Colarusso v Lo
2013 NY Slip Op 33465(U)
September 25, 2013
Supreme Court, New York County
Docket Number: 104148/10
Judge: Joan B. Lobis
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SCANNED ON 1/7/2014
[* 1]

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

PRESENT: LOBIS, Justice

PART 6

COLARUSSO, HARRIET

- v -

ANDREW Y. LO, M.D.

INDEX NO. 104148/10
MOTION DATE 10/8/13
MOTION SEQ. NO. 02
MOTION CAL. NO.

The following papers, numbered 1 to 7 were read on this motion to/for Summary Judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4-6
Replying Affidavits	7

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
DEC 04 2013
NEW YORK
COUNTY CLERK'S OFFICE

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION and Order

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

Dated: 11/25/13

JOAN B. LOBIS, J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

---X

HARRIET COLARUSSO,

Plaintiff,

FILED
DEC 04 2013
NEW YORK
COUNTY CLERK'S OFFICE

-against-

Index No. 104148/10

ANDREW Y. LO, M.D.,

Decision and Order

Defendant.

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

This medical malpractice action arises out of a hemorrhoid banding procedure performed on Harriet Colarusso by Andrew Y. Lo, M.D. Ms. Colarusso sues Dr. Lo, alleging medical negligence and lack of informed consent. Ms. Colarusso claims that, as a result of the medical negligence and lack of informed consent, she suffered from permanent incontinence and a recurrent anal fissure. Dr. Lo moves for summary judgment pursuant to Section 3212 of the Civil Practice Law and Rules. Alternatively, Dr. Lo, pursuant to Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), moves for an order precluding the Plaintiff's expert testimony or granting a hearing on the grounds that the opinions to be offered are not generally accepted by the relevant scientific and medical communities. For the following reasons, the motion is denied.

Dr. Lo first treated Ms. Colarusso on October 2, 2007. She had been suffering from bleeding hemorrhoids and frequent bowel movements. Her medical history showed, among other conditions, chronic myelogenous leukemia ("CML") and six years of recurring clostridium difficile infection ("*C. diff*"), both of which had required numerous hospitalizations. Dr. Lo performed a

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digital examination of the rectum, followed by an anoscopy. Dr. Lo alleges that he informed the patient that if he saw hemorrhoids he would repair them by performing a banding procedure. He also claims to have informed Ms. Colarusso of any risks involved in the procedure.

During the anoscopy, Dr. Lo identified two internal hemorrhoids above the dentate line, which is approximately 2 centimeters above the opening of the anal canal. Dr. Lo applied local anesthetic and banded these by applying a band that cuts off circulation to the hemorrhoids, causing them to slough off. The patient was then sent home.

Four days later, Ms. Colarusso went to the Beth Israel Medical Center ("Beth Israel") emergency room, complaining of rectal pain. A surgical resident informed Dr. Lo of Ms. Colarusso's complaints. The surgical resident then examined her. Upon examination, the surgical resident found no erythema or induration. There was no gross blood, but Ms. Colarusso did experience pain during the digital examination. Ms. Colarusso was recommended analgesics, a Sitz bath, and a follow up visit with Dr. Lo.

The next day Ms. Colarusso returned to Beth Israel's emergency room complaining of continued rectal pain. She was recommended further pain medications and stool softeners but refused to go home and was admitted. On October 8, 2007, Dr. Lo came to Beth Israel to examine Ms. Colarusso. She refused a digital rectal examination because of the pain. The following day, Dr. Lo performed the examination while Ms. Colarusso was under anesthesia. Dr. Lo used a retractor and observed a fissure in the posterior midline of the anal canal. The fissure was located

approximately 2-3 centimeters away from the banding. Dr. Lo repaired the fissure, and, on October 12, 2007, Ms. Colarusso was discharged.

On November 20, 2007, Ms. Colarusso saw Dr. Lo for her follow up visit. Dr. Lo claims that Ms. Colarusso did not complain of pain and that the fissurectomy had healed well. There was no rectal bleeding or tenderness. He documented that she had good sphincter tone but was not excessively tight.

Ms. Colarusso also saw Joseph Martz, M.D., a colon and rectal surgeon, on December 28, 2007. She provided her medical history and complained of intermittent, bright red blood from her rectum and perianal irritation. Dr. Martz examined her and noted a posterior midline anal fissure. Ms. Colarusso had two follow up visits with Dr. Martz. At Ms. Colarusso's second follow up appointment, on March 14, 2008, Dr. Martz noted her decreased stool frequency and improving discomfort.

