

Castillo v Columbia University Health Care Inc.

2016 NY Slip Op 32490(U)

December 15, 2016

Supreme Court, New York County

Docket Number: 805387/13

Judge: Martin Shulman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 1

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GIOVANNA CASTILLO,

Index No. 805387/13

Plaintiff,

-against-

COLUMBIA UNIVERSITY HEALTH CARE INC. d/b/a
COLUMBIA UNIVERSITY COLLEGE OF DENTAL
MEDICINE, CUHC ORAL AND MAXILLOFACIAL
SURGERY CLINIC AT COLUMBIA UNIVERSITY OF
DENTAL MEDICINE and NEW YORK PRESBYTERIAN-
COLUMBIA MEDICAL CENTER,

Defendants.
-----X

MARTIN SHULMAN, J. :

In this dental malpractice action, defendants The Trustees of Columbia University in the City of New York (Columbia), s/h/a "Columbia University Health Care Inc. d/b/a Columbia University College of Dental Medicine, CUHC Oral and Maxillo-Facial Surgery Clinic at Columbia University of Dental Medicine"; and The New York and Presbyterian Hospital, s/h/a New York Presbyterian-Columbia Medical Center (NYPH) move pursuant to CPLR 3212 for summary judgment dismissing the complaint.

Columbia University Health Care, Inc. (CUHC) is a Columbia subsidiary which operates the Oral and Maxillo-Facial Surgery Clinic at Columbia University College of Dental Medicine (OMFS Clinic), a dental clinic staffed by medical students and residents who are supervised by attending physicians. According to its answer, NYPH is a New York non-profit domestic corporation (Motion at Exh. C).¹

¹ Defendants allege, and plaintiff does not dispute, that NYPH is not affiliated with the OMFS Clinic and that plaintiff did not receive any treatment at NYPH. It is unclear from this record what relationship and/or affiliation, if any, NYPH has to co-defendants Columbia and CUHC. Defendants also state that plaintiff's bill of particulars

On March 10, 2011, plaintiff presented to the OMFS Clinic on an emergency basis complaining of pain in the area of her lower third molars (wisdom teeth). After defendants performed intra-oral and extra-oral examinations and took X-rays, plaintiff's lower wisdom teeth were found to be "partially erupted" and she was advised to have them extracted. Plaintiff returned to the OMFS Clinic on March 14, 2011, at which time a full series of radiographs was performed and she was referred for surgery. On March 22, 2011 during a follow-up examination, intra-oral and extra-oral examinations were repeated.

On May 4, 2011, resident Dr. David Alfi (Alfi)² extracted molars #17 and #32 with the assistance of Dr. Aaron Park. Drs. Barry Wolinsky (Wolinsky) and Steven Cho, both attending oral surgeons, supervised the procedure. Written informed consent was obtained on that date prior to the surgery (*id.* at Exh. K). On May 16, 2011, plaintiff returned to the OMFS Clinic for a follow-up visit and complained of tongue numbness and an inability to fully open her mouth. She returned for a follow-up visit with Alfi on May 24, 2011. Although Alfi concluded that plaintiff's condition was normal and that no further follow-ups were necessary, plaintiff subsequently suffered nerve damage.

Plaintiff commenced this action alleging that defendants' conduct caused the nerve damage and continuous pain and suffering. Her complaint (*id.* at Exh. B) alleges the following causes of action: medical malpractice (first cause of action);³ failure to

contains no allegations of negligence as to NYPH.

² Plaintiff discontinued this action as to Alfi on May 5, 2016 (*id.* at Exh. L).

³ While the complaint identifies the first cause of action as one "for conscious pain and suffering", it sounds in medical malpractice.

obtain proper consent (second cause of action); and negligent hiring, training and supervision (third, fourth and fifth causes of action).

Defendants move for summary judgment arguing that their conduct was clearly within the standards of accepted dental practice and not the proximate cause of plaintiff's injuries. Defendants also argue that plaintiff was properly informed and consented to the surgery prior thereto, and that Wolinsky properly supervised Alfi during the extraction procedure.

