

Burvick v Kafka

2012 NY Slip Op 30249(U)

February 1, 2012

Sup Ct, NY County

Docket Number: 406045/07

Judge: Alice Schlesinger

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER
Justice

PART IA PART 16

Index Number : 406045/2007
BURVICK, ARNOLD STEVEN
VS.
KAFKA, NICOLE J.
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

Motion to/for _____
_____ No(s). _____
_____ No(s). _____
_____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is *granted and the action is dismissed in accordance with the accompanying memorandum decision.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
FEB 02 2012

NEW YORK COUNTY CLERK'S OFFICE

Dated: FEB 01 2012

Alice Schlesinger
ALICE SCHLESINGER S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
ARNOLD STEVEN BURVICK,

Plaintiff,

-against-

NICOLE J. KAFKA, M.D., and BETH ISRAEL
MEDICAL CENTER,

Defendants.

-----X
SCHLESINGER, J.:

Index No. 406045/07
Motion Seq. No. 001

FILED

FFB 02 2012

NEW YORK

COUNTY CLERK'S OFFICE

The plaintiff Arnold Steven Burvick underwent a procedure known as a fistulotomy performed on February 11, 2005, by defendant Dr. Nicole J. Kafka at defendant Beth Israel Medical Center. At that time, Dr. Kafka was an attending/employee of the Hospital. According to Dr. Kafka's records¹, she met once with this patient earlier, on February 2, 2005, at which time she had examined Mr. Burvick and identified the presence of a "superficial transsphincteric anal fistula". This surgical procedure, together with the information provided to Mr. Burvick before it, as well as the aftermath of it, is the subject matter of a pending medical malpractice action. It is also the subject matter of the motion for summary judgment made by both defendants now before this Court.

In the initial complaint, the defendants had been charged with committing malpractice in the alleged negligent manner in which the fistulotomy was performed. However, it was agreed by counsel for the parties that an amended complaint could be filed. One was, on July 31, 2009, and this one contained a Second Cause of Action against Dr. Kafka alleging a failure by her to obtain Mr. Burvick's informed consent. The motion now being decided addresses all the asserted causes of action.

¹Dr. Kafka has no independent recollection of Mr. Burvick.

Before discussing the substance of the motion and the opposition, Mr. Burvick's problems with legal representation should be noted. Originally, he was competently represented by the Law Offices of Daniel W. Isaacs. However, Mr. Burvick then discharged Mr. Isaacs and retained instead Gerald Tanella. Some months after this, Mr. Tanella was suspended from the practice of law. I believe this happened after defendants had brought this motion on or about June 30, 2011 but before there had been any response/opposition to it. I then gave Mr. Burvick a great deal of time to try to obtain new counsel. However, not surprisingly, he was unable to do so. Then he decided to attempt to oppose the motion without legal assistance. Not only was he now lacking in representation, but as shown in the papers he submitted, he also lacked any medical support for his claims.

The motion by the defendants was supported by an affidavit from Dr. Kafka, but also, more significantly by an affirmation from Dr. Jerald D. Wishner. Therefore, under the procedures inherent in a medical malpractice action, where a defendant moves for summary judgment, or a termination of the action in the defendant's favor, without a trial, that moving defendant has the burden of proving that the case has no merit. Another way of putting this is that from a medical point of view and as a matter of law, the defendant must show that there was no malpractice.

Dr. Wishner, a stranger to this lawsuit, is board certified in the fields of General Surgery and Colorectal Surgery. He is currently the Medical Director of the Colorectal Cancer Program at Northern Westchester Hospital in Mount Kisco, New York. Therefore, in the first instance, I find that he is qualified to give opinions regarding the issues in this case.

Dr. Wishner states that he has reviewed all the records relevant to Arnold Burvick. This includes Dr. Kafka's records, as well as those of Beth Israel, Dr. Mitchell Bernstein, Mount Sinai Medical Center and Dr. Carlton Moore. He also read the Bills of Particulars and the depositions of Dr. Kafka, Arnold Burvick, Helen E. Simmons, (a good friend of Burvick) and the before-mentioned affidavit of defendant Dr. Nicole Kafka.

