NEW YORK SUPREME COURT – COUNTY OF BRONX

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 34

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MAXIMILLIAN PETERSON,

Plaintiff,

- against -

WILSON ORTHOPAEDICS, PLLC and ARNOLD WILSON, M.D.,

Defendants.

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Index №. 31723/2019E

Hon. MICHAEL A. FRISHMAN, Justice of the Supreme Court

DECISION AND ORDER

The following papers numbered 49-66, 69-73 and 74 were read on this Motion for Summary Judgment (Seq. No. 003):

Sequence No. 003	NYSCEF Doc. Nos.
Notice of Motion, Affirmation in Support, Statement of Material Facts – Exhibits and Affirmations Annexed	49-66
Affirmation in Opposition, Memorandum of Law in Opposition, Response to Statement of Material Facts – Exhibits and Affirmation Annexed	69-73
Reply Affirmation	74

In this action for medical malpractice and lack of informed consent defendants WILSON ORTHOPAEDICS, PLLC and ARNOLD WILSON, M.D. ("Wilson Orthopaedics," Dr. Wilson," or "defendants"), move by Notice of Motion for an Order granting them summary judgment dismissing the Complaint of plaintiff MAXIMILLIAN PETERSON ("plaintiff"). Plaintiff opposes the motion. For the reasons discussed infra, defendants' motion is granted in part and denied in part.

This action stems from allegations that as a result of Dr. Wilson's negligence and failure to render proper and acceptable treatment on June 28, 2017 for recurrent pain in his right elbow which increased with activity, resulted in permanent damage thereto, including ulnar collateral ligament ("UCL") tear; bursting ulnar nerves; ulnar collateral ligament reconstruction surgery; elbow arthroscopy surgical debridement; medial collateral reconstruction surgery; UCL reconstruction surgery; surgical tendon graft; physical therapy; radiating pain including tenderness and swelling; scarring of the right elbow; decreased ability to do activities of daily living; stress; mental anguish; loss of enjoyment of life; conscious pain and suffering; limited mobility; and loss of scholarships.[1] Specifically, plaintiff asserts that Dr. Wilson's negligent administration of a cortisone injection and negligent instructions to plaintiff that he may gradually return to pitching

[1] Plaintiff's Summons and Complaint stated a time frame of in or around 2013 through June 28, 2017, but the Bill of Particulars states June 28, 2017 as the date of the alleged negligence.

after a period of rest for seven to ten days caused plaintiff's subsequent UCL tear discovered in an August 4, 2017 MRI ordered by non-party Dr. Yormack after plaintiff's complaints persisted after June 28, 2017.[2]

A defendant in a medical malpractice action establishes *prima facie* entitlement to summary judgment by showing that in treating the plaintiff, he or she did not depart from good and accepted medical practice, or that any such departure was not a proximate cause of the plaintiff's alleged injuries (*Anyie B. v Bronx Lebanon Hosp.*, 128 AD3d 1, 2 [1st Dept 2015]). If a defendant in a medical malpractice action demonstrates *prima facie* entitlement to summary judgment by a showing either that he or she did not depart from good and accepted medical practice or that any departure did not proximately cause the plaintiff's injuries, plaintiff is required to rebut defendant's *prima facie* showing "via medical evidence attesting that the defendant departed from accepted medical practice and that such departure was a proximate cause of the injuries alleged" (*Ducasse v New York City Health Hosps. Corp.*, 148 AD3d 434, 435 [1st Dept 2017], *citing Anyie B.* at 3). "The plaintiff must rebut defendant's prima facie showing without '[g]eneral allegations of medical malpractice, merely conclusory and unsupported by competent evidence'" (*Henry v Duncan*, 2018 NY Slip Op 30219[U] at *2 [Sup Ct, New York County 2018] [*citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986])]; *affd* 169 AD3d 421 [1st Dept 2019]).

"A plaintiff's expert opinion must demonstrate 'the requisite nexus between the malpractice allegedly committed' and the harm suffered" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 307 [1st Dept 2007] [internal citation omitted]). "With respect to opinion evidence, it is well settled that expert testimony must be based on facts in the record or personally known to the witness, and that an expert cannot reach a conclusion by assuming facts not supported by record evidence" (*Henry*, 2018 NY Slip Op 30219[U] at *2, *affd* 169 AD3d 421 [1st Dept 2019] ["[t]he injury itself cannot be the only basis to conclude that a departure occurred" [internal citations 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 New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]; *Giampa v Marvin L. Shelton, M.D., P.C.*, 67 AD3d 439 [1st Dept 2009]). Further, the plaintiff's expert must address the specific assertions of the defendant's expert with respect to negligence and causation (*see Foster-Sturrup v Long*, 95 AD3d 726, 728-729 [1st Dept 2012]).

Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]). The burden on the movant is a heavy one, and the facts must be viewed in the light most favorable to the non-moving party *(Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824 [2014]).

Proximate cause is almost invariably a factual issue (*see Turturro v City of New York*, 28 NY3d 469, 485 [2016]; *Kriz v Schum*, 75 NY2d 25, 33-34 [1989]; *Eiseman v State of New York*, 70 NY2d 175 [1987]; Restatement [Second] of Torts § 433B, Comment *b*). Ordinarily, it is for the trier of fact to determine the issue of proximate cause (*see Howard v Poseidon Pools*, 72 NY2d

[2] Plaintiff never returned to Dr. Wilson again after June 28, 2017. Rather, plaintiff next sought treatment from Dr. Yormack on July 20, 2017 and July 31, 2017 respectively, when Dr. Yormack ordered an MRI that was subsequently conducted on August 4, 2017.

972, 974 [1988]). However, the issue of proximate cause may be decided as a matter of law "'where only one conclusion may be drawn from the established facts'" (*id.* at 974, quoting *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]). Additionally, it is the jury's function to assess conflicting evidence and determine the credibility of the witnesses and the weight to be accorded expert testimony *(see e.g. Kallenberg v Beth Israel Hosp.*, 45 AD2d 177, 180 [1st Dept 1974], *affd* 37 NY2d 719 [1975]).

At the outset, it is undisputed that plaintiff was a high school baseball pitcher who pitched several times per week and wanted to play baseball in college. It is also undisputed, and supported by the records, that plaintiff had previously presented to Dr. Wilson in May 2015 with complaints of right elbow pain when pitching; that an X-ray was taken which was unremarkable; that Dr. Wilson's diagnosis at that time was medial epicondylitis of the right elbow associated with pitching; and that Dr. Wilson's recommendations were to wear a tennis elbow brace when he is not pitching, take anti-inflammatories, work on strengthening his forearm, especially his flexor tendons, and that plaintiff should return in four weeks. Additionally, Dr. Wilson's notes indicated that a cortisone injection could be a benefit if symptoms worsened, and Dr. Wilson ordered an MRI which showed mild tendinopathy of the common flexor tendon but no other abnormalities.[3]

It further appears undisputed, and supported by the records, that plaintiff returned to Dr. Wilson on May 18, 2017 again with right elbow tenderness about the medial epicondyle but with full range of motion and no signs of instability; that an X-ray on that date showed no abnormalities of plaintiff's right elbow; that Dr. Wilson's assessment was that plaintiff was exhibiting signs of right elbow medial epicondylitis; that he may have a sprain or strain of the UCL. During this visit Dr. Wilson ordered an MRI; issued plaintiff a tennis elbow brace; recommended anti-inflammatories; advised plaintiff to modify his activity as much as possible; and discussed the benefit of a cortisone injection if severe symptoms persisted.

It is also undisputed and supported by the records that plaintiff returned to Dr. Wilson on June 28, 2017; that plaintiff's 2017 right elbow MRI results showed a strain of the flexor carpi radialis muscles in the area of the medial epicondyle consistent with medial epicondylitis with no abnormalities about the UCL present; that Dr. Wilson injected the area of maximum tenderness of medial epicondyle with twenty milligrams of Depo-Xylocaine; that he again suggested wearing the brace when not pitching and engaging in exercises to strengthen his forearm; advised plaintiff that he may be a candidate for a platelet rich plasma ("PRP") injection if symptoms persisted; that he may gradually return back to pitching after seven to tens days of rest; and that he would like to reevaluate plaintiff in four weeks' time.

However, it is further undisputed and supported by the records that, plaintiff had stopped pitching at the beginning of June 2017 and that he pitched in a showcase on July 17, 2017 for Jefferson University. In his deposition, plaintiff stated that after the cortisone shot and advised period of seven to ten days rest by Dr. Wilson, he gradually ramped up to perform in the July 17, 2017 showcase, but had to come out of the showcase game after two or three innings because of his pain.

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[3] There is no evidence in the record that plaintiff returned to Dr. Wilson in four weeks' time in 2015.