Included in the motion papers are copies of deposition testimony from plaintiff, Alfi and Wolinsky; medical records provided by CUHC regarding plaintiff's examination, treatment and follow-ups; and an affidavit from Dr. Raymond Fonseca (Fonseca), an oral surgeon who provides his expert opinion on this case. Based on this evidence defendants contend there is no issue of fact precluding summary judgment.

In opposition, plaintiff claims that issues of fact exist concerning the examinations, the procedure itself and the follow-up treatment. Plaintiff also disputes that defendants adequately informed her of all risks and consequences of the procedure. In response to Fonseca's affidavit, plaintiff submits an affirmation from Dr. Eugene Antenucci (Antenucci), a dentist who questions defendants' assertions and their expert's conclusions. In reply, defendants challenge Antenucci's expertise, point out alleged inconsistencies in his statements and claim that he fails to contradict certain of Fonseca's conclusions.

Discussion

"It is axiomatic that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of factual issues" (*Birnbaum v*

Hyman, 43 AD3d 374, 375 [1st Dept 2007]). “The substantive law governing a case dictates what facts are material, and '[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment [internal quotation marks and citation omitted].” (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008]). “To prevail on a summary judgment motion, the moving party must provide evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in his or her favor [citation omitted]” (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 81 [1st Dept 2013]). “Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial [citation omitted]” (*id.* at 82).

This court first addresses defendants' challenge to plaintiff's expert's qualifications. “The requisite elements of proof in a dental malpractice action are a deviation or departure from accepted standards of dental practice, and that such departure was a proximate cause of the plaintiff's injuries [citations omitted]” (*Liyanage v Amann*, 128 AD3d 645, 647 [2d Dept 2015]). The parties rely heavily on their dental experts, who claim to have assessed the medical records and other evidence in this case and reached their conclusions pursuant to the prevailing dental standards.

“To establish the reliability of an expert's opinion, the party offering that opinion must demonstrate that the expert possesses the requisite skill, training, education, knowledge, or experience to render the opinion [citations omitted]” (*Hofmann v Toys “R” Us-NY Ltd. Partnership*, 272 AD2d 296, 296 [2d Dept 2000]). An expert “need not be a specialist in a particular field” in order to render an expert opinion “if he [or she]

nevertheless possesses the requisite knowledge necessary to make a determination on the issues presented" (see *Joswick v Lenox Hill Hosp.*, 161 AD2d 352, 355 [1st Dept 1990]).

Defendants argue that their expert, Fonseca, has superior expertise in the field of oral surgery because he is a Board Certified Oral and Maxillofacial Surgeon. They claim that plaintiff's expert, Antenucci, is an authority on oral implantology, which is unrelated to extraction. While Antenucci need not be a specialist in tooth extraction, defendants contend that there should be some indication in his affirmation that he has some requisite knowledge or education in the area of tooth extraction in order for his observations and opinions to be acceptable. Defendants state that Antenucci's failure to demonstrate such a background renders his opinions inadequate and his affirmation should be disregarded.

Having reviewed Antenucci's affirmation, this court finds that he has sufficient professional experience to provide an expert opinion on the facts underlying this action. Antenucci's affirmation refers to his many years as a professional dentist and it is apparent that his expertise in this subject matter is adequate.

Both Fonseca and Antenucci analyze defendants' examination of plaintiff prior to the procedure with respect to whether or not the extractions at issue were necessary. Fonseca states that, upon examination, defendants found clinical signs of infection in plaintiff's lower third molars. He cites plaintiff's complaints of pain and bleeding as symptoms of infection, as well as the discovery of increased pocket depth and connective tissue loss. Because the teeth appeared to be infected, Fonseca concludes that "there were no reasonable alternatives to extraction of the lower wisdom teeth", as

the failure to remove infected wisdom teeth can cause "serious consequences" such as an abscess or a cyst. See Motion at Exh. A (Fonseca Aff.), ¶ 23.

