Henderson v Takemoto
2023 NY Slip Op 35271(U)
February 3, 2023
Supreme Court, Otsego County
Docket Number: Index No. EF2019-576
Judge: John F. Lambert
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.

At a term of the Supreme Court of the State of New York, held in and for the County of Delaware, at Delhi, New York on September 16th, 2022.

PRESENT: Hon. John F. Lambert,
Acting Supreme Court Justice

STATE OF NEW YORK SUPREME COURT
COUNTY OF OTSEGO

VERONICA HENDERSON,

Plaintiff,

-against-

DECISION & ORDER
Index Number: EF2019-576

FILED & ENTERED
Feb 14, 2023 @ 4:05
Otsego County Clerks Office

RICHELLE TAKEMOTO, M.D., JESSIE WELCH, RPA-C, MATTHEW W. JONES, M.D., DAVID A. FANION, M.D., BRINN M. OSTRANDER, PA, MICHAEL R. DIAZ, D.O., KRISTEN HERBST, D.O., BASSETT HEALTHCARE NETWORK, THE MARY IMOGENE HOSPITAL d/b/a BASSETT MEDICAL CENTER,

Defendants.

Defendant Dr. Richelle Takemoto filed a motion on August 25th, 2022 requesting reargument of the court's order dated August 3rd, 2022 which denied the motion for summary judgment as to the plaintiff's claims against Dr. Richelle Takemoto, as that portion of the motion was unopposed, and further relief may seem just and proper. Pursuant to CPLR § 2219(a), the Court has read the following e-filed documents, listed by NYSCEF document number (Motion #3) 163 – 169, 172 and 173.

Defendant maintains that the Court overlooked or misapprehended, in determining the prior motion, the facts that Dr. Richelle Takemoto's last involvement with the plaintiff was when she left the Emergency Department on January 31st, 2018. Plaintiff claims in the Bill of Particulars that Dr. Richelle Takemoto was negligent on January 31st, 2018 in failing to: (1) use sufficient fixation and/or surgical techniques in reducing the fracture; (2) read/interpret the post-reduction

films; (3) order a CT or MRI to further evaluate the bony alignment; address the ulnar styloid avulsion fracture; and (4) reduce the fracture a second time. It is further alleged that Dr. Richelle Takemoto failed to recommend an open surgical procedure, failed to refer the plaintiff for the appropriate follow-up care, failed to properly splint/cast the fracture, and failed to communicate to the plaintiff to be non-weight bearing at discharge. Defendant indicates that in the prior motion there is no opinion in this plaintiff's Orthopedic expert affidavit that the fracture was not initially reduced appropriately by Dr. Richelle Takemoto. Further the defendant maintains, that the Court overlooked or misapprehended, in determining the prior motion, the law in that as there was no opposition to Dr. Takemoto's application for dismissal, and any claims against her should have been dismissed with prejudice as abandoned. Additionally, the Court overlooked or misapprehended, in determining the prior motion, the law in that plaintiff's opposition papers, including the expert affidavits that were submitted in support contain an entirely new theory of negligence and the plaintiff did not crossmove to amend the pleadings in response to Dr. Richelle Takemoto's motion for summary judgment.

In response, the plaintiff acknowledges that plaintiff failed to submit any opposition at summary judgment to the care and treatment Dr. Richelle Takemoto provided to Ms. Veronica Henderson on January 31, 2018, with regard to the actual physical reduction that was performed in the Emergency Department. However, plaintiff differs with the defendant's characterization that the orthopedic expert opined an entirely new theory of negligence. Rather plaintiff asserts that the standard of care beyond a reasonable degree of medical certainty for treating and setting of the distal radial fracture is to thereafter prescribed vitamin C (500 mg daily) for the first (50) days after surgery/nonoperative treatment as a prophylaxis to prevent the development of Complex Regional Pain Syndrome (CRPS) after

initial treatment. Specifically, that expert opined:

> "29. ...It is well-known in the orthopedic medical community that CRPS can occur in patients after a distal radial fracture. With that knowledge, the American Academy of Orthopedic Surgeon's clinical based practice guidelines since 2009 has recommended providing 500 mg of Vitamin C to a patient every day for fifty (50) days after treatment for a distal radius fracture to prevent the occurrence of CRPS.
> 31. The medical record indicates that it was not until March 20, 2018, that Ms. Henderson was provided and/or taking Vitamin C (500 mg by mouth daily). The record also indicates that Ms. Henderson was taking Vitamin C at visits on March 22, 2018, March 27, 2018, May 21, 2018, and thereafter. The record is clear that Ms. Henderson was provided and/or taking Vitamin C for the first time approximately fifty (days) after her fracture. Again, the AAOS has recommended since 2009 that prescribing 500 mg of Vitamin C every day for fifty (50) days after a distal radius fracture to prevent CRPS."

Plaintiff asserts that the prophylactic aftercare prescription of Vitamin C is part of the standard of care when treating a distal radial fracture.

On the other hand, defendant expert James M. Schneider, M.D., opines that:

> "46. It is my opinion within a reasonable degree of medical certainty that Ms. Henderson unfortunately developed CRPS as a result of her fall, not management of the fracture. CRPS is the cause of her continued deformity, limitations, and pain complaints. The development of CRPS was not a result of any medical treatment by any of the defendants in this case. Nor was there any alternative treatment course that would have prevented the CRPS from developing or worsening. The treatment provided by the defendants was at all times standard of care and did not cause or contribute to Ms. Henderson's unfortunate outcome."

