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

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JASON DENG, as the Administrator of the Estate of JING JIANG, deceased,

Plaintiff,

Index No: 805310/2014

-against-

Supplemental Decision and Order

JEFFREY BRUCE, M.D., ELIZABETH FONTANA, M.D., THE NEW YORK AND PRESBYTERIAN HOSPITAL, COLUMBIA UNIVERSITY MEDICAL CENTER, and COLUMBIA UNIVERSITY-COLLEGE OF PHYSICIANS & SURGEONS,

Defendants.

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Hon. Martin Shulman,

In this medical malpractice/wrongful death action, defendants Jeffrey Bruce, MD ("Bruce"), Elizabeth Fontana, MD ("Fontana"), the New York Presbyterian Hospital, Columbia University Medical Center, and Columbia University-College of Physicians and Surgeons (the "Hospital" and collectively "Defendants," where appropriate) moved for summary judgment on the issue of liability and negligence. Plaintiff, Jason Deng ("Plaintiff" or "Deng"), as the Administrator of the Estate of Jing Jiang, deceased ("decedent") opposed this motion. On September 12, 2017, this court issued a Bench Decision ("Sept 12 Decision") on the record granting Defendants' summary judgment motion and dismissing this action.

In searching the record on this round of summary judgment motion practice, the the Sept 12 Decision preliminarily determined no factual basis to: (1) challenge a correct decision to perform a pineal cyst resection (the cyst was obstructing the outflow

of spinal fluid causing intra-cranial pressure); (2) sustain a lack of informed consent claim; (2) sustain any medical negligence claim against Fontana; (3) sustain any medical negligence claim against Defendants in the pre-operative care and work-up of decedent as well as in the performance of the complicated, pineal cyst resection on February 4, 2013; and/or (4) impute vicarious liability against the Hospital for any acts of alleged medical negligence Bruce (an attending neurosurgeon with privileges) may have caused during the post-surgical care of decedent (Tr[1] at pp 6-10).

After the foregoing dust has settled, the sole issue is whether it was a departure from the standard of care for Bruce to have performed decompression surgery when decedent suffered post-operative bleeding and a venous infarct within two (2) hours after the craniotomy to surgically remove the cyst. Unfortunately, despite the performance of these surgical procedures to resolve life threatening conditions, decedent died.

In opposition, Plaintiff's expert contends that during the post-operative care of decedent, Bruce should have ordered serial scans to have anticipated the real potential for clot formation which can cause infarction. Had Bruce done so, Plaintiff's expert opines, this neurosurgeon would have discovered the transverse sinus thrombosis, and then administer a less invasive, catheter-directed thrombolytic agent (e.g., tPA[2]) to dissolve the clot, which could have given decedent an opportunity for a

[1] Parenthetical references preceded with "Tr" are to the transcript of the Sept 12 Decision.

[2] The intravenous medication, Tissue Plasminogen Activator ("tPA"), is a thrombolytic agent usually administered via a catheter into a vein to dissolve clots.

better outcome.

As noted in the Sept 12 Decision, it was conceded that Plaintiff's expert, while a renowned neurologist with extensive experience treating neurosurgical patients post-operatively in critical care settings, is not a neurosurgeon and therefore never performed a craniotomy or, particularly, a pineal cyst resection. Nor has this neurologist ever made the ultimate call for surgical intervention during triage decision making of high risk surgical patients experiencing a post-operative event such as decedent (Tr at p 4).

Based on the foregoing, this court determined that Plaintiff's expert was simply not qualified to question Bruce's judgment to surgically intervene to stem the emergent cerebellar hemorrhaging and relieve brain stem pressure within two (2) hours of the craniotomy and avoid a then fatal outcome. Moreover, this court's Sept 12 Decision found Plaintiff's expert's opinion on the central departure claim speculative and equivocal and, after searching the record, granted summary judgment to Defendants (Tr at p 19).