By contrast, Antenucci observes that the records⁴ fail to expressly document the existence of any infection. He characterizes plaintiff as having presented to defendants with "soft tissue inflammation" and states that "the notes focus on orthodontic care, and the need to extract teeth #17 and #32 for solely orthodontic reasons (emphasis in original)."⁵ See Seilback Aff. in Opp. at Exh. A (Antenucci Aff.), ¶5. Antenucci concludes that plaintiff's lower wisdom teeth "posed no harm to the patient, were asymptomatic, and should not have been removed" (*id.* at ¶6).

The medical records documenting plaintiff's examinations prior to the procedure do not specifically mention infection. However, they refer to plaintiff's pain and bleeding, which Fonseca identified as symptoms of infection (*see* Motion at Exh. K). The records also refer to increased pocket depth in the molars and Alfi's deposition testimony indicates that there were clinical signs of infection at the time plaintiff was examined. See Motion at Exh. I (Alfi EBT Tr.), p 20. He further testified that the infection necessitated extraction to prevent its further spread to the neck and other parts of the body, which could be life threatening (*id.* at p 39).

⁴ Antenucci's affirmation contains no citations to the record on this round of motion practice.

⁵ During this time plaintiff also expressed an interest in undergoing orthodontic treatment to defendants and she went for an orthodontic consultation on April 25, 2011. She testified at her deposition that she required extractions in order to proceed with orthodontic work.

Antenucci's affirmation fails to address these symptoms and thus fails to controvert that they were indicative of an infection for which there was no alternative but extraction. On this record, defendants establish sufficient proof of an infection and the necessity of extracting plaintiff's lower wisdom teeth, which plaintiff fails to rebut.⁶ Accordingly, defendants' recommendation to extract plaintiff's molars did not deviate from accepted standards of dental practice and her first cause of action sounding in medical malpractice is dismissed to the extent it is based upon allegations that the subject procedure was not indicated.

Fonseca comments on plaintiff's pre-extraction examinations, which included the use of Panorex X-ray equipment. The examinations revealed that plaintiff had multiple caries (cavities) and mobility in several teeth. Importantly, the two dimensional (2D) Panorex film showed that the inferior alveolar nerve was close to the roots of the lower wisdom teeth, which Fonseca states is not uncommon (*see* Fonseca Aff. at ¶ 14). He notes that the diagnostic tests performed on plaintiff clearly showed the location of the nerves in relation to the wisdom teeth (*id.* at ¶ 25). Fonseca concludes that the examinations were within the standards of the dental profession, specifically maintaining that "additional imaging, such as a cone beam CT scan, was not necessary in this case" and "was not the standard of care at that time and is not the standard of care now" (*id.*).

Antenucci confirms that the Panorex film showed the nerve roots' close proximity to the teeth, thus indicating that the extraction would be difficult (Antenucci Aff. at ¶ 6).

⁶ Although it was necessary to extract plaintiff's lower wisdom teeth, it was not necessary to perform the procedure on an emergency basis (*see* Fonseca Aff. at ¶ 24).

He insists that defendants should have utilized three dimensional (3D) cone beam imaging instead of the 2D Panorex equipment for more accurate results. According to Antenucci, this equipment has been available to both specialists and general dentists for a number of years and is accepted by the profession as routine technology for diagnosis prior to tooth extractions. Antenucci claims that additional imaging by means of cone beam technology was necessary in this case and constituted the standard of care for dental professionals in 2011 as well as presently (*id.* at ¶¶ 9-10).

The issue here centers on two different technologies. While Fonseca is familiar with the 3D imaging Antenucci references, he concludes that such technology is not the standard equipment his colleagues utilize in similar situations. Antenucci, on the other hand, states that this imaging was the appropriate and essential technology at the time of the procedure. He claims that not only was it essential, but that the failure to use it proximately caused plaintiff's subsequent injuries.

