Del Terzo v Hospital for Special Surgery
2012 NY Slip Op 32389(U)
September 14, 2012
Supreme Court, New York County
Docket Number: 111839/09
Judge: Joan B. Lobis
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SCANNED ON 9/17/2012

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN B. LOBIS PART 6

Justice

Del Terzo

INDEX NO. 111839/09

MOTION DATE 6/19/12

- v -

MOTION SEQ. NO. 002

THE HOSPITAL FOR SPECIAL SURGERY

The following papers, numbered 1 to 36, were read on this motion to/for summary judgment.

Notice of Motion / Order to Show Cause – Affidavits – Exhibits	No(s). 1-26
Answering Affidavits – Exhibits	No(s). 27-34
Replying Affidavits	No(s). 35-36

Upon the foregoing papers, it is ordered that this motion is

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

FILED

SEP 17 2012

NEW YORK COUNTY CLERK'S OFFICE

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

Dated: 9/14/12

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

---X

DIANE DEL TERZO and JULIUS DEL TERZO,

Plaintiffs,

Index No. 111839/2009

- against -

Decision and Order

THE HOSPITAL FOR SPECIAL SURGERY,
CHRISTOPHER EDMONDS, M.D., and
ANSWORTH ALLEN, M.D.,

Defendants.

---X

FILED
SEP 17 2012
NEW YORK
COUNTY CLERK'S OFFICE

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

Defendants Hospital of Special Surgery ("HSS"), Christopher Edmonds, M.D., and Answorth Allen, M.D., move, by order to show cause, for an order granting them summary judgment and dismissing plaintiffs' complaint pursuant to C.P.L.R. Rule 3212. Plaintiffs Diane and Julius Del Terzo oppose the motion as to HSS and Dr. Edmonds; they do not oppose the motion as to Dr. Allen.

This case arises out of an arthroscopic surgical procedure performed on Ms. Del Terzo on March 16, 2007, at HSS. Her history was significant for a prior open surgery to repair her left rotator cuff in 2003. Prior to the surgery, Ms. Del Terzo signed a number of consent forms; on the form specifically related to consent for the anesthesia, she signed that she understood the risks of anesthesia include bruising, infection, hemorrhage, drug reactions, organ reaction, seizures, blood clots, loss of sensation, loss of limb function, paralysis, blindness, brain damage, and death. Dr. Allen performed the shoulder surgery and Dr. Edmonds administered the anesthesia. Dr. Edmonds administered an interscalene nerve block (at the brachial plexus between the anterior and middle scalene muscles) as part of his anesthesia; for an interscalene nerve block, the anesthesiologist uses a needle to place medication near the patient's brachial plexus using a nerve stimulator. Dr.

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Edmonds also administered an intravenous sedative (combination of Versed, propofol, and fentanyl). Dr. Allen's records indicate that Ms. Del Terzo initially had a normal recovery from the surgery but approximately six weeks into her recovery she presented to Dr. Allen with swelling around her neck at the superclavicular fossa (the area between her neck and shoulder). She also began reporting pain at her trapezius muscle (the muscle at the back of the neck, shoulder, and upper back which supports the arm). She saw a number of physicians regarding her pain and swelling. On December 21, 2007, Edmond Cleeman, M.D., performed arthroscopic surgery on Ms. Del Terzo's left shoulder to remove residual suture material and perform a debridement. On April 2, 2008, Ms. Del Terzo underwent an electromyography ("EMG"), which was interpreted by Mark Sivak, M.D., as indicative of neuropathic dysfunction of the left accessory spinal nerve, affecting the trapezius muscle.