On May 13, 2008, Ms. Colarusso was seen by Michael Goggins, M.D., a gastroenterologist at John Hopkins Medical Center. Dr. Goggins evaluated Ms. Colarusso's *C. diff* colitis. She reported that the hemorrhoid banding caused her to develop poor anal function with leakage, soreness, and recurrent diarrhea. She was prescribed several medications and Dr. Goggins noted that it would be difficult to find other alternatives to assist her with her bowel issues.

Dr. Martz saw Ms. Colarusso again on June 23, 2008. She informed him that her diarrhea had resolved, and she could move her bowels without pain or bleeding, but Dr. Martz noted

she still had a fissure at the top of the anus. Over a year later, Ms. Colarusso was seen by Lawrence Brandt, M.D., for complaints of diarrhea and *C. diff.* Dr. Brandt also noted the midline anal fissure. Between June 23, 2009, and February 6, 2010, Ms. Colarusso was admitted to Beth Israel eight times for complaints related to her *C. diff.* On March 26, 2010, Ms. Colarusso was again seen by Dr. Martz, who noted that her fissure had resolved. In March 2010, Ms. Colarusso began this medical malpractice action against Dr. Lo.

On April 7, 2010, Ms. Colarusso was treated by oncologist Larissa Temple, M.D., at Memorial Sloan Kettering Cancer Center. Ms. Colarusso reported that she leaked liquid stool for about one hour after every bowel movement. Dr. Temple recommended an anal manometry and an ultrasound. On May 25, 2010, Dr. Jeffrey Aronoff performed an anal manometry, balloon expulsion, and neurological studies. Ms. Colarusso's studies showed that she had "extremely high resting pressure and resting pressure volume, normal sphincter length and percentage of cross sectional asymmetry." The anal manometry did not indicate a sphincter defect. Because of Ms. Colarusso's anal fissure, a balloon expulsion test was not performed.

On January 5, 2011, Ms. Colarusso had an appointment with Victor A. Gallo, M.D., a colon and rectal surgeon, to address her rectal bleeding. Dr. Gallo noted that Ms. Colarusso had rectal bleeding and symptomatic internal hemorrhoids, which he suggested treating with sclerotherapy treatments to control the rectal bleeding. Ms. Colarusso saw Dr. Gallo multiple times between January 5, 2011, and May 3, 2013, due to her rectal bleeding.

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On June 8, 2011, Ms. Colarusso had a second appointment with Dr. Temple. Dr. Temple, following an examination, noted that there was an abnormality in the internal sphincter and that the anoscopy showed three complexes of grade two to three hemorrhoids but no evidence of a fissure. Dr. Temple believed that Ms. Colarusso had a defect in her internal sphincter from Dr. Lo's procedure. In July, 2012, Ms. Colarusso saw Dr. Martz again. Dr. Martz noted that Ms. Colarusso still had a posterior midline anal fissure.

In moving for summary judgment on the medical malpractice claim, Defendant argues that there are no genuine issues of material fact and that he is entitled to summary judgement as a matter of law. In support of his motion, he provides the expert opinion of Randolph Steinhagen, M.D., a Board-certified colon and rectal surgeon, the deposition testimony, and Ms. Colarusso's medical records. Dr. Steinhagen asserts that a hemorrhoid banding performed in one part of the rectum cannot cause an ischemic injury and fissure to another part of the rectum and that Dr. Lo cannot be responsible for Plaintiff's injuries, including the anal fissure. Dr. Steinhagen opines that it is more likely that the fissure was present prior to Dr. Lo's treatment and was recurrent. Dr. Steinhagen argues that the anal manometry establishes that Ms. Colarusso had a fully functional sphincter after Dr. Lo's treatment. Additionally, Dr. Steinhagen states that Dr. Lo met the appropriate standard of care. Defendant contends he established a prima facie case for summary judgment, and that Plaintiff must meet the burden of demonstrating that there are triable issues of fact.

Defendant also seeks summary judgment on the claim of lack of informed consent. Defendant states that he obtained consent from Ms. Colarusso. Dr. Lo asserts that he advised Ms.

Colarusso of the risks and received oral consent. Dr. Steinhagen affirms that for minimally invasive procedures, such as hemorrhoid banding, receiving oral consent is consistent with accepted medical and surgical standards and that written informed consent is not required.

