Williams v Robertson
2024 NY Slip Op 35555(U)
July 14, 2024
Supreme Court, Orange County
Docket Number: Index No. EF005683-2020
Judge: E. Loren Williams
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

CLINT WILLIAMS, as Administrator of the Estate of ZAUSHA TYSON, and CLINT WILLIAMS, Individually,

Plaintiffs,

- against -

KARYN ROBERTSON, JULIA BYMAN, JOHN FIORIANTI, CRYSTAL RUN HEALTHCARE, LLP, and GARNET HEALTH MEDICAL CENTER,

Defendants.

DECISION AND ORDER

Index No: EF005683-2020
Motion Date: January 19, 2024
Sequence No.: 2

WILLIAMS, J.

The papers filed electronically as NYSCEF Doc. Nos. 45-52 and 55-59, were read and considered on a motion for summary judgment pursuant to CPLR § 3212 filed by Defendants Karyn Robertson, Julia Byman, John Fiorianti and Crystal Run Healthcare, LLP ("Crystal Run Defendants").

This is a medical malpractice action to recover damages for negligence, medical malpractice, lack of informed consent, and loss of services and consortium.

Background

This action was commenced on October 6, 2020, by Plaintiffs Zausha Tyson and Clint Williams, wife and husband, for injuries allegedly sustained by Ms. Tyson following a February

20, 2020 surgery. Ms. Tyson died on January 29, 2022 due to reasons unrelated to the instant action for medical malpractice. Mr. Williams was thereafter appointed the fiduciary of Ms. Tyson's estate, and, in his representative capacity as Administrator of the Estate of Ms. Tyson, he was substituted for Plaintiff Tyson (collectively, "Plaintiff") by unopposed motion granted on March 10, 2023, and the caption was amended accordingly.

Ms. Tyson suffered from end stage renal disease and was receiving dialysis treatment. Ms. Tyson had been on dialysis since 2016, performed through a catheter in her upper chest or umbilicus, both of which led to complications. On February 20, 2020, Ms. Tyson had an arteriovenous ("AV") graft surgically placed in her left arm for administration of her dialysis treatment.

The surgery was performed at Defendant Garnet Health Medical Center, by Defendant John Fiorianti (an MD), who was assisted by Defendant Karyn Robertson (a PA), with post-operative care rendered by the foregoing, as well as Defendant Julia Byman (a PA), each of whom was employed by Defendant Crystal Run Healthcare, LLP. Following the surgery, Ms. Tyson complained of severe pain and numbness to her upper left extremity, including her hand. It is ultimately alleged that Ms. Tyson suffered from steal syndrome caused by the AV graft, which Defendants Karyn Robertson, Julia Byman and John Fiorianti failed to properly diagnose and treat, and that by the time the AV graft was removed on February 28, 2020, Ms. Tyson had suffered permanent ischemic damage in her left upper extremity.

Applicable Standards of Review

On a medical malpractice claim, it is well established that "a defendant physician seeking summary judgment must make a prima facie showing that there was no departure from good and

accepted medical practice or that the plaintiff was not injured thereby," and, in opposition, "a plaintiff must submit evidentiary facts or materials to rebut the defendant's prima facie showing, so as to demonstrate the existence of a triable issue of fact" (*Stukas v. Streiter,* 83 A.D.3d 18, 23, [2d Dept 2011]). "In order to sustain this prima facie burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff's complaint and bill of particulars" (*Wiater v. Lewis,* 197 A.D.3d 782, 783 [2d Dept 2021]).

"To establish a cause of action [to recover damages] for malpractice based on lack of informed consent, [a] plaintiff must prove (1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury" (*Zapata v. Buitriago*, 107 A.D.3d 977, 979 [2d Dept 2013]).

"'Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions'" (*Clarke v. New York City Health & Hosps.,* 210 A.D.3d 631, 633 [2d Dept 2022], quoting *Feinberg v. Feit,* 23 A.D.3d 517, 519 [2d Dept 2005]). "Although conflicting expert opinions may raise credibility issues which can only be resolved by a jury, expert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise triable issues of fact" *Wagner v. Parker*, 172 A.D.3d 954, 955 [2d Dept 2019] (internal citations omitted)). Expert opinions, in order not to be considered speculative or conclusory, should address specific assertions made by the movant's experts, setting forth an

explanation of the reasoning and relying on "specifically cited evidence in the record" (*Roca v. Perel*, 51 A.D.3d 757, 759 [2d Dept 2008]).