In their bill of particulars, plaintiffs alleged that Dr. Edmonds was negligent in failing to properly administer the interscalene nerve block; failing to properly position the needle for the block; improperly performing the block so as to injure the spinal accessory nerve; failing to utilize proper needle placement technique; injuring the spinal accessory nerve intra-operatively; and failing to obtain Ms. Del Terzo's informed consent. Plaintiffs alleged that Dr. Edmonds ignored Ms. Del Terzo's complaints of severe left sided neck pain with swelling and a lump in her neck immediately following the surgical procedure with the intrascalene block. They further alleged that as a result of Dr. Edmonds' departures from the standard of care, Ms. Del Terzo suffered a brachial plexus/accessory nerve injury; neuropathic dysfunction of her left spinal accessory nerve; innervation of the trapezius muscle with headache; a lump; persistent trapezius contracture spasm; swelling of the left trapezius, the left side of the neck, and the suprascapular region; hardening of muscle; pulling sensation; and weakness to the left upper extremity. Plaintiffs alleged that these injuries have

required Ms. Del Terzo to have further surgical intervention, pain management, and physical therapy. They alleged that Ms. Del Terzo's injuries have interfered with her ability to lift or carry items with her left arm, swim, drive, perform household chores, and work. They maintained that Ms. Del Terzo's injuries did not exist prior to March 16, 2007.

Dr. Edmonds moves for summary judgment. As established by the Court of Appeals in Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985), and Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986), a party moving for summary judgment motion must show that there are no disputed issues of fact. A defendant in a medical malpractice case moving for summary judgment must demonstrate either that there were no departures from accepted standards of practice or that, even if there were departures, they did not proximately injure the patient. Roques v. Noble, 73 A.D.3d 204, 206 (1st Dep't 2010) (citations omitted). Once the movant meets this burden, it is incumbent upon the opposing party to proffer evidence sufficient to establish the existence of a material issue of fact requiring a trial. Alvarez, 68 N.Y.2d at 324. In medical malpractice actions, expert medical testimony is essential for demonstrating either the absence or the existence of material issues of fact pertaining to an alleged departure or proximate cause.

In support of his motion, Dr. Edwards submits his own affidavit in which he asserts that his care and treatment of Ms. Del Terzo was within the standards of good and accepted medical practice and that there is no causal link between his treatment and Ms. Del Terzo's claimed injuries. He states that it is his practice to administer Versed prior to administering the nerve block because Versed allows the patient to respond to his questions during the administration of the nerve block, even though the patient will have no memory of the nerve block being administered. Dr. Edmonds

explains his technique for administering the interscalene nerve block, wherein he uses his fingers and the patient's body as a guide to inserting the needle in the correct area. Dr. Edmonds states that by examining the patient's motor responses, he can tell where the needle has been placed. He states that a biceps twitch indicates that the needle is at the radial nerve, one of the five nerves in the brachial plexus where anesthetic can be administered for a brachial plexus nerve block. He states that a trapezius twitch indicates that the needle is stimulating the spinal accessory nerve. Dr. Edmonds states that the spinal accessory nerve (from the upper spinal cord to the base of the skull) is not close to the brachial plexus in the neck and that the trapezius does not lie in the brachial plexus. He states that the spinal accessory nerve is in a different fascial plane from the brachial plexus. He states that the interscalene groove is a distinct compartment from the spinal accessory nerve, so that when anesthetic for a brachial plexus nerve block is administered, there is no way for the medication to reach the spinal accessory nerve.

Dr. Edmonds states that on the day of Ms. Del Terzo's surgery, he discussed with her the risks and benefits of an interscalene block. He states that he elicited a biceps twitch on his first advance of the needle and then deposited the anesthetic, being careful to ensure periodically that he had not infiltrated a blood vessel. He sets forth that if he had seen a trapezius twitch, that would have indicated that the needle was not in the correct place and that the spinal accessory nerve was being stimulated. Dr. Edwards states that once the block was administered, he continued Ms. Del Terzo's sedation with propofol and fentanyl. He states that there were no anaesthesia complications during the procedure. However, six weeks after the surgery, he saw Ms. Del Terzo at Dr. Allen's office and observed swelling at her neck from her jawline to her collarbone. Dr. Edmonds states that he considered whether some of the anesthetic had leaked during the procedure or whether Ms. Del

