

Carnovali v Sher

2014 NY Slip Op 30020(U)

January 2, 2014

Supreme Court, New York County

Docket Number: 800148/2010

Judge: Joan B. Lobis

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

PRESENT: HON. JOAN B. LOBIS

PART 6

Justice

PATRICIA CARNOVALI and MICHAEL CARNOVALI

INDEX NO. 800148/2010

Plaintiffs,

MOTION DATE 10/29/13

- v -

MOTION SEQ. NO. 3

GEOFFREY SHER, M.D., et al.,

MOTION CAL. NO.

Defendants.

The following papers, numbered 1 to 4 were read on this motion to/for summary judgment

	<u>PAPERS NUMBERED</u>
Notice of Motion / Order to Show Cause – Affidavits – Exhibits _____	<u>1,2</u>
Answering Affidavits – Exhibits _____	<u>3</u>
Replying Affidavits _____	<u>4</u>

**THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION**

Dated: 1/2/14

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

- 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

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 41B).

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

-----X
PATRICIA CARNOVALI and MICHAEL CARNOVALI,

Plaintiffs,

Index No. 800148/2010

-against-

Decision and Order

GEOFFREY SHER, M.D., and SHER INSTITUTES FOR
REPRODUCTIVE MEDICINE,

Defendants.

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

This medical malpractice action arises out Patricia Carnovali's infertility treatment performed by Sher Institutes for Reproductive Medicine ("SIRM") and Geoffrey Sher, M.D., in which it is alleged that Ms. Carnovali's cancerous pelvic mass was not timely diagnosed. Patricia Carnovali and Michael Carnovali sue Dr. Sher and SIRM alleging medical negligence and lack of informed consent. Defendants move for summary judgment on all claims pursuant to Rule 3212 of the Civil Practice Law and Rules. Plaintiffs oppose the motion. For the following reasons, the motion is granted in part and denied in part.

On December 9, 2005, Ms. Carnovali had an in vitro fertilization ("IVF") consultation with Dr. Sher. Ms. Carnovali had previously seen two reproductive medicine specialists who performed, in total, six unsuccessful IVF cycles. Ms. Carnovali informed Dr. Sher that at age 15 she had her right ovary removed due to a granulosa cell tumor. Dr. Sher suspected that the cause of Ms. Carnovali's infertility was an immunologic implantation dysfunction. Dr. Sher discovered that Ms. Carnovali had abnormal natural killer cell activity and antiphospholipid antibodies. To counter the

effects of the abnormal natural killer cell activity, he administered intravenous immunoglobulin ("IVIG") during the IVF cycles. Ultrasounds were taken for baseline testing to check for uterine abnormality. During an ultrasound, Dr. Sher discovered a cystic mass on the left ovary, and Dr. Aykut Byrak, a doctor at SIRM, performed an aspiration of the cyst. During the first IVF cycle, Ms. Carnovali became pregnant. She delivered on October 5, 2006.

Ten months following the birth, Ms. Carnovali saw Dr. Sher to attempt conceiving a second child. After seven unsuccessful IVF cycles, Ms. Carnovali decided to pursue IVF with a different physician at SIRM, Dr. Drew Tortoriello. Dr. Tortoriello referred Ms. Carnovali for a pelvic imaging study to rule out gynecologic pathology. Ms. Carnovali had a sonohysterogram, which revealed a complex adnexal mass. In June 2010, Ms. Carnovali underwent, among other procedures, a transvaginal pelvic ultrasound, which also revealed the adnexal mass. The mass was removed at Columbia Presbyterian Hospital. The Columbia Presbyterian Hospital pathology report indicated a granulosa cell tumor. A Massachusetts General Hospital pathology report indicated an endometrial stromal sarcoma.

On July 7, 2010, Ms. Carnovali had a total abdominal hysterectomy, retro sigmoid resection, left salpingo-oophorectomy, appendectomy, omentectomy, and lysis of adhesion. The surgical pathology revealed metastatic granulosa cell tumor. A month later, Ms. Carnovali had a retroperitoneal lesion biopsy. The pathology showed that the mass was consistent with a metastatic granulosa cell tumor. On March 28, 2012, after she completed all treatment for the granulosa cell tumor, a CT guided biopsy showed that there was no residual disease or evidence of metastasis.

