[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOAN B. LOBIS PART 6
Justice

JEAN ANNE BYRNES and EDWARD BYNRES,

Plaintiffs,

- v -

ANIL K. ANKOLEKAR, M.D., et al.,

Defendants,

INDEX NO. 100026/11

MOTION DATE 4/1/14

MOTION SEQ. NO. 1

MOTION CAL. NO.

The following papers were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause – Affidavits – Exhibits	1
Answering Affidavits – Exhibits	2 - 3
Replying Affidavits	4

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION, ORDER and JUDGMENT

Dated: June 18, 2014

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

1. CHECK ONE: .....
2. CHECK AS APPROPRIATE:....MOTION IS
3. CHECK IF APPROPRIATE: .....

☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
☐ 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

JEAN ANNE BYRNES and EDWARD BYRNES,

Plaintiffs,

Index No. 100026/2011

-against-

Decision, Order, and Judgment

ANIL K. ANKOLEKAR, M.D., YORK ANESTHESIOLOGISTS, PLLC, CHARLES P. MELONE JR., M.D., and BETH ISRAEL MEDICAL CENTER,

Defendants.

----------X

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

In this medical malpractice action, Defendants Charles P. Melone, Jr., M.D., and Beth Israel Medical Center (BIMC) move pursuant to Section 3212 of the Civil Practice Law and Rules for summary judgment. Plaintiffs Jean Anne Byrnes and Edward Byrnes oppose the motion. Defendants Anil K. Ankolekar, M.D., and York Anesthesiologists, PLLC (York), submit partial opposition to the motion. For the following reasons, the motion is granted for BIMC, and denied as to Dr. Melone.

This action arises out of a surgical procedure performed on Plaintiff Jean Anne Byrnes' left thumb and her subsequent medical care. Mrs. Byrnes alleges Dr. Melone negligently performed the surgical procedure, Dr. Ankolekar negligently administered anesthesia during the procedure, and that Dr. Melone and BIMC failed to appreciate her post-operative complaints. Mrs. Byrnes alleges that she was not adequately advised of the risks and alternatives to the proposed course of treatment. She claims that as a result of Defendants' negligence, she suffers from Reflex Sympathetic Dystrophy (RSD) of the left wrist, pain in the left arm, paresthesia of the left hand,

numbness and swelling of the left hand, weakness and atrophy of the left arm, and RSD symptoms, including burning pain in both feet and sensitivity to touch throughout the body.

On February 11, 2008, Mrs. Byrnes presented to Dr. Melone with complaints of pain in her left thumb. She was diagnosed with flexor nodules of the left thumb flexor mechanism and a mucous cyst on the interphalangeal joint. On September 25, 2008, Mrs. Byrnes received out-patient surgery at BIMC. She underwent surgical decompression of the flexor mechanism and an excision of the mucous cyst. Dr. Ankolekar administered regional anesthesia called a wrist block. In a wrist block, anesthesia is administered to the median, ulnar, and radial nerves. Following the procedure she was discharged.

The following day, Mrs. Byrnes had her first post-operative visit to Dr. Melone, who cleaned and redressed the wound. Plaintiffs allege that Mrs. Byrnes initially had an appointment several days after but made numerous calls regarding excruciating pain after returning home from the surgery. At the visit, Mrs. Byrnes complained that her wrist was swollen and hurt where the wrist block was administered. Mrs. Byrnes alleges that Dr. Melone told her that the pain she was feeling was from the wrist block anesthesia. She claims to have felt pain and tingling in her left hand following the procedure. On October 6, 2008, Mrs. Byrnes returned to have her sutures removed. She began hand therapy ten days later, at which time she complained of constant paresthesia in her fingers and left thumb. On November 17, 2008, she returned to see Dr. Melone. He noted that she was showing improvement despite complaints of paresthesia. Mrs. Byrnes alleges that she told Dr. Melone about the mottled appearance of her left forearm. He believed that she had median neuritis secondary to wrist block and prescribed a corticosteroid.