Terzo had an anatomical variant that would allow lymphatic fluid to fill the space of her neck. He scheduled an examination by magnetic resonance imaging ("MRI") and referred Ms. Del Terzo to a pain specialist, Philip Wagner, M.D. He states that the MRI yielded normal results. He referred Ms. Del Terzo for a consultation with an ear, nose, and throat ("ENT") specialist, who found no ENT etiology. Thereafter, Dr. Edmonds states, Ms. Del Terzo stopped taking his calls. Dr. Edmonds states that he and Dr. Allen could not establish the etiology of Ms. Del Terzo's swelling, though they did establish that she had no nerve injury, weakness, lack of sensation, sensory compromise, tingling, neurologic compromise, or cranial nerve problems, and they found that her range of motion and motor strength was normal. He opines that his treatment and the manner in which he obtained informed consent comported with the standards of good and accepted medical practice among anesthesiologists, and that neither was in any way causally connected to Ms. Del Terzo's present complaints of injury to the spinal accessory nerve or brachal plexopathy.

Additionally, Dr. Edmonds offers an affidavit from Daniel J. L. MacGowan, M.D., a physician board certified in neurology and neurophysiology. Dr. MacGowan performed a physical examination of Ms. Del Terzo on October 7, 2011. His examination revealed normal conditions at Ms. Del Terzo's neck, back, and shoulder (except for thoracic scoliosis), though his examination was limited due to her complaints of pain. He states that Ms. Del Terzo's medical records from her admission to HSS clearly show that her left upper trapezius pain was present prior to the date of the surgery at issue in this lawsuit; the record to which Dr. MacGowan is referring is Ms. Del Terzo's "Patient Data base" form, which she apparently filled out, on which she circled that she was in pain at her left and right shoulders and the left side of her neck (approximately where the trapezius muscle is located). Dr. MacGowan states that from his review of Ms. Del Terzo's postoperative studies,

except for the swelling and her complaints of pain, she had normal findings. Dr. MacGowan opines that despite the April 2, 2008 EMG which depicted complex repetitive discharges in the left upper trapezius, Ms. Del Terzo did not suffer an injury to the left spinal accessory nerve as a result of Dr. Edmonds' nerve block, because she does not have any atrophy or weakness of the left upper trapezius or sternomastoid muscle or any winging or instability of the left scapula, the hallmarks of spinal accessory neuropathy. Further, he opines, pain and swelling are not signs of an injury to the spinal accessory nerve; Ms. Del Terzo's left trapezius appears more prominent than the right side (i.e., not atrophied) and is elevated due to her scoliosis, findings which are the opposite of the expected trapezius atrophy and downsloping shoulder that would be seen in spinal accessory neuropathy; there is no evidence of denervation edema signal intensity change or muscular atrophy on any of the MRI scans that Ms. Del Terzo had since the surgery of March 2007 in the left trapezius or any of the muscles around the left shoulder; the medical records clearly reflect that a biceps twitch was obtained prior to the administration of the block, suggesting that the nerve stimulator and needle were in a position closest to the upper trunk of the left brachial plexus; the upper trunk of the left brachial plexus is nowhere near the left spinal accessory nerve in the posterior triangle, which is nearly 10 centimeters posterior to the position of the needle for the interscalene block; and Ms. Del Terzo had symptoms of left upper trapezius pain prior to the surgery in March 2007. Dr. MacGowan concludes that Ms. Del Terzo has a myofacial pain syndrome in the left upper trapezius of unclear etiology which was present prior to the interscalene block in March 2007. He states that he knows of no medical literature that would support the proposition that there can be injury to the left spinal accessory nerve based on the facts of this case. Dr. MacGowan opines that, given that Ms. Del Terzo has no signs or symptoms of a spinal accessory neuropathy or brachial plexopathy, there is no evidence that any of Dr. Edmonds' acts are causally connected to her present complaints.