Additionally, it is undisputed that, after the showcase game, plaintiff presented to non-party Dr. Yormack on July 20, 2017 and July 31, 2017, at which time Dr. Yormack ordered another MRI due to continued symptoms. It is also undisputed and supported by the records that subsequently, non-party Dr. Khabie discussed potential courses of treatment with plaintiff and his family as the MRI results showed a near complete tear at the humeral attachment and no palmaris longus; that that Dr. Khabie would be obtaining opinions from non-parties Dr. Andrews and Dr. Ahmad who was noted as having done quite a bit of elbow Tommy John work, to discuss whether or not he feels PRP injection should first be tried and, if unsuccessful, consider a primary repair versus a formal Tommy John procedure. It is further undisputed that plaintiff ultimately underwent right elbow UCL reconstruction with ipsilateral gracilis tendon hamstring graft, arthroscopic extensive debridement of posterior compartment of the elbow with synovectomy, olecranon debridement, loose body removal, intraarticular injection of lidocaine with epinephrine, and ulnar nerve neurolysis. It is further undisputed that the latter UCL reconstruction procedure was ultimately performed on plaintiff by non-party Dr. Ahmad.

In support of their motion, defendants submit the affirmations of Dr. Paul Cagle, Jr., M.D., who is Board Certified in Orthopedic Surgery, and Dr. Jonathan Luchs, M.D., FACR, who is Board Certified in Diagnostic Radiology. Collectively, the affirmations of defendants' experts satisfy a *prima facie* showing of their entitlement to summary judgment.

Specifically, Dr. Cagle opines that, based upon his review of the record including an initial blind review of plaintiff's MRI images, medical records, deposition transcripts, and pleadings, not only did Dr. Wilson comport with good and accepted orthopedic practice in his care and treatment of plaintiff, but that there is no action or inaction on Dr. Wilson's part that is a proximate cause of plaintiff's alleged injuries.[4] To this point, Dr. Cagle opines that during plaintiff's May 18, 2017 presentation to Dr. Wilson for recurrent pain in his right elbow, Dr. Wilson appropriately elicited plaintiff's medical history and complaints detailing them in the chart; appropriately conducted a physical examination which revealed tenderness about the medial epicondyle and full range of motion with no signs of instability, which was consisted with Dr. Wilson's suspected diagnosis of medial epicondylitis; that performing and reviewing an x-ray of the right elbow and recording that it showed no abnormalities was consistent with good and accepted orthopedic surgical practice. He further opines that Dr. Wilson also appropriately ordered an MRI, recommended anti-inflammatories, the wearing of a tennis elbow brace, and suggested a possible cortisone injection if symptoms persisted, while also advising plaintiff to modify his activity as much as possible and to return in two weeks.[5]

Dr. Cagle further opines that during plaintiff's return appointment on June 28, 2017, Dr. Wilson performed an appropriate physical examination; appropriately considered plaintiff's complaints, medical history and prior visits including the MRI which showed findings consisted with his initial diagnosis of medial epicondylitis; advised plaintiff to gradually return to pitching

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[4] The Court recognizes that Dr. Cagle also discusses plaintiff's previous medical history seemingly involving sports related injuries in his younger years. However, the Court has not taken these into consideration in this decision as the Court does not find them germane to the allegations at issue in this current matter.

[5] The MRI ordered by Dr. Wilson was conducted on June 12, 2017 and plaintiff returned to Dr. Wilson on June 28, 2017.

after a period of seven to ten days' time; to continue to strengthen the forearm with exercise; and to wear a tennis elbow brace when not pitching, all in accordance with good and accepted orthopedic practice. Additionally, Dr. Cagle opines that it was not a deviation for Dr. Wilson to give plaintiff a cortisone injection at this visit as he was a proper candidate given plaintiff's complaints and clinical presentation and its administration was reasonable under the circumstances. On this point Dr Cagle explains that the goal of the cortisone injection is to reduce inflammation and help with reducing the pain while the elbow was at rest to speed up overall healing, which would allow plaintiff to return to strengthening exercises and gradually return his arm to competitive pitching, but that it is not a substitution for proper ramp up training after a period of inactivity. Furthermore, he opines that based on his review of the records, it is more likely than not that plaintiff sustained his UCL tear on or about the June 17, 2017 showcase date at Jefferson University.

With respect to Wilson Orthopaedics, Dr Cagle opines that since there are no allegations of independent acts of negligence against the practice, liability is confined to vicarious liability as the practice engaged in no departures from good and accepted medical practice and there is no proximate cause between any alleged acts or omissions on the part of the practice and plaintiff's claimed injuries.

Dr. Luchs, defendants' diagnostic radiologist, also conducted a blind review of plaintiff's June 12, 2017 right elbow MRI radiologic imaging without contrast,[6] which were of diagnostic quality, and identified a mild effusion of the elbow joint with no fracture of the bones and with joint cartilage preserved. Dr. Luchs further notes that plaintiff's UCL was intact with no tear thereto as he was able to follow the entire length of the UCL without interruption; that a strain at the proximal aspect of the flexor carpi radialis muscle was identifiable; that the remaining tendons were intact and normal in appearance; and the nerves were intact and normal in appearance. Upon his subsequent review of the related report, he notes that his findings are consistent with the radiologist's impression and findings.

