (N.Y.A.D. 2nd Dept. 2019).

"Expert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause. Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions." *Joyner v. Middletown Med., P.C.*, 183 A.D.3d 593, 123 N.Y.S.3d 169 (N.Y.A.D. 2nd Dept. 2020). *See also Melendez v. Parkchester Med. Servs., P.C.*, 76 A.D.3d 927, 908 N.Y.S.2d 33 (N.Y.A.D. 1st Dept. 2010).

There is a question of fact, among others, as to whether Defendants' proximately caused Plaintiff's injuries that must be decided by the finder of fact. *Carnovali v. Sher*, 121 A.D.3d 552, 995 N.Y.S.2d 16 (N.Y.A.D. 1st Dept. 2014).

There are also questions of fact as to whether Defendant Duane Reade breached their duty to Plaintiff and is liable for Plaintiff's injuries.

ORDERED that Defendant Duane Reade Inc.'s motion (sequence #002) for summary judgment and dismissal of Plaintiff's complaint against Duane Reade is denied; and it is further

ORDERED that Plaintiffs' motion (sequence #003) for summary judgment on the issue of liability against Defendants Rajveer Singh Purohit, M.D., Rajveer Singh Purohit, M.D. P.C., New York City Urology, PLLC and Duane Reade is denied; and it is further

ORDERED that any and all other requested relief is denied; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly.

2/11/2021				**S//**			
DATE				**JUDITH REEVES MCMAHON, J.S.C.**			
CHECK ONE:		**CASE DISPOSED**		X	**NON-FINAL DISPOSITION**		
		GRANTED	**DENIED**		**GRANTED IN PART**	X	**OTHER**
APPLICATION:		**SETTLE ORDER**			**SUBMIT ORDER**		
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**			**FIDUCIARY APPOINTMENT**		**REFERENCE**