Plaintiffs filed a Summons with Notice on November 10, 2010, and a verified complaint was filed on January 19, 2012. They allege that the treatment rendered by Dr. Sher and SIRM fell below the accepted standard of medical care and, as a result, caused Ms. Carnovali injury. Plaintiffs allege that Dr. Sher and SIRM had exposed Ms. Carnovali to material risk by treating her with medications for fertility treatments, including IVIG. In the verified bill of particulars, Plaintiffs make a number of claims including, among others, negligence for failing to consider potential conditions given the patient's history, failing to inform the patient of the risk of recurrence of granulosa cell tumor caused by SHER's fertility treatments, failing to timely diagnose, failure to perform transvaginal ultrasounds, and lack of informed consent.

In seeking summary judgment, Defendants submit the expert affirmation of Dr. James Howard. Dr. Howard is a New York-licensed physician and is board certified in obstetrics and gynecology. He opines that Defendants acted in accordance with good and accepted medical practice. He contends that Defendants did not proximately cause any of the Plaintiff's alleged injuries. Dr. Howard opines that the absolute risk of cancer recurrence for Ms. Carnovali was remote and not an established serious risk. He claims that Dr. Sher did not depart from good medical practice by not informing Ms. Carnovali of the risk of recurrence of her granulosa cell tumor or other ovarian cancer. Dr. Howard asserts that no validated literature, as opposed to theoretical, exists that shows that there is a risk of granulosa cell tumor from IVF treatments. Dr. Howard also argues that it is not possible that Dr. Sher's and SIRM's action or inaction could have caused Ms. Carnovali's new cancer. He explains that IVIG therapy does not suppress the immune system and that no fertility medications prescribed to Ms. Carnovali caused any of the injuries alleged. Dr. Howard opines that

it was impossible for Defendants to know that Ms. Carnovali had cancer without any indications or complaints and that monitoring for cancer was outside Dr. Sher's and SIRM's speciality. Dr. Howard states that he inspected the ultrasounds performed as part of Ms. Carnovali's IVF treatment and that, outside a cystic mass on the left ovary from January 27, 2006, no other ultrasounds performed by the Defendants indicated any abnormality.

Defendants contend that the Plaintiffs have not elicited any evidence to demonstrate that Dr. Sher failed to exercise the degree of skill expected of a physician or that such a departure has contributed to injuring Ms. Carnovali. They aver that absent evidence of a departure from the accepted standards of medical practice, that Plaintiffs cannot, as a matter of law, establish proximate cause and therefore Plaintiffs' claims must be dismissed. They also claim that the Plaintiffs have no basis to support allegations that fertility medications caused any of the injuries alleged to Ms. Carnovali. Defendants assert that there is no basis for a lack of informed consent claim. Finally, they argue that Plaintiffs executed a release to hold Dr. Sher and SIRM free and harmless from all claims related to IVF and related medical procedures performed by physicians.

In response, Plaintiffs claim that Defendants have not met their burden of establishing a prima facie case for summary judgment. Plaintiffs claim that Defendants 1) failed to timely diagnose Ms. Carnovali's cancerous pelvic mass during the course of infertility treatments, 2) failed to perform baseline pelvic ultrasounds as required by the standard of care to assess the Plaintiff for gynecologic pathology during fertility treatments; 3) failed to maintain adequate documentation of ultrasound examinations and failed to include interpretations of the studies and copies of images,

both normal and abnormal; and 4) that as a result of these failures, Ms. Carnovali's cancer was not timely diagnosed and, therefore, required multiple surgeries and more extensive treatment. Lastly, Plaintiffs also claim that there was lack of informed consent. Plaintiffs have limited their cause of action to these categories of claims, essentially withdrawing the unrelated claims in the bill of particulars.