There is a factual question for the jury to determine.

The plaintiff further asserts that the opinions submitted by defendants' experts are that Ms. Veronica Henderson's left wrist dysfunction is entirely the result of CRPS. Plaintiff's experts countered and/or rebutted such assertion at summary judgment by opining in the first instance that Ms. Veronica Henderson's wrist dysfunction was caused by inadequate alignment of the bony

structure. Alternatively, these experts opined that if the fact finders believes that the plaintiff's wrist dysfunction is not related to anatomic alignment and is related to CRPS, or her symptoms are caused by a combination of both, then it was a deviation from the standard of care by Dr. Richelle Takemoto on January 31st, 2018 to not provide and/or recommend her taking Vitamin-C, and that such lack of treatment was a substantial factor in her current wrist condition.

The Court notes that in defendants Statement of Material Facts (NYSCEF document number [Motion #3] 146) it is asserted that:

"26. The numbness, allodynia, and radiating pain were all new findings on March 8, 2018. 27. An x-ray was performed on March 8, 2018, which demonstrated healing of the fracture and no change in alignment from the prior x-rays.
28. P.A. Ostrander reviewed Ms. Henderson's case with Dr. Diaz at this visit. Dr. Diaz felt that Ms. Henderson's symptoms at this visit were consistent with Complex Regional Pain Syndrome (CRPS) Type 1 (also known as RSD)."

The plaintiff's response is (NYCEF document number [Motion #3]151):

"26. Plaintiff admits to the allegations contained in Paragraph 26 of the Statement.
28. Plaintiff admits to the allegations contained in Paragraph 28 of the Statement"

Contrary to the assertions of the defendant, there was a sufficient showing in the record to create a factual issue regarding possible liability for the alleged negligence of the physician in the standard treatment of care of the plaintiff, including the issue of whether or not vitamin C was prophylactically prescribed after the procedure or whether vitamin C should have been prescribed. Plaintiff will not be prohibited from raising the Vitamin C theory at trial. Plaintiff's complaint at paragraph number forty (40) states that Dr. Richelle Takemoto: "... failed to provide proper follow up care in treating clinics left wrist injury..." Thereafter, expanding on this pleading, the plaintiff's Bills of Particular relating to Dr. Richelle Takemoto stated plaintiff was not informed of:

> "...any risks of the closed reduction that was going to be performed, including, but limited to the following: bleeding, blood clots, infection, nerve damage,

> pain, swelling or trouble moving the wrist, incomplete healing of the bone, nonunion; potential for new fractures; malalignment of the bones; shortening of the bones; need for additional surgeries; that the bone may grow back together in a different way than it was before the fracture; and potential for development of RSD. By way of further answer, and without limitation, Defendant Takemoto failed to give Plaintiff an adequate, full and complete informed consent with regard to the nature of her injury upon which she was afflicted, and the possible ways the injury could be and should be treated and otherwise dealt with at that time and over the course of time, and the potential effects if left untreated, the type and severity of the fracture and the risks associated with such fracture, and overall failed to inform the Plaintiff of the foreseeable risks, complications, consequences, and/or dangers of the care, treatment and procedure Defendants ultimately undertook and/or failed to inform the Plaintiff of the possible alternate methods of treatment applicable to Plaintiff's condition in a manner to allow Plaintiff to make a knowledgeable evaluation and which was required under the circumstances and that a reasonable prudent health care provider would disclose...".

Thus, the movant's argument that plaintiff failed to plead or expand the pleadings relating to the CRPS (also known as RSD) is unconvincing and does not justify this Court in granting Dr. Richelle Takemoto's motion relating to that issue. Nor has she demonstrated that the lack of informed consent claim should be dismissed. As defendant's moving papers stated, as to Dr. Richelle Takemoto (and Jessie Welch, P.A.), the plaintiff claims that she did not consent to the closed reduction of the left distal radius using traction and finger traps.

Plaintiff admits that no opposition was submitted on the underlying motion with regard to the physical reduction that was performed on January 31, 2018. Thus, those portions of any claims against Dr. Takemoto relating to the closed reduction that was performed on January 31, 2018 are dismissed, except for the issue of the failure to prescribe Vitamin C as follow up care.

Regarding defendant's position relating to the request to dismiss the informed consent claims against Dr. Diaz, Dr. Herbst, or Brinn Ostrander, these assertions were unrebutted by plaintiff and, as such, are granted. The plaintiff's Bills of Particulars stated that the lack of informed

consent claims were not applicable to Dr. Diaz, Dr. Herbst, or Brinn Ostrander. Thus they are dismissed.

As such it is,

ORDERED that application by defendant to reargue the Decision and Order of this Court dated August 3rd, 2022 is denied except as stated herein.

This is the decision and order of the Court.

Dated: February 3rd, 2023
Cooperstown, New York

Hon. John F. Lambert
Acting Justice of the Supreme Court

TO: Peter C. Papayanakos, Esq.
Attorneys for Plaintiff

Molly C. Casey, Esq.
Attorneys for Defendants