SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN B. LOBIS Justice

PART 6

Keil, Jennifer

- v -

Leftwits, Albert M.

INDEX NO. 104668/10

MOTION DATE 5-15-12

MOTION SEQ. NO. 006

The following papers, numbered 1 to 46, were read on this motion to/for preclude

Notice of Motion / Order to Show Cause – Affidavits – Exhibits No(s). 1-13; 14-32; 47-53

Answering Affidavits – Exhibits No(s). 33-39

Replying Affidavits No(s). 40; 41-43; 44-46

Upon the foregoing papers, it is ordered that this motion is decided in accordance with accompanying decision & order.

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

FILED

AUG 22 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8-20-12

JOAN B. LOBIS, J.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
NEW YORK COUNTY: IAS PART 6

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JENNIFER KEIL, as Executrix of the Estate of H. BRADEN KEIL, a/k/a HERBERT BRADEN KEIL, Deceased, and JENNIFER KEIL, Individually,

Plaintiffs,

Index No. 104668/10

-against-

Decision and Order

ALBERT M. LEFKOVITS, M.D., THE PARK AVENUE CENTER for ADVANCED MEDICAL and COSMETIC DERMATOLOGY, MOUNT SINAI DERMATOLOGY ASSOCIATES, MICHAEL DIAZ, M.D., DANIEL F. ROSES, M.D., NYU HOSPITALS CENTER, NYU MEDICAL CENTER, NYU LANGONE MEDICAL CENTER, and STEWART G. GREISMAN, M.D.,

Defendants.

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JOAN B. LOBIS, J.S.C.:

Defendants bring in limine motions seeking preclusion of plaintiff's expert from testifying at trial or a hearing in accordance with Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) (a "Frye hearing"). Plaintiff opposes the motions.

The facts of this case are more fully set forth in this court's decision and order dated December 15, 2011 (familiarity with which is presumed), which resolved defendants' respective summary judgment motions. Briefly, in November 2006, Mr. Keil had a melanoma (mole) removed from his back, and in December 2006, he had a wide deep excision of the tissue surrounding the area where the mole had been previously and removal of the sentinel lymph node. All indications were that the melanoma had been completely excised. On December 1, 2006, Mr. Keil underwent a positron emission tomography ("PET") scan, which depicted a 5 millimeter nodule in the left lower lobe of his lungs; the physician who read the PET scan recommended a follow-up chest computed

tomography ("CT") scan. Mr. Keil never had a follow-up CT scan. Two years later, in December 2008, Mr. Keil was diagnosed with metastatic malignant melanoma in his bone, brain, spine, liver, and lungs. Mr. Keil died on March 10, 2009, within two and one-half months of the diagnosis. Defendants treated Mr. Keil at various times between December 2006 and December 2008.

One of the essential components of plaintiff's malpractice claims against defendants is that the December 2006 PET scan indicated that Mr. Keil already had metastatic melanoma when the PET scan was taken, but that defendants never followed up on this, which caused Mr. Keil to go without treatment that could have extended his life or increased his chances of survival. In their summary judgment motions, among other arguments, defendants' experts argued that any failure to treat the metastatic melanoma from December 2006 through December 2008 did not proximately cause Mr. Keil's death because there were no treatments at that time that could have prolonged his life or affected his survival chances. The court found that issues of fact existed and denied summary judgment (except Dr. Roses was granted summary judgment on the claim for medical malpractice due to expiry of the statute of limitations).

As the case progressed towards trial, plaintiff served expert disclosures. The subject matter to which plaintiff's expert is expected to testify came as no surprise to defendants, as it reiterated the opinions contained within plaintiff's opposition to defendants' prior summary judgment motions, i.e., that defendants' delay in diagnosing the metastatic melanoma caused Mr. Keil to lose his chances to fight the melanoma, deprived him of a chance of survival, diminished his lifetime, and caused his untimely death.

Defendants argue that plaintiff's expert's anticipated testimony that treatment could have prolonged Mr. Keil's life or that earlier treatment could have improved his chances for survival is inadmissible at trial because no studies at the time had demonstrated improvement in survival with treatment for metastatic melanoma, as opposed to no treatment, regardless of the type of treatment provided or the time treatment is commenced. Defendants argue that the date of death of patients with metastatic melanoma is determined at the moment of metastasis, and that during the relevant time period, no treatment had been shown to delay the date of death, regardless of when treatment was commenced. Their respective experts provide opinions echoing the aforementioned arguments, together with a number of articles. The articles, for the most part, summarize studies about the efficacy of various treatments on metastatic melanoma and whether those treatments elicited response rates or prolonged survival. Plaintiff argues that a Frye hearing is inappropriate and unwarranted and submits an expert affidavit in which her expert refutes defendants' expert's positions, contending that there were treatments available to Mr. Keil that had the potential to achieve a response rate and prolong his life. Plaintiff's expert criticizes defendants' experts' interpretation of the studies. Plaintiff's expert also relies on his own experience in actually treating Mr. Keil in the last weeks before he died and his observations in practicing medicine.