Plaintiffs argue that Dr. Howard asserts unsupported conclusions and his statements conflict with deposition testimony and Ms. Carnovali's medical chart. Furthermore, Plaintiffs contend that it was the responsibility of Dr. Sher and SIRM to perform testing ruling out gynecologic pathology, such as cancer, which could preclude a patient from becoming pregnant. They aver that Dr. Sher and SIRM were required to perform baseline transvaginal pelvic ultrasounds, which would have revealed the presence of a pelvic mass. Plaintiffs assert that they are not alleging that Defendants caused Ms. Carnovali's cancer, but rather that Defendants failure to perform required testing caused the Plaintiffs significant harm. In particular, they state that the lengthy delay in diagnosing the cancer resulted in the growth of the cancer so as to require a total abdominal hysterectomy, removal of Ms. Carnovali's remaining ovary, and resection of the rectal-sigmoid colon, along with radiation and chemotherapy. Plaintiffs also state that there was a lack of informed consent.

Lastly, Plaintiffs contend that the release signed by Ms. Carnovali was not intended to relieve Defendants from responsibility for their negligent acts. Plaintiffs argue that under New York law, the language from the release reading, in relevant part, "arising from or related to any and

all in vitro fertilization procedures or related medical procedures” does not apply in this case as the injuries did not arise from IVF procedures. Furthermore, they state that contracts cannot exculpate persons from their own negligence without intense judicial scrutiny. They claim that a special relationship exists, specifically physician-patient, that would make enforcement of an exculpatory clause against the public interest.

In support of the opposition to the motion, Plaintiffs offer the expert opinion of Richard A. Boothby, M.D., a Florida-licensed physician who is board certified in obstetrics, gynecology, and gynecology oncology. Dr. Boothby states that the standard of care for IVF requires a baseline transvaginal pelvic ultrasound to be performed prior to every new fertility cycle. He claims that Dr. Sher did not perform a baseline transvaginal pelvic ultrasound prior to cycles two, three, four, five, six, or seven. Dr. Boothby explains that Dr. Sher only performed limited ultrasounds to view the thickness of the uterine lining or the number of ovarian follicles and that transabdominal ultrasounds would not show the mass. He argues that the tumor seen on the transvaginal ultrasound taken in June 2010, was present while Ms. Carnovali was under the care of Dr. Sher and SIRM. He contends that it was negligence to fail to diagnose the tumor in January 2009, and as a result the tumor grew and required more extensive surgical resection, radiation, and chemotherapy. He asserts that Defendants were negligent in failing to formulate a differential diagnosis, which included gynecologic pathology as a cause for Ms. Carnovali’s continued infertility. Dr. Boothby claims that due to the failure to perform standard and required baseline imaging studies, important data was lost regarding Ms. Carnovali’s underlying condition.

In reply, Defendants argue that all causes of action relating to IVF and Immune Suppression causing Ms. Carnovali's cancer must be dismissed as Plaintiffs made no rebuttal in opposition papers. Defendants aver that baseline ultrasounds were performed within the standard of care for IVF. They claim that the IVF baseline ultrasound is different from other baseline ultrasounds. Defendants, however, also state that they were not required to do anything more than the IVF baseline ultrasound after the initial pelvic ultrasound. Furthermore, they assert that the standard of care does not require maintaining ultrasound images. They assert that there was no negligence in the reading of the ultrasounds, as no allegation of this was made in opposition papers. Defendants contend that Dr. Boothby's claim that a tumor was present in January of 2009 is conclusory, speculative and presumptive. They argue that the standard of care for IVF would not require a differential diagnosis, as suggested by Dr. Boothby. Defendants also argue that Plaintiffs have essentially withdrawn the lack of informed consent claim. Additionally, Defendants claim that the release from liability that was signed by Plaintiffs should be enforced as the language of the release is unequivocal, explicit, and unambiguous in expressing the limitations of liability. Lastly, Defendants claim that Plaintiffs' expert affidavit cannot be accepted because, pursuant to Rule 2106 of the Civil Practice Law and Rules, an affirmation by an out of state physician is insufficient to defeat a summary judgment motion.

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 must then 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.

Lack of informed consent claims 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); see also Shkolnik v. Hosp. for Joint Diseases Orthopaedic Inst., 211 A.D.2d 347, 355 (1st Dep't 1995).

The Court finds that the Defendants have established a prima facie case for summary judgment as to lack of informed consent. Defendants' expert establishes that the recurrence of Ms. Carnovali's granulosa cell tumor as a risk of IVF or IVIG was without merit. Due to this, Dr. Howard argues that Dr. Sher did not violate the standard of care by not informing Ms. Carnovali of the risk that the granulosa cell tumor could recur. Furthermore, Dr. Howard claims that the granulosa cell tumor would have recurred even without IVF treatment. Plaintiffs have not attempted to rebut Defendants' prima facie case. Roques, 73 A.D.3d at 207.