Eight weeks later, Mrs. Byrnes returned with complaints of pain and numbness in her left thumb, index, middle, and ring fingers. The pain had increased since her November 17, 2008, visit. Dr. Melone referred Mrs. Byrnes for nerve conduction studies and to a pain management physician. Though she had ongoing hand therapy, between January and April 2009 Mrs. Byrnes continued to complain of severe wrist pain, paresthesia, and difficulty with fine motor tasks. She presented to neurologist Dwight Rosenstein, M.D., on May 11, 2009. His impression was that she suffered from a median nerve injury at the left wrist, which would likely resolve completely. He noted that she could develop RSD if she continued to not use her affected hand.

On November 19, 2009, Dr. Rosenstein ordered electrodiagnostic studies. The studies ruled out distal nerve entrapment, peripheral neuropathy, and lower cervical radiculopathy. His impression was a mild form of RSD pain. At the suggestion of Dr. Rosenstein, Mrs. Byrnes returned to see Dr. Melone on March 15, 2010. Dr. Melone's impression was type II Complex Regional Pain Syndrome (CRPS). He referred her to a pain management specialist.

On April 11, 2010, Mrs. Byrnes consulted with anesthesiologist and pain specialist Robert Lin, M.D. Dr. Lin diagnosed her with RSD and recommended a trial of stellate ganglion block injections, an injection of local anesthetic in the sympathetic nerve tissue of the neck. Mrs. Byrnes sent a fax to Dr. Melone the following day, stating that she was diagnosed with RSD attributed to an overreaction by the sympathetic nervous system to the original nerve trauma to the median nerve. Mrs. Byrnes treated with Dr. Rosenstein and Dr. Lin until August 2011, during

which time she underwent several stellate ganglion blocks but reported that the blocks caused the pain to spread to her left arm, left shoulder, and right foot.

Dr. Melone and BIMC contend that Plaintiffs cannot establish that there was a departure from the accepted standards of medical care. Dr. Melone and BIMC claim that there are no triable issues of material facts. They assert that there was no failure to obtain informed consent. They maintain that BIMC did not need to obtain informed consent as Dr. Melone and Dr. Ankolekar are private physicians. They argue that Dr. Melone informed Mrs. Byrnes of all risks, benefits, and alternatives, and that a reasonably prudent person would have consented to the procedures.

Defendants argue that BIMC cannot be held liable for Dr. Ankolekar or his private partnership, York Anesthesiologists, PLLC, because they are not employees of BIMC. They contend that a hospital cannot be held liable for the acts or omissions of an anesthesiologist who is not an employee of the hospital. Lastly, they assert that *res ipsa loquitur* cannot be relied upon because Plaintiffs cannot show that this injury is the kind that occurs only if someone is negligent.

In support, BIMC and Dr. Melone provide the expert affidavit of Jesse B. Jupiter, M.D., a board certified orthopedic surgeon licensed to practice medicine in Massachusetts. Dr. Jupiter avers that Dr. Melone and BIMC rendered medical treatment within the accepted standards of medical care and did not proximately cause any of Plaintiffs' injuries. Dr. Jupiter affirms that the surgical decompression of the left flexor mechanism with removal of a mucous cyst was medically indicated and properly performed. He opines that the decision to utilize a wrist block

for regional anesthesia was appropriate in light of Mrs. Byrnes' prior medical history and the nature of the surgery. Dr. Jupiter contends that Dr. Melone adequately informed Mrs. Byrnes of the risks, complications, and alternatives to the planned surgical procedure, as well as the type of anesthesia that would be used. He asserts that the "Request and Authorization for Operation and/or Procedure" form signed by Mrs. Byrnes sufficiently outlined the surgical procedure.