Dr. Luchs subsequently reviewed plaintiff's August 17, 2017 MRI imaging of the right elbow in which he opines that a UCL tear was present and appropriately diagnosed by the radiologist. Dr. Luchs explains that upon his comparison of these MRIs, the UCL tear was not present in the June 12, 2017. In sum, he not only opines that a non-contrast MRI is the standard imaging to diagnose UCL injury, but that Dr. Wilson appropriately relied on the June 12, 2017 elbow MRI radiologist's report which was correctly read and interpreted. Additionally, he similarly opines as to Wilson Orthpaedics' liability, to wit, it is only vicariously liable based on a lack of allegations of independent acts of negligence against the practice.

In opposition, plaintiff submits the affirmation of Dr. Fine, a practicing orthopedic surgeon and a Professor of Orthopedic Surgery and of Exercise Science. At the outset, the Court acknowledges that although plaintiff's expert states that he reviewed the medical records, which presumably included plaintiff's MRI imaging, it is unclear whether he reviewed the entire record, including deposition testimony. Dr. Fine's recitation of the facts does not contradict that of

[6] Defendants' experts explained that a "blind review" is one in which they initially review only the radiological imaging itself and no other related documents, including the MRI report.

defendants, and he does not disagree that plaintiff's June 12, 2017 right elbow MRI showed no tear and no abnormalities of the UCL but rather revealed a strain on the flexor carpi radialis muscles in the area of the medial epicondyle. Consequently, any claims of misdiagnosis must be dismissed.

Similarly, plaintiff's expert fails to acknowledge, as supported by the record, that plaintiff admittedly had no determinative letters of intent for athletic scholarships and was unable to produce any evidence to the contrary.[7] Therefore, any claims surrounding missed athletic scholarship opportunities at the time of these allegations must be dismissed.

In contrast, Dr. Fine's affirmation raises issues of fact as to some of plaintiff's claims. Specifically, he opines that Dr. Wilson deviated from accepted standards of care in his evaluation and advice to plaintiff on June 28, 2017, to wit, that to advise to treat plaintiff's elbow with a cortisone injection and recommendation of rest for seven to ten days was not correct. Rather, he opines, a recommendation of rest from throwing for at least ten to twelve weeks was the more appropriate advice. Dr. Fine further states that plaintiff's August 29, 2017 right elbow UCL reconstruction with ipsilateral gracilis tendon hamstring graft, arthroscopic extensive debridement of posterior compartment of the elbow with synovectomy, olecranon debridement, loose body removal, intraarticular injection of lidocaine with epinephrine, ulnar nerve neurolysis was as a result of Dr. Wilson's advice and recommendation on June 28, 2017. Consequently, plaintiff's expert sufficiently raises issues of fact that make dismissal of the balance of plaintiff's medical malpractice claims inappropriate.[8]

With respect to plaintiff's claims of lack of informed consent, there has been no evidence presented that defendants failed to obtain plaintiff's informed consent for the June 28, 2017 injection and any such claims must be dismissed.

The parties' remaining arguments have been considered and are unavailing.

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[7] The record supports that plaintiff had received some scholarship interest but that none of these were specifically contingent upon his athletic ability and appear to have been academic based scholarships at the time. In addition, plaintiff was unable to provide any documentary evidence of definitive athletic scholarships in response to defendants' demand during plaintiff's deposition.

[8] To the extent that defendants alluded in their motion papers to plaintiff's short period of time to ramp up his training in preparation for the July 17, 2017 showcase, the weight, if any, of such alleged factors may be considered by a jury at trial, but have had no bearing on the Court's determination of defendants' motion for summary judgment.

Accordingly, it is hereby

ORDERED that defendants' motion seeking summary judgment is heretofore granted only to the extent that any claims of UCL tear misdiagnosis by Dr. Wilson; missed athletic scholarships; and lack of informed consent only are dismissed; And it is further

ORDERED that defendants' motion seeking summary judgment is otherwise denied; And it is further

ORDERED that counsel for defendants shall serve a copy of this Order with Notice of Entry on all parties within thirty (30) days of the entry of this Order.

This constitutes the Amended Decision and Order of the Court.

Dated: October 2, 2024

HON. MICHAEL A. FRISHMAN, J.S.C.

1. CHECK ONE.....	☐ CASE DISPOSED IN ITS ENTIRETY	X CASE STILL ACTIVE
2. MOTION IS.....	☐ GRANTED ☐ DENIED	X GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE.....	☐ SETTLE ORDER	☐ SUBMIT ORDER