In New York, the rule is that "expert testimony based on scientific principles or procedures is admissible but only after a principle or procedure has 'gained general acceptance' in its specified field." People v. Wesley, 83 N.Y.2d 417, 422 (1994), quoting Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). Novel expert medical testimony propounded by plaintiffs to establish causation that lacks any objective support from the medical community should not survive a Frye challenge. See Lara v. New York City Health & Hosps. Corp., 305 A.D.2d 106 (1st Dep't 2003).

However, First Department case law supports the notion that Frye hearings should not be granted with great regularity as a means of precluding expert medical causation testimony in malpractice suits. See, e.g., Ashton v. D.O.C.S. Continuum Med. Group, 68 A.D.3d 613, 614 (1st Dep't 2009); Meth v. Gorfine, 34 A.D.3d 267, 268 (1st Dep't 2006); Marsh v. Smyth, 12 A.D.3d 307, 307-08 (1st Dep't 2004); Gayle v. Port Auth. of N.Y. & N.J., 6 A.D.3d 183, 184 (1st Dep't 2004).

The court has read the articles and studies submitted by the various experts and does not believe that the disputed issues call for preclusion or a Frye hearing. The main themes presented in the studies are that patients with metastatic melanoma have a poor prognosis, with a median survival time from 3 to 11 months; the standard treatment for patients with metastatic melanoma is dacarbazine, which induces objective tumor responses in small populations of patients; no combination of approaches in the relevant time period had significantly better outcomes than the single approach of dacarbazine; there is no definite evidence that treatment of metastatic melanoma has any impact on prolongation of patients' overall survival; and long-time survival rates may be related to spontaneous regression as opposed to treatment. In forming their opinions, both sides' experts are simply relying on the statistics of patient outcomes reported in the studies. Defendants' experts look at the aforementioned studies and state that there was no treatment that would have definitively prolonged Mr. Keil's life, but plaintiff's expert looks at these studies and states that some patients who receive treatment for metastatic melanoma show responses. Plaintiff's expert also takes into account Mr. Keil's personal circumstances, in particular that Mr. Keil was healthy for nearly two years after the December 2006 PET scan showing that the cancer had metastasized to the lungs, and the fact that treatment is generally administered to patients who are diagnosed with metastatic melanoma. Thus, the basis for plaintiff's expert's conclusions is not novel, i.e., there is

nothing experimental about the scientific principles that plaintiff's expert relies on. See Marsh v. Smyth, 12 A.D.3d at 308-11 (Saxe, J. concurring). It is not a distortion of the studies for plaintiff's expert to opine that Mr. Keil lost his opportunity for treatment due to defendants' negligence and that, if he had undergone timely treatment, he could have been in the percentage of patients whose treatment elicits responses. While defendants argue that a response does not equal survival, it is not "novel" for plaintiff's expert to opine, based on his own expertise in treating cancer and the treatment studies, that "the very nature of having responded [to treatment] implies that survival is almost always prolonged." Moreover, the concept that response rates equal prolongation of survival is articulated in at least one of the articles. See L. Serrone et al, *Dacarbazine-Based Chemotherapy for Metastatic Melanoma: Thirty-Year Experience Overview*, 19 J. EXP. CLIN. CANCER RES., Mar. 2000, at 21, 31. "[I]t is *not* the court's job to decide . . . which expert's conclusions are correct." Marsh, 12 A.D.3d at 311 (Saxe, J. concurring). The experts' varying interpretations of the studies and their own experiences with treating metastatic melanoma are issues of credibility which are best reserved for the jury at the time of trial. Accordingly, it is hereby

ORDERED that defendants' respective motion and cross motions are denied; and it is further

ORDERED that the parties shall appear for a pre-trial conference on August 28, 2012 at 10:00 a.m., prepared to pick trial dates.

Dated: August 20, 2012

ENTER:

JOAN B. LOBIS, J.S.C.