Since he considered defendants' use of Panorex X-ray imaging to be less accurate in determining the nerve's proximity to the teeth, Antenucci concludes that failure to use the 3D imaging resulted in a flawed procedure. Plaintiff's expert's conclusion that the use of 3D imaging would have provided a more accurate analysis raises an issue of fact as to whether its use was the accepted standard of care at the time of plaintiff's treatment. Accordingly, defendants' motion for summary judgment dismissing plaintiff's first cause of action sounding in medical malpractice is denied to the extent it is based upon allegations that the pre-procedure imaging equipment defendants used was insufficient.

With respect to plaintiff's lack of informed consent claim, as stated in *Colarusso v. Lo*, 42 Misc3d 1210(A), 2013 WL 6985388, [*5] (Sup Ct, NY County, Schlesinger, J.S.C.):

Claims of lack of informed consent are statutorily defined. Pub. Health § 2805-d. The law requires persons providing professional treatment or diagnosis to disclose alternatives and reasonably foreseeable risks and benefits involved to the patient to permit the patient to make a knowing evaluation. *Id.* § 2805-d(1). Causes of action for lack of informed consent are limited to non-emergency procedures or other treatment and include diagnostic procedures that involve invasion or disruption to bodily integrity. *Id.* § 2805-d(2). To ultimately prevail on a lack of informed consent claim, a claimant must prove that a reasonably prudent person in the patient's position would not have undergone the treatment or diagnosis had the patient been fully informed, and the claimant must prove that the lack of informed consent is a proximate cause of the injury or condition for which recovery is sought. *Id.* § 2805-d(3).

Here, Fonseca notes that plaintiff signed the written consent form on the day of the procedure (see Motion at Exh. K). The form indicates that Jean-Gilbert Paulo, a medical student, informed plaintiff of the risks, benefits and alternatives to extraction prior to her signing her consent. In her deposition testimony, plaintiff acknowledged signing the consent form as well as speaking briefly with Alfi about the risks and consequences of the extraction prior thereto (*id.* at Exh. H [plaintiff EBT Tr.], pp 86-87). Although Alfi testified that it is his custom and practice to advise patients of the risk of nerve damage prior to extracting wisdom teeth (see Alfi Tr, p 39-41), plaintiff testified that Alfi did not discuss the possibility of nerve damage with her. However, plaintiff further testified that she was aware of the risk of nerve injury prior to the procedure because she had read articles concerning the subject (see plaintiff EBT Tr, pp 81-82).

Fonseca thus concludes that plaintiff's consent was properly obtained (see Fonseca Aff. at ¶ 26).

Antenucci opines that there is a question as to whether plaintiff gave proper consent and was informed in a competent manner. According to him, a proper discussion of procedural risks would have involved a discussion that the third molars were in proximity to the nerve, and that with the available 2D panographic imaging it was not possible to precisely locate the nerve's position in relation to the teeth. Antenucci claims that this discussion would detail the possibility of subsequent nerve damage during extraction. Antenucci concludes that plaintiff should have been informed of the option of an available cone beam imaging which would precisely locate the nerve's position in relation to the teeth and reduce the risk of nerve damage (see Antenucci Aff. at ¶12).

This court previously found that the oral surgery herein was indicated given the likelihood of an infection which ultimately could prove life threatening unless plaintiff's lower wisdom teeth were extracted. Plaintiff's expert failed to refute, or even address, her symptoms indicating an infection. He similarly failed to refute Fonseca's conclusion that "there were no reasonable alternatives to extraction" (Fonseca Aff., ¶23). Under these circumstances, plaintiff fails to establish that a fully informed reasonable person would have declined the procedure. *Orphan v Pilnik*, 15 NY3d 907, 909 (2010). Rather, defendants demonstrate that a reasonably prudent person in plaintiff's position would not decline to undergo the procedure, therefore lack of informed consent did not proximately cause her alleged injury. *Zapata v Buitriago*, 107 AD3d 977, 980 (2d Dept

2013). Moreover, having undertaken her own research, plaintiff admittedly was aware of the risk of nerve damage. Accordingly, the portion of defendants' motion for summary judgment dismissing plaintiff's second cause of action for lack of informed consent is granted.