Plaintiff opposes Dr. Lo's motion. Plaintiff argues genuine issues of material fact remain. Plaintiff's expert, Michael Goggins, M.D., a gastroenterologist at John Hopkins Medical Center, opines that Ms. Colarusso's permanent incontinence is a direct result of Dr. Lo's banding procedure. Dr. Goggins states that Dr. Lo departed from good and accepted medical practice by placing the band too close to the base of the hemorrhoid and, as a result, included surrounding epithelial tissue. This compromised blood flow to the sphincter muscle, which permanently weakened the muscle in the area of the banding. Dr. Goggins explains that the anal manometry, which did not show sphincter defects, does not measure every portion of the sphincter muscle but rather measures various points using catheters placed in the rectum and attached to a machine that measures activity. Due to this, there may be normal pressure where catheters are placed but a lack of sufficient pressure in a particular area that can cause incontinence. Furthermore, Dr. Goggins alleges that Dr. Lo should have taken particular care in the placement of the bands because Ms. Colarusso's age and medical history placed her at a greater risk of compromised blood flow. Dr. Goggins also states that Dr. Lo's misplacement of the band resulted in Ms. Colarusso's recurrent anal fissure. If the anal fissure was preexistent, Dr. Goggins opines that a hemorrhoid banding would have been contraindicated.

Finally, Plaintiff alleges that Dr. Lo did not have informed consent. In her affidavit,

Ms. Colarusso states that Dr. Lo did not advise her about the banding procedure and only informed her after performing the procedure. In her deposition, Ms. Colarusso explains that she thought she had come in for a consultation only. Following the procedure, she did not sign any forms or receive any information about a follow up appointment. Dr. Goggins asserts that Dr. Lo needed formal consent before undergoing the procedure and should have advised the Plaintiff of the risks associated with the procedure, including an increase in the chance of injury to the tissue near the banding procedure.

In reply, Defendant argues that Dr. Goggins' claim that "severe pain during and after the [banding] procedure is a strong indicator that more than hemorrhoids were banded" is insufficient to defeat Defendant's prima facie showing for summary judgment dismissal. Defendant claims that Plaintiff did not rebut the results of Ms. Colarusso's anal manometry. Dr. Lo avers that the medical theory offered by Plaintiff is not based on upon theories of medicine which are generally accepted within the medical community. Defendant claims that Ms. Colarusso's expert cannot offer peer-reviewed literature, case studies, or other accepted evidence to support the medical theory underlying their case. Dr. Steinhagen states that Plaintiff's expert's theory is not accepted by the medical community. Defendant asks the Court to either preclude expert testimony or to inquire into the reliability of the Plaintiff's medical theory by conducting a Frye Hearing. Furthermore, Dr. Steinhagen disputes Dr. Goggins' claim that, when there is a pre-existing anal fissure, a hemorrhoid banding is contraindicated.

In considering a motion for summary judgment, this Court reviews the record in the

light most favorable to the non-moving party. E.g., Dallas-Stephenson v. Waisman, 39 A.D.3d 303, 308 (1st Dep't 2007). A movant must support the motion by affidavit, a copy of the pleadings, and other available proof, including depositions and admissions. C.P.L.R. Rule 3212(b). The affidavit must recite all material facts and show, where a defendant is the movant, that the cause of action has no merit. Id. This Court may grant the motion if, upon all the papers and proof submitted, it is established that the Court is warranted as a matter of law in directing judgment. Id. It must be denied where facts are shown "sufficient to require a trial of any issue of fact." Id.

In a medical malpractice case, to establish entitlement to summary judgment, a physician must demonstrate that he did not depart from accepted standards of practice or that, even if he did, he did not proximately cause injury to the patient. Roques v. Noble, 73 A.D.3d 204, 206 (1st Dep't 2010). In claiming treatment did not depart from accepted standards, the movant must provide an expert opinion that is detailed, specific and factual in nature. E.g., Joyner-Pack v. Sykes, 54 A.D.3d 727, 729 (2d Dep't 2008). Expert opinion must be based on the facts in the record or those personally known to the expert. Roques, 73 A.D.3d at 206. The expert cannot make conclusions by assuming material facts not supported by record evidence. Id. Defense expert opinion should specify "in what way" a patient's treatment was proper and "elucidate the standard of care." Ocasio-Gary v. Lawrence Hosp., 69 A.D.3d 403, 404 (1st Dep't 2010). A defendant's expert opinion must "explain 'what defendant did and why.'" Id. (quoting Wasserman v. Carella, 307 A.D.2d 225, 226 (1st Dep't 2003)). Conclusory medical affirmations or expert opinions that fail to address a plaintiff's essential factual allegations are insufficient to establish prima facie entitlement to summary judgment. 73 A.D.3d at 206. Once a defendant establishes a prima facie

case, a plaintiff only then must rebut that showing by submitting an affidavit from a medical doctor attesting that the defendant departed from accepted medical practice and that the departure proximately caused the alleged injuries. Id. at 207.