Dr. Wishner, under the heading of "Facts", reviewed Mr. Burvick's situation regarding complaints of an anal cyst or fistula going back to September 10, 2004, when he was first seen for this complaint at Beth Israel, then on September 27, 2004, when he was seen and examined by Dr. Ronald Chamberlain there. Dr. Chamberlain diagnosed the plaintiff with a superficial anal fistula and wished to schedule him for an anal fistulotomy. This is the surgical procedure ultimately performed by Dr. Kafka on February 11, 2005.

However, between these two medical appointments, Mr. Burvick was seen and examined for similar complaints of anal leakage and diarrhea by other doctors at Mount Sinai gastroenterology clinic. On January 31, 2005, Mr. Burvick returned to the general surgery clinic at Beth Israel. Two days later, on February 2, 2005, he went to the proctology clinic where he met Dr. Kafka, who after taking a history and examining him, noted in the records that he had "painful bowel movements", "blood and pus at all times", and "loose bowel movements". She also diagnosed a posterior anal fistula.

Dr. Wishner relates, pursuant to the records and Dr. Kafka's affidavit, that Dr. Kafka discussed with Mr. Burvick various options for treating the fistula. These included a fistulotomy using fibron glue and a flap advancement repair. Mr. Burvick then returned to

Mount Sinai which supported the diagnosis that the plaintiff did have an anal fistula.² Apparently, Mr. Burvick gave testimony that he was advised at Mount Sinai to use sitz baths for his condition and that they were helping. However, Dr. Wishner states that the records from Mount Sinai do not show this. But, whether or not this was the case, Mr. Burvick still decided to return to Dr. Kafka for the fisutolomy.

With regard to the risks of surgery, particularly fecal incontinence, this is the prime injury Mr. Burvick is complaining of. Here, Dr. Wishner states from his reading of the records and Dr. Kafka's affidavit that she did explain that this could occur because performance of the fistulotomy requires cutting some of the sphincter muscles. Dr. Wishner points out here that Mr. Burvick even acknowledges in his deposition that he was so advised of this risk by the defendant.

Dr. Wishner then describes (§19) what actually occurred during the procedure according to the operative report. In this regard, he opines that:

Dr. Kafka's detailed operative report reflects that the procedure she used to treat the fistula was proper and in accordance with standard surgical practice. No evidence has been provided that Dr. Kafka did anything improper during the course of the surgery. She was careful to protect as much of the muscle as was possible in an effort to minimize the risk of incontinence. She carefully left the remnants of the fistula open to promote good healing..

At subsequent visits after the procedure, specifically on April 13, 2005, Mr. Burvick reported bleeding and the defendant noted at an examination that there was a slight

²The records also show that throughout this period, Mr. Burvick had Hepatitis-C. This complicated the problem with the fistula and made him more susceptible to infection.

“keyhole” defect, with a minimal area still not fully covered by tissue or unepithelialized. However, Dr. Wishner opines that this type of deformity is a “known risk of fistulotomy procedures, since a portion of muscle must be divided during fistulotomies. This defect may contribute to fecal incontinence”. (¶21).

Dr. Wishner goes on to state that Dr. Kafka used proper surgical judgment in the performance of this procedure. He emphasizes that a surgeon in dealing with an anal fistula can only truly assess the situation after the surgery is commenced and he/she can determine how much muscle must be cut. He says that Dr. Kafka’s report carefully describes cutting as little muscle as possible while still effectuating the repair. He states here that in his “opinion to a reasonable degree of medical certainty Dr. Kafka acted in accordance with standard surgical practice when she performed an anal fistulotomy on the plaintiff on February 11, 2005”. (¶23).

By that same standard, which is the requisite standard which physicians giving expert opinions must use, he also opines that the fistulotomy was warranted and that the procedure utilized by Dr. Kafka was the correct option for treating Mr. Burvick’s fistula (¶25).

Finally, on the issue which formed the basis for plaintiff’s Amended Complaint, informed consent, by this same standard Dr. Wishner opines that Mr. Burvick “made a full informed consent to the procedure”. Here he appears to point to the plaintiff’s own deposition testimony which leads Dr. Wishner to conclude that Mr. Burvick understood from Dr. Kafka and from surgeons at Mount Sinai that there were alternatives to the surgery and that fecal incontinence was a risk of it. (¶29).