Nonetheless, this court granted Plaintiff's counsel leave to reargue and brief what precisely is the legal standard underlying Plaintiff's expert's causation opinion which counsel claims supports the proposition that Plaintiff's expert neurologist's opinion was not speculative as this court found but, instead, raised a material issue of fact warranting the denial of Defendants' summary judgment motion (Tr at pp 26-30).

In addition to reiterating what he believes should be the legal standard underlying proximate cause to raise the existence of a material issue of fact (Tr at pp19-21 and 22-2), Plaintiff's counsel's subsequent memorandum of law quotes

portions of Plaintiff's expert's opposition affirmation where the neurologist repeatedly opines that Bruce's departure from the standard of care in failing to timely evaluate for a sinus thrombosis and correct same via catheter-directed thrombolysis or a thrombectomy (surgical removal of the clot) would have provided decedent an opportunity for a better outcome. Counsel argues this is equivalent to opining that Bruce's departure diminished decedent's chance of a better outcome (*see*, *King v St. Barnabas Hosp.*, 87 AD3d 238 [1st Dept 2011]; *see also*, *Hernandez v New York City Health & Hosp. Corp.*, 129 AD3d 532 [1st Dept 2015]) and, thus, warrants modifying the Sept 12 Decision and restoring this action to the trial calendar ultimately for a jury to determine the material issue of fact as to Bruce's claimed departure.

In opposing reargument, Defendants' counsel's memorandum of law reiterates and highlights the following points:

- Decedent was fully aware of the known risks of having a penial cyst resection (i.e., an infarction, stroke or death), and a CT scan taken shortly after surgery revealed massive intra-cranial bleeding requiring Bruce to perform emergency decompression surgery;

- Plaintiff's theory that thrombolysis with tPA was more appropriate as set forth in opposition to Defendants' summary judgment motion was never pleaded, amplified in any way in the Bill of Particulars nor raised during discovery (e.g., no line of questioning during Bruce's deposition about the use of thrombolysis to resolve decedent's then emergent condition) and must be precluded;

- Because Plaintiff's expert-neurologist lacked the skill, knowledge and experience of a neurosurgeon, he was not competent to opine whether Bruce's decision to perform emergency surgery was a departure from the standard of care and the competent producing cause of decedent's eventual death (*Schectman v Wilson*, 68 AD3d 848 [2nd Dept 2009]);

- The literature Plaintiff's expert relies on fails to support his theory that catheter-directed administration of "tPA into the right transverse sinus vein two hours after major brain surgery was even the standard of care[, but rather] would have been contraindicated because it would have caused further damage. . . [especially

when decedent suffered a cerebellar hemorrhage] . . ." (bracketed matter added)(Defendants' Memorandum of Law in Opposition to Reargument at p 6);

- Defendants' expert neurosurgeon's medically supported assertions support his opinion that the blockage of the transverse sinus vein occurred secondary to the massive brain bleed;

- Without evidentiary support, Plaintiff's expert, seemingly focused on a blocked transverse sinus vein detected on a CT scan two days after the craniotomy, never weighs in on the fact that two hours after the successful penial cyst resection, Bruce's emergency surgery was medically required to evacuate the hematoma and relieve brain stem pressure due to intra-cranial bleeding (otherwise damage to this part of the brain could adversely affect respiration, heart rate, and blood pressure resulting in death); and

- Finally, Plaintiff's expert has failed to proffer an evidence-based opinion with any degree of medical certainty that the focused administration of tPA would have resulted in a better outcome for decedent, instead, his factually unsupportable opinion was conclusory and equivocal as to the issue of Bruce's claimed departure from the standard of care as the proximate cause of decedent's fatal outcome.

As previously noted, this court granted Plaintiff leave to reargue its Sept 12 Decision. Nonetheless, it will adhere to its initial determination granting Defendants summary judgment dismissing the complaint.

Contrary to Plaintiff's position that it is a question of subtle semantics, there is a marked difference between a "diminished chance of a better outcome" and an "opportunity for a better outcome." An expert opinion on the departure issue concluding with the former suggests a factually based adverse consequence in consonance with *Hernandez*, *supra*