Dr. Lo has established a prima facie case for summary judgment. Dr. Steinhagen provides a detailed, specific, and factual opinion. See Joyner-Pack, 514 A.D.3d at 729. He describes a hemorrhoid banding as a minimally invasive, ambulatory procedure, performed without anesthesia, which requires very little to no follow-up care. Furthermore, he states that such a treatment was appropriate for the treatment of Ms. Colarusso's internal hemorrhoids. He explains that based on the location of the hemorrhoid it is not possible that an ischemic injury could have occurred at the site alleged. Furthermore, he argues that, based on the medical records, that there is no objective evidence that Ms. Colarusso has a damaged sphincter. Because Dr. Lo has established a prima facie case for summary judgment, Plaintiff must then rebut the showing by submitting an affidavit from a medical doctor. Roques, 73 A.D.3d at 206. Ms. Colarusso provides the expert opinion of Dr. Michael Goggins.

Dr. Goggins attests that Dr. Lo departed from accepted medical practice and that the departure proximately caused the alleged injuries. Dr. Goggins asserts that the anatomical and physiological concepts that he used to evaluate Ms. Colarusso are well founded in medicine and not novel. He opines that if the band used in the procedure were placed too close to the epithelium and anal margin, that tightness and excess pressure would develop in the surrounding tissue, including the sphincter muscle. The tightness would then compromise blood flow and weaken the sphincter

muscle in the area where the banding procedure was performed.

Dr. Steinhagen and Dr. Goggins disagree over a number of medical opinions, such as whether a banding procedure is contraindicated when an anal fissure is present, whether an anal fissure can be caused by banding, the effectiveness of the manometry test, or what severe rectal pain can indicate about banding. Summary judgment is not appropriate when both parties' medical experts have conflicting opinions. Magel v. John T. Mather Memorial Hosp., 95A.D.3d 1081, 1083 (2nd Dep't 2012).

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).

Dr. Lo has not met his initial burden in establishing entitlement to summary judgment on the lack of informed consent claim. Though Dr. Lo claims to have informed the plaintiff of the

procedure, there is no objective evidence, such as a signed consent form, that indicates that, in accordance with Public Health Law Section 2805-d(1), he informed Ms. Colarusso of any of the foreseeable risks, benefits, or alternatives. See Ericson v. Palleschi, 23 A.D.3d 608, 610 (2nd Dep't 2005).

Lastly, the Court addresses Defendant's request for a Frye Hearing. In New York, the Frye 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, 293 F. at 1013). 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). First Department case law, however, 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).

The threshold question is whether or not Plaintiff is offering novel expert medical testimony. The purpose of the Frye test is "to distinguish between scientific principles where are 'demonstrable' and those which are 'experimental[.]'" Marsh v. Smyth, 12 A.D.3d 307, 310 (1st Dep't 2004). Dr. Goggins is offering expert testimony as to whether a certain treatment could have the effects that Ms. Colarusso alleges; there is no "newly minted procedure or test, or a newly posited behavioral syndrome" that would require a Frye hearing. Id. at 311. That a theory is established in

anatomical and physiological concepts, instead of studies in peer reviewed literature, does not mean that it is novel. See id. at 311. Nor is it required that Plaintiff submit peer-reviewed literature, since not every theory prompts the profession to conduct studies. See id. Furthermore, in the medical records attached to Defendant's papers, several doctors claim that it is possible that Ms. Colarusso's injuries were caused by the banding procedure, even if they might not all claim that the injury was actually caused by the procedure. This directly conflicts with Dr. Steinhagen's reply affirmation that states that Dr. Goggins' theory is not accepted by the medical community. Dr. Steinhagen also does not claim that the methodology used by Plaintiff's expert is novel, even if his conclusion is different. Questions as to the logic or foundation of Dr. Goggins' conclusion can be addressed during trial. Accordingly, it is

ORDERED that the motion is denied; and it is further

ORDERED that the parties appear for a pre-trial conference on Jan. 7, 2014 at 9:30

Dated: Nov. 25, 2013

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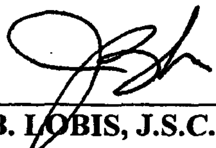

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