Dr. Jupiter argues that Mrs. Byrnes' post-operative care was within the standard of care. He avers that no further testing or workup was warranted following the completion of the surgical procedure. He affirms that Mrs. Byrnes exhibited no signs of RSD while at BIMC on the day of the surgery. He maintains that the following day, Dr. Melone acted within the standard of care by prescribing Vicodin and a splint to Mrs. Byrnes and asking her to return in 10 days. He contends that Dr. Melone's impression of median neuritis secondary to a wrist block in October and November 2008 was within the standard of care. Dr. Jupiter argues that the diagnosis was reasonable as Mrs. Byrnes' complaints did not worsen until January 2009. He opines that none of the injuries alleged by Mrs. Byrnes can be attributed to the September 25, 2008, surgical procedure. He claims that Dr. Melone timely referred Mrs. Byrnes for further testing.

In opposition, Plaintiffs claim that post-operative medical records following the September 25, 2008, surgery are not included in the motion for summary judgment, and, as a result, the motion must be denied. They state that the medical records annexed to the moving papers are not in evidentiary form and are inadmissible. In particular, they claim that records from Dr. Melone, BIMC, Dori Appleman, and Dr. Rosenstein are unsworn and uncertified. Plaintiffs contend that Dr. Jupiter did not consider all relevant facts in his expert opinion. They maintain

that the symptoms Mrs. Byrnes experienced were not typical as Dr. Melone testified that no other patient who had undergone anesthesia from Dr. Ankolekar had experienced these symptoms. Plaintiffs drop any claims as to treatment prior to and during the surgery. Plaintiffs assert that though the surgery was not a departure from the standard of care, the post-operative treatment was a departure as Dr. Melone did not take Mrs. Byrnes' complaints seriously. Plaintiffs aver that if Dr. Melone provided treatment within 4-8 weeks after surgery, there may have been a chance to reverse the nerve damage from the wrist block.

In support, they provide the expert affirmation of Irene C. Lin, M.D., a board certified anesthesiologist licensed to practice medicine in New York. Dr. Lin states that despite ongoing regularly scheduled treatment with stellate blocks and acupuncture, Mrs. Byrnes' complaints continued and spread to her feet and extremities. She avers that Mrs. Byrnes is a patient with RSD. Lastly, she contends that if Mrs. Byrnes received care in the 4-8 week post-operative period, then it is Dr. Lin's experience that the process might have been reversed or had a better outcome.

Plaintiffs also provide the affidavit of Mrs. Byrnes. Mrs. Byrnes claims that at no point did Dr. Melone inform her of the treatment or diagnosis for her condition. She maintains that at multiple points she informed Dr. Melone of her pain, inability to pick up or hold objects, or use her left hand for daily activities. She avers that Dr. Melone never informed her of the reasons for the referrals to other physicians. Mrs. Byrnes affirms that she was informed that she would receive block anesthesia but was not informed as to the procedure for administering the block. She

asserts that he failed to diagnose and treat her post-operative pain and complaints regarding her left wrist, hand, and forearm.

Defendants Dr. Ankolekar and York submit partial opposition to the motion for summary judgment. They claim that issues of fact remain as to whether Dr. Melone and BIMC proximately caused the Plaintiffs' injuries. They state that for the purpose of preserving Dr. Ankolekar and York's Article 16 rights, they adopt and preserve Plaintiffs' opposition to the motion.

In reply, Dr. Melone and BIMC claim that Plaintiffs fail to establish material issues of fact. They concede that they attached an incomplete copy of Dr. Melone's chart but include it attached to the reply. They affirm that Plaintiffs do not oppose various portions of the motion for summary judgment. Dr. Melone and BIMC state that Dr. Lin does not refute Dr. Jupiter's opinion, does not discuss any pre-operative treatment or testing, the diagnosis, or the proposed surgical and anesthesia plans. They aver that Dr. Lin does not refute Dr. Jupiter's conclusions about surgery, complications, and does not mention any acts or omissions on the part of any defendant. There is no mention of post-operative care. Dr. Melone and BIMC argue that Plaintiffs have failed to respond to any arguments regarding *res ipsa loquitur* or vicarious liability for Dr. Ankolekar or York. Nor does Dr. Lin mention any violation of lack of informed consent. Lastly, Dr. Melone and BIMC request that if summary judgment cannot be granted in whole, that it be granted part for areas not opposed by Plaintiffs.