As to the procedure itself, Fonseca opines that the extractions were properly performed and that Alfi took all necessary precautions to avoid nerve injury. Referring to deposition testimony, he states that Alfi made a hockey stick incision with vertical release on the cheek side of tooth #32, reflected the flap to expose the bone, then sectioned and extracted the tooth.⁷ The same technique was used to extract tooth #17 (see Fonseca Aff. at ¶ 27). Fonseca further refers to Alfi's testimony that he cleaned and curetted the sockets towards the end of the procedure. Alfi testified he does not use instruments such as curettes if he sees that a nerve is exposed (see Alfi EBT Tr., p 73).⁸

Antenucci states that Alfi deviated from the standard of care because without the precise information provided by 3D imaging, he "blindly" curetted⁹ the tooth sockets,

⁷ At his deposition, Alfi testified that in certain cases when the nerve is close to the tooth, an alternative surgical approach known as a "coronectomy" is performed, wherein only the crown of the tooth is removed and the roots are spared. However, he stated that this was not an option for plaintiff since she exhibited signs of infection (see Alfi EBT Tr., pp 44-45).

⁸ Alfi stated he did not know whether in this case he saw the nerve (*id.* at 74). Antenucci thus characterizes Fonseca's affirmative statement that Alfi did not see the nerve as supposition.

⁹ Antenucci describes curettage as "a gross surgical procedure" wherein a spoon-shaped instrument is used to scrape soft tissue from the bone (see Antenucci Aff. at ¶ 10).

likely causing plaintiff's nerve damage. Antenucci notes that Alfi testified he did not use magnification and states that nerves are often obscured by blood and thus are difficult to see.

As previously held, Antenucci's conclusion that 3D imaging would have provided a more accurate analysis raises an issue of fact as to whether defendants performed the extractions in accordance with the accepted standard of dental care. Accordingly, defendants' motion for summary judgment dismissing plaintiff's first cause of action sounding in medical malpractice is denied to the extent it is based upon negligent performance of the extractions.

Regarding the follow-up to the procedure, Fonseca concludes defendants' conduct was appropriate. He refers to evidence that plaintiff's extraction sites were inspected prior to discharge and she was given antibiotics as well as medications for pain and swelling. Her subsequent examinations were, in his opinion, also appropriate. Fonseca opines that nerve injuries can occur in the absence of malpractice, and that plaintiff's complaint of tongue numbness and difficulty opening her mouth at the first follow-up visit on May 16, 2011 was a common complaint that would resolve eventually and spontaneously (see *Fonseca Aff.* at ¶¶ 30-31). The records indicate plaintiff had no complaints on her second follow-up visit with Alfi, and as such no further follow-up was necessary.

Antenucci states that when plaintiff presented with the foregoing complaints on May 16, 2011 there is no proof that any further action was taken. He concludes that Alfi failed to thoroughly evaluate plaintiff's condition during the subsequent meeting on May

24, 2011. Antenucci claims that proper management would have involved an examination, X-rays and sensory testing, however, there is no documentation of such treatment in the medical records. He concludes that this conduct is a deviation from accepted standards of dental practice (see Antenucci Aff. at ¶ 12).

This court notes that the medical records pertaining to the follow-up sessions are in fact sparse (see Motion at Exh. K). There is little reference to plaintiff's complaints and Alfi's notes from the May 24, 2011 follow-up examination indicate plaintiff had no complaints and was healing well (*id.*; see also Alfi EBT Tr, pp 82-84). However, plaintiff testified that she told Alfi on that date that she continued to have pain, swelling and numbness and was not chewing properly (see Plaintiff EBT Tr, pp 118-119).