Based on this thorough recitation of the facts and explicit opinions given by Dr. Wishner, a physician qualified to give such opinions, I find that defendants have proven a prima facie case on the two claims, malpractice and informed consent. As stated earlier, this finding by me results in the burden now shifting to the plaintiff, Arnold Burvick. In order for the action to continue, Mr. Burvick was obliged to show that legitimate issues of fact regarding both claims exist. But he must do this by offering up opinions on these issues by one qualified, as Dr. Wishner was, to provide them. In other words, a credentialed physician, knowledgeable in the field of anal fistula surgery, must be able to state with a reasonable degree of medical certainty that Dr. Kafka in some way(s) deviated from accepted standards of medicine/surgery in her treatment of the plaintiff and pursuant to that same standard, that such deviation or departure from accepted standards of medicine/surgery caused injury to the patient, Arnold Burvick.

But Mr. Burvick has not done this. Instead, via his own lengthy affidavit (and letter) and the deposition of his dear friend Helen E. Simmons, who was often with him in seeing physicians, he tries to suggest that Dr. Kafka was not telling the truth and that the medical records suggest contradictions and ambiguities. He also makes unfair and uncalled for accusations against Dr. Wishner and moving counsel, Carmen Barroso.³

But these efforts fail. As stated earlier, Dr. Kafka's testimony and affidavit have been consistent with one another and in accord with her records and her operative report. Accusations and the like are not a substitute for an affirmation/affidavit from a qualified

³I said "uncalled for" because it is clear to me that Ms. Barroso's work on this case on behalf of her clients, as well as her work on many other cases which have been before me, has consistently been of the highest degree of integrity and professionalism.

physician who can opine on issues of malpractice.

With regard to the informed consent claim, Mr. Burvick says two things. First, he believes that the resident assisting Dr. Kafka, Dr. Alexander Miller, was the doctor who actually performed the operation. But that is pure speculation, lacking in any factual basis. Dr. Kafka acknowledges that Dr. Miller assisted, as was the common practice at the hospital, but insists that she herself did the significant parts of the procedure, including the intentional cutting of the sphincter muscle.

Mr. Burvick also insists that Dr. Kafka performed a procedure that differed substantially from that to which he had consented. He states that Dr. Kafka told him it would be "simple" and "superficial". He states that Dr. Kafka explained she would "make a small lance and clean it out slightly."

Dr. Kafka does acknowledge using the word "superficial" to describe the transsphincteric anal fistula. But she insists in her sworn affidavit that that meant that it ran through the sphincter muscle, though most of the sphincter muscle was located below the probe and was not involved. However, Dr. Kafka in explaining the risk of fecal incontinence, which Mr. Burvick agrees she told him, said that this was a risk because some muscle would need to be cut during the fistulotomy. This could lead to impaired function, which she insists, pursuant to her custom and practice, she told him.

For claims involving informed consent, a sworn statement from a qualified expert is also needed to attest to what information must be given to a patient before receiving his or her consent. Here there really seems to be no dispute as to what was told to Mr. Burvick with regard to risks. However, Mr. Burvick claims that Dr. Kafka told him she would not cut. But again, there is absolutely no support for this claim in the records or the

sworn testimony. Finally, as a matter of simple logic, since the plaintiff acknowledges that Dr. Kafka informed him that fecal incontinence could result from this procedure, a risk also told him by other surgeons, and since such an impairment could only come from a muscle being cut and causing such an impairment, it follows that he must have been told the procedure involved some cutting.

I have gone on longer than I normally would in deciding such a motion because I believe it is important for the plaintiff to understand the rationale for this Court's decision to dismiss the action. I understand that Mr. Burvick believes he was wronged because he has an injury now that adversely affects his life. But he must understand, or at least I would like him to, that a poor result from a procedure, while unfortunate, is not commensurate with the doctor being negligent. As has been made clear to this Court by both Drs. Kafka and Wishner, a fistulotomy does carry a small risk of this kind of injury happening. The fact that it did occur here, while unfortunate, is not malpractice.

Accordingly, it is hereby

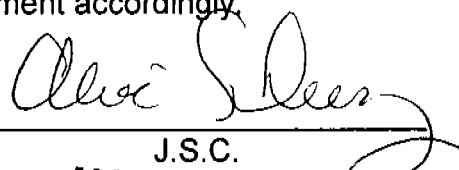
ORDERED that the motion for summary judgment by defendants Nicole J. Kafka, M.D., and Beth Israel Medical Center is in all respect granted and the action is dismissed without costs or disbursements; and it is further

ORDERED that moving counsel's request to have the file sealed is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: February 1, 2012

FEB 01 2012



J.S.C.
ALICE SCHEINGEE D

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