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). The 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 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. This Court does not weigh disputed issues of material facts. See, e.g., Matter of Dwyer's Estate, 93 A.D.2d 355 (1st Dep't 1983). It is well-established that summary judgment proceedings are for issue spotting, not issue determination. See, e.g., Suffolk County Dep't of Soc. Servs. v. James M., 83 N.Y.2d 178, 182 (1994).

In a medical malpractice case, to establish entitlement to summary judgment, a movant must demonstrate that it did not depart from accepted standards of practice or that, even if it did, the departure 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 195. 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 affirmations fail to establish prima facie entitlement to summary judgment. 73 A.D.3d at 195. Expert opinion that fails to address a plaintiff's essential factual allegations fails to establish prima facie entitlement to summary judgment as a matter of law. Id. If a defendant establishes a prima facie case, only then must a plaintiff rebut that showing by submitting an affidavit from a doctor attesting that the defendant departed from accepted medical practice and that the departure proximately caused the alleged injuries. Id. at 207. Summary judgment should be determined "upon the facts appearing in the record, without regard to technical defects or deficiencies in the pleadings, and should be denied 'if plaintiff's submissions [provide] evidentiary facts making out a cause of action.'" Javitz v. Slatus, 93 A.d.2d 830 (2d Dep't 1983) (citing Alvord & Swift v. Muller Constr. Co., 46 N.Y.2d 276, 280 (1978)).

The Court finds that Dr. Melone has not established a prima facie case for summary judgment. Defendants have not included the medical records from Dr. Melone's post-operative treatment of the patient. Though Dr. Jupiter attests that Dr. Melone's treatment was within the standard of care, "an expert cannot reach a conclusion by assuming material facts not supported by record evidence." Roques, 73 A.D.3d at 195. In this case, the record evidence is not available in the moving papers. Defendants did not submit all available proof as required by section 3212(b) of the Civil Practice Law and Rules.

A prima facie case for summary judgment has been established for BIMC. The medical records for Mrs. Byrnes treatment at BIMC are attached. Plaintiffs do not address any of

Defendants' arguments regarding vicarious liability or *res ipsa loquitur*. Nor do they address BIMC's claim that Dr. Ankolekar not an employee of BIMC but a private physician. Nonetheless, any claims regarding Dr. Ankolekar were dropped as Plaintiffs limit their claims to post-operative treatment only. Plaintiffs do not rebut the prima facie case. As a result, summary judgment is granted as to BIMC.

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).

The Court finds that Dr. Melone did not establish a prima facie case for lack of informed consent. Though Dr. Melone includes generic informed consent forms signed by Mrs. Byrnes, Plaintiffs allege that Dr. Melone did not inform her of all the reasonable risks and alternatives of treatment. Furthermore, Dr. Melone cannot establish a prima facie case due to the lack of supporting medical records for the post-operative treatment.

BIMC has established a prima facie case for summary judgment as to informed consent. Dr. Melone and Dr. Ankolekar are private physicians. When a "private physician attends his or her patient at the facilitates of a hospital, it is the duty of the physician, not the hospital, to obtain the patient's informed consent." Salandy v. Bryk, 55 A.D.3d 147, 152 (2d Dep't 2008). Plaintiffs do not indicate whether BIMC "knew or should have known that the injured plaintiff's physician was acting without informed consent . . . ." Sita v. Long Is. Jewish-Hillside Med. Ctr., 22 A.D.3d 743, 7443 (2d Dep't 2005). As Plaintiffs do not contest Defendants' claim that Dr. Melone and Dr. Ankolekar, as private physicians, were responsible for obtaining Mrs. Byrnes' consent, they are unable to rebut BIMC's prima facie case. Accordingly, it is

ADJUDGED that the motion is granted as to BIMC, and denied as to Dr. Melone; and it is

ORDERED that the parties are to appear for a preliminary conference on July 22, 2014, at 2:15pm, at Part 6, 60 Centre Street, Room 345.

Dated: June 18, 2014

ENTER:

JOAN B. LOBIS, J.S.C.