In opposition, plaintiffs maintain that Ms. Del Terzo did suffer an injury to her spinal accessory nerve, as evidenced by the April 2, 2008 EMG. They aver that the doctrine of res ipsa loquitur applies to their case. Plaintiffs submit three physicians' affirmations in opposition to defendants' motion. Seymour Gendelman, M.D., a board certified neurologist, and Vinoo Thomas, M.D., an anesthesiologist specializing in pain management, both dispute Dr. MacGowan's opinion that Ms. Del Terzo does not have an injury to the spinal accessory nerve or does not display signs of an injury to the spinal accessory nerve. Both physicians respectively assert that the April 2, 2008 EMG findings were consistent with neuropathic dysfunction of the left spinal accessory nerve, and that her injury results in persistent spasm, tenderness, and swelling.

Lawrence Shields, M.D., board certified in psychiatry and neurology, submits a third affirmation on plaintiffs' behalf. Dr. Shields states that he has reviewed Ms. Del Terzo's medical records and physically examined her. He states that he is familiar with the relevant anatomy and the procedure of interscalene block based on his own education and clinical experience. He also states that he has observed the performance of an interscalene block and has evaluated patients with injuries to the spinal accessory nerve on many occasions. Dr. Shields recites that Ms. Del Terzo underwent arthroscopic rotator cuff surgery on March 16, 2007, and several weeks post-operatively, after commencement of mobilization, she began to experience anterior neck swelling, pain, and restriction of motion of her left arm, neck, and head. He examined Ms. Del Terzo on April 20, 2012, and noted spasm, edema, atrophy, and restriction of movement around the left trapezius muscle and the head, neck, and left shoulder. He opines that his physical examination of Ms. Del Terzo and the April 2, 2008 EMG support the diagnosis of a left spinal accessory nerve injury affecting the trapezius muscle.

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Dr. Shields sets forth that an interscalene block with proper needle placement does not result in injury to the spinal accessory nerve in the absence of a departure from accepted standards of needle placement. He states that if needle placement is too posterior, then the spinal accessory nerve may be subjected to direct trauma from the needle. Dr. Shields states that an iatrogenic injury to the spinal accessory nerve is most common in the posterior cervical triangle and that a peri-operative nerve injury is most often a result of needle trauma. He states that contact with the spinal accessory nerve during an interscalene block demonstrates that the needle was improperly placed in a position posterior to the brachial plexus.

Dr. Shields opines that Ms. Del Terzo's spinal accessory nerve was traumatized by the needle that Dr. Edwards used during the interscalene nerve block. Based on his knowledge of basic anatomy and his review of the operative report, Dr. Shields opines that the spinal accessory nerve was not within the operative field. He opines, "to a high degree of probability[,]" that Dr. Edwards improperly placed the needle in the region posterior to the brachial plexus. He states that Dr. Edwards had exclusive control of the needle during the brachial plexus block. He opines that Ms. Del Terzo did not contribute to this injury as she was sedated and there is no indication that Ms. Del Terzo moved or contributed to her injury during the procedure or the post-operative period. Dr. Shields concludes that trauma to the spinal accessory nerve during the interscalene block was a substantial factor in causing Ms. Del Terzo's trapezius injury.

In reply, defendants argue that there is no evidence to suggest that Ms. Del Terzo's spinal accessory nerve was traumatized during the administration of the nerve block, and further argue that one cannot presume negligence from the mere fact that there was an injury. They reassert