While defendants performed physical examinations, there is no indication of X-rays or sensory testing which allegedly would be part of a thorough post-procedural assessment. The alleged lack of additional examinations could be deemed a departure from the accepted standards of dental care. Accordingly, the experts raise issues concerning the post-procedure care plaintiff received that preclude summary judgment on the first cause of action sounding in medical malpractice to the extent such claims are based upon post-operative examinations defendants performed on May 16, 2011 and May 24, 2011.

Plaintiff's third, fourth and fifth causes of action allege negligent supervision, hiring and/or retention as to Columbia (third cause of action), CUHC (fourth cause of action) and NYPH (fifth cause of action). Plaintiff's opposition focuses on Wolinsky's supervision of Alfi during the procedure. Neither her bill of particulars nor her

opposition papers specifies which of defendants' employees were negligently hired or retained.

As to Wolinsky's supervision of Alfi, Fonseca concludes that his supervision during the procedure was "excellent" (see Fonseca Aff. at ¶ 28). As a fifth year resident Alfi had performed hundreds of wisdom tooth extractions and was amply qualified to perform the procedure in question under supervision (*id.*). Here, Wolinsky testified he had discussed the patient's chart with Alfi prior to the extractions and they had reviewed the films together. Wolinsky approved Alfi's treatment plan and was present during the entire procedure, even looking in plaintiff's mouth at one point.

Antenucci questions the quality of Wolinsky's supervision during the procedure because he purportedly "was not scrubbed and was walking around the perimeter of the room" (see Antenucci Aff. at ¶ 12). These allegations are insufficient to rebut defendants' prima facie showing that Wolinsky properly supervised the procedure.

Finally, plaintiff does not allege that any of defendants' agents/employees acted outside the scope of their employment. The law is well-settled that where an employee is acting within the scope of his or her employment, thereby rendering the employer vicariously liable for any of the employee's departures from standards of accepted medical practice under a theory of respondeat superior, a claim for negligent hiring or retention (*Weinberg v Guttman Breast & Diagnostic Inst.*, 254 AD2d 213 [1st Dept 1998]) or supervision cannot stand. *Quiroz v Zottola*, 96 AD3d 1035, 1037 (2d Dept 2012); *Segal v St. John's Univ.*, 69 AD3d 702, 703 (2d Dept 2010). For the foregoing

reasons, defendants' motion is granted with respect to the third, fourth and fifth causes of action for negligent hiring, retention and supervision, and these claims are dismissed.

Conclusion

Defendants' motion for summary judgment is granted in part as follows: the first cause of action sounding in medical malpractice is dismissed to the extent it is based upon allegations that it was unnecessary to extract plaintiff's wisdom teeth; the second cause of action alleging lack of informed consent is dismissed in its entirety; and the third, fourth and fifth causes of action alleging negligent hiring, retention and/or supervision are dismissed in their entirety. Summary judgment is denied as to the first cause of action as issues of fact exist with respect to whether or not defendants: performed proper comprehensive pre-operative imaging studies; performed the surgical procedure negligently; and provided insufficient post-operative care on May 16, 2011 and May 24, 2011.

This court's function in this case is issue finding, not issue determination (see *Creighton v Milbauer*, 191 AD2d 162, 166 [1st Dept 1993]). The expert opinions submitted are not vague or conclusory, are based on the facts and have probative value. The experts' conflicting conclusions cannot be resolved at this time as a matter of law. Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted in part and denied in part as set forth herein.

Counsel for the parties are directed to appear for a pre-trial conference at Part 1 MMSP, 60 Centre St., Room 325, New York, New York on January 3, 2017 at 9:30 a.m.

In the event that no settlement can be reached, counsel shall be prepared on that date to stipulate to a firm trial date in Part 40 TR.

The foregoing constitutes this court's decision and order.

Dated: New York, New York
 December 15, 2016



HON. MARTIN SHULMAN, J.S.C.