Argument

Following discovery, the Crystal Run Defendants moved for summary judgment. They submit an affirmation from Defendant Fiorianti stating that he, and Defendants Robertson and Byman, did not depart from the applicable standard of care. Namely, the AV graft was an appropriate standard of care for patients such as Ms. Tyson (ESRD with a need for permanent regular dialysis), that the surgery went well and without complication, and that the AV graft was working properly based upon various tests performed in response to Ms. Tyson's complaints. In addition, following an AV graft procedure, a certain amount of blood is "stolen," and Ms. Tyson's post-operative symptoms of steal syndrome (e.g., pain, swelling, numbness, weakness, coolness, diminished pulse and/or pain in the hand or fingers) were an expected result of the diminished arterial flow, and said symptoms typically resolve after a few weeks without any residual effect. Defendant Fiorianti also states that while Ms. Tyson "may have developed symptoms of steal syndrome, she did not sustain a permanent ischemic injury" as a result of the treatment provided in connection with the AV graft and its reversal.

Defendant Fiorianti further states that Ms. Tyson was advised of the risks of the AV graft procedure, but/and that ischemic injury as a result of steal syndrome was not, based on his experience, a reasonably foreseeable risk.

In opposition, Plaintiff submits an expert affidavit opining that Defendants departed from good and accepted medical practice/standard of care by failing to acknowledge the symptoms of steal syndrome and by failing to remove the AV graft until 8 days later, resulting in permanent

injury to Ms. Tyson. While milder cases of steal syndrome may cause a body's compensatory mechanisms to adjust and provide adequate distal blood flow, when the compensatory mechanisms fail, as with Ms. Tyson, "frank steal syndrome" occurs, manifested by ischemic pain and numbness in the hand below the AV shunt. In such cases, the only appropriate treatment is immediate ligation and/or removal of the AV graft. Steal syndrome is a clinical diagnosis that can only be confirmed with quantitative vascular laboratory blood flow measurements, which Plaintiff's expert states were never ordered.

Plaintiff's expert further attests that steal syndrome is reported in 6 to 10% of patients after placement of AV graft or fistula, and steal syndrome is therefore a foreseeable risk of an AV dialysis shunt placement. Because steal syndrome is a "well-known and feared complication of vascular access procedures," the risk must be disclosed, and had it been disclosed, a "reasonable patient in Ms. Tyson's position would more likely than not have refused the procedure in favor of alternative methods of dialysis."

In reply, the Crystal Run Defendants argue that any expectation of Defendants Robertson and Byman to perform surgery and remove the AV graft, or obtain informed consent as physician assistants, was incredible.

Analysis

Here, the Crystal Run Defendants established their prima facie entitled to judgment as a matter of law dismissing the complaint by submitting the affirmation of Defendant Fiorianti, and exhibits, showing that the AV graft placement was working properly and that the placement of the AV graft was not a departure from accepted standards of practice. Defendant Fiorianti addressed

and rebutted the specific allegations of malpractice set forth in the complaint and bill of particulars (*see Elstein v. Hammer*, 192 A.D.3d 1075 [2d Dept 2021]).

In opposition, however, Plaintiff raised a triable issue of fact by submitting an expert affidavit that opined, based on his review of, *inter alia*, Defendant Fiorianti's affirmation, that Ms. Tyson exhibited several symptoms and complaints indicating the presence of steal syndrome and the need for additional workup/immediate surgery. Plaintiff's expert "address[ed] specific assertions made by [defendants'] experts, set[ ] forth an explanation of the reasoning and rel[ied] on specifically cited evidence in the record" (*Tsitrin v. New York Community Hosp.,* 154 A.D.3d 994, 996 [2d Dept 2017] (internal quotation marks and citation omitted), via, at a minimum, Defendant Fiorianti's affirmation.

The Crystal Run Defendants further established that informed consent was obtained from Ms. Tyson. While Plaintiff's expert, in part, similarly raised a triable issue of fact that the possibility of steal syndrome should have been provided to Ms. Tyson before the AV graft was placed as a foreseeable risk, there is no triable issue of fact regarding informed consent as to Defendant Robertson, who assisted Dr. Fiorianti during the AV graft placement surgery, or Defendant Byman, who did not treat Ms. Tyson until after the surgery had been completed (*see Spinosa v. Weinstein*, 168 A.D.2d 32, 39 [2d Dept 1991]).

Plaintiff was not required to raise a triable issue of fact as to the element of proximate cause, as the Crystal Run Defendants failed to make a *prima facie* showing of entitlement to judgment as a matter of law as to that element.

Accordingly, it is hereby

ORDERED that the motion for summary judgment by the Crystal Run Defendants is **GRANTED IN PART** and the Second Cause of Action for lack of informed consent as to Defendants Robertson and Byman is dismissed. All other claims for summary judgment are **DENIED**.

The Parties' remaining contentions not specifically addressed herein have been considered and found to be without merit or rendered moot in light of this decision.

The foregoing constitutes the Decision and Order of the Court.

E N T E R:

Dated: July 14, 2024
Goshen, New York

HON. E. LOREN WILLIAMS, J.S.C.

TO: Counsel of Record via NYSCEF