that Ms. Del Terzo had preoperative pain at the trapezius muscle. Defendants assert that while Dr. Shields infers that Dr. Edmonds must have departed from the standard of care because Ms. Del Terzo has a left spinal accessory nerve injury, Dr. Shields fails to cite a single fact in the record to support his inference that Dr. Edmonds departed from accepted medical practice. They maintain that Dr. Shields impermissibly works backwards from the alleged injury, assuming that there was a bad result due to the way anesthesia was administered and concluding that the bad result must have been caused by departures by Dr. Edmonds. Defendants argue that Dr. Shields' opinion is purely speculative and conclusory. Further, defendants assert that there is no dispute that the brachial plexus nerve block was successful and that the brachial plexus and spinal accessory nerves are situated in different anatomical locations. They point out that while Dr. Shields opines that the spinal accessory nerve was injured by the needle during the brachial plexus nerve block, he does not challenge Dr. Edmonds' assertion that one cannot injure the spinal accessory nerve while administering a successful brachial plexus block. Defendants also point out that Dr. Shields acknowledges that an interscalene block with proper needle placement does not result in injury to the spinal accessory nerve, but does not dispute that the brachial plexus block was successful. Defendants aver that the successful brachial plexus nerve block undermines Dr. Shields' theory that Dr. Edwards improperly placed the needle in a higher, more posterior, and deeper position from the interscalene groove, thereby injuring the spinal accessory nerve. They argue that since the block was successful, Dr. Shield's hypothesis of mechanism of damage to the spinal accessory is both speculative and anatomically impossible. Finally, defendants argue that res ipsa loquitur does not apply to this case, because Ms. Del Terzo noted preoperative pain in the left trapezius muscle and a number of Ms. Del Terzo's symptoms manifested long after the surgery.

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There are certainly unresolved issues about whether Ms. Del Terzo has an injury to her spinal accessory nerve and when she first had pain in the region of her trapezius muscle. However, even assuming that Ms. Del Terzo has an injury to her spinal accessory nerve, plaintiffs failed to submit an expert affidavit which refutes defendants' expert opinion evidence that the brachial plexus nerve block was successful, thus it would have been anatomically impossible for the needle to have traumatized a nerve that is 10 centimeters away from the site of the interscalene groove. Plaintiffs do not dispute that the brachial plexus nerve block was successful, i.e., that Ms. Del Terzo was not in pain during the arthroscopic shoulder surgery in March 2007. The only expert who opined on causation for plaintiffs was Dr. Shields. While Dr. Shields opines that an improperly placed needle during an interscalene block could traumatize the spinal accessory nerve, he fails to address the anatomical distance between the two sites as addressed in defendants' experts opinion testimony, and fails to address how the needle used to administer an undisputedly successful brachial plexus nerve block could have traumatized another nerve remote to the site of the interscalene groove. Rather, Dr. Shields simply reasons back from Ms. Del Terzo's spinal accessory nerve injury to attribute the cause of her injury to improper placement of the needle during the nerve block. Speculation and hindsight reasoning are insufficient to defeat a party's establishment of prima facie entitlement to summary judgment. Fernandez v. Moskowitz, 85 A.D.3d 566, 568 (1st Dep't 2011). Moreover, there is no context provided to Dr. Shields' statement that a peri-operative nerve injury is most often a result of needle trauma; there is no citation to any published materials or any basis given for this conclusion. Finally, although plaintiffs dismiss Dr. Edmonds' submission of his own affidavit in support of his motion for summary judgment as self-serving, it is well established that a defendant may submit his or her own affidavit as an expert in support of a motion for summary

judgment, and the issue of his or her credibility only arises as an issue for the jury if the opposing party submits expert opinion evidence which raises an issue of fact.

As plaintiffs have failed to raise issues of fact regarding a departure or proximate cause, Dr. Edmonds is entitled to summary judgment. Having failed to raise an issue of fact with respect to departure or proximate cause, the claims for HSS's vicarious liability for the acts of Dr. Edmonds, lack of informed consent, and loss of services fall away. Accordingly, it is hereby

ORDERED that the motion for summary judgment by defendants Hospital of Special Surgery, Christopher Edmonds, M.D., and Answorth Allen, M.D., is granted in its entirety, the complaint is dismissed, and the clerk is directed to enter judgment accordingly.

Dated: September 14, 2012

ENTER:

JOAN B. LOBIS, J.S.C.

FILED

SEP 17 2012

NEW YORK
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