The Court also finds that a prima facie case for summary judgment has been established for any claims that IVF or IVIG treatment caused cancer or that Defendants misread

ultrasound images. Dr. Howard argues that the Plaintiffs cannot establish or prove that the granulosa cell tumor was at all related to Ms. Carnovali's prior granulosa cell tumor or to the IVF treatments. Furthermore, Dr. Howard argues that there were no abnormalities visible in the ultrasound images. In opposition, Plaintiffs do not contest Dr. Howard's claims. Indeed, Plaintiffs unequivocally state that they are not claiming that any treatment by Dr. Sher or SIRM caused Ms. Carnovali's cancer. Plaintiffs also do not address the issue of misread ultrasound images. See id.

As to all other allegations raised by Plaintiff, the Court is not persuaded that Defendants have established a prima facie case of entitlement to summary judgment. Dr. Howard, Defendants' expert, does not establish what type of ultrasound must be performed on Ms. Carnovali, the differences between baseline and non-baseline ultrasounds, or how records of such images must be maintained. In this respect, the expert opinion is severely under inclusive in delineating the standard of care. Without establishing a standard of care and how treatment was proper, Defendants fail to establish a prima facie case. See Ocasio-Gary, 69 A.D.3d at 404. Furthermore, it is insufficient to argue that since Ms. Carnovali was diligent in seeing her OB/GYNs for OB/GYN issues that Defendants were not required to monitor for granulosa cell tumor or conduct more in-depth ultrasounds. Conclusory statements that Defendants met the standard of care are simply not sufficient. Roques, 73 A.D.3d at 206.

Even if the Court found that Defendants had established a prima facie case, however, Plaintiffs' opposition raises triable issues of fact. Both experts disagree as to what the standard of care should be for Dr. Sher and SIRM. The disagreement as what type of ultrasounds are necessary

should be settled by a jury. Though Plaintiffs do not dispute that Dr. Sher and SIRM did not cause Ms. Carnovali's cancer, there is a factual dispute as to whether their actions delayed Ms. Carnovali's diagnosis.

The Court now turns to the release signed by Ms. Carnovali. The law frowns upon agreements intended to exculpate parties from the consequences of their own negligence and requires that such contracts be subjected to close judicial scrutiny. Gross v. Sweet, 49 N.Y.2d 102 (1979). Exculpatory provisions are strictly construed against the reliant party and must be unambiguously expressed in unmistakable language that is clear and explicit in absolving from negligence the party seeking to be insulated. Ash v. N.Y. Univ. Dental Ctr., 165 A.D.2d 366, 368 (1st Dep't 1990). Exculpatory agreements that implicate "both the State's interest in the health and welfare of its citizens, as well as the special relationship between physician and patient" are invalid as a matter of public policy. Id. at 369. Defendants argument that the release was legally sufficient to exculpate Defendants from negligence due to the clear, unequivocal, and explicit language is wholly incorrect. The language in the release is the sort of ambiguous language contemplated in Gross. See 49 N.Y.2d at 108-09. Most significantly, because the language implicates the State's interest in the health and welfare of its citizens, as well as the physician-patient relationship, the agreement itself is invalid as a matter of public policy.

Lastly, the Court is not persuaded by Defendants' argument that the Court cannot accept Plaintiffs' expert affidavit. Rule 2106 of the Civil Practice Law and Rules states that only New York licensed physicians may submit an affirmation in lieu of an affidavit. Plaintiffs' expert,

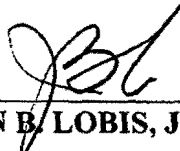
however, submitted an expert affidavit, not an expert affirmation. The Court's *in camera* copy is signed and notarized. Accordingly, it is

ADJUDGED that motion is granted in part, as to claims that IVF or IVIG treatment caused Ms. Carnovali's cancer and as to the lack of informed consent; and it is further

ORDERED that the motion is denied, as to all other claims.

Dated: Jan 7, 2014

ENTER:



JOAN B. LOBIS, J.S.C.

JOAN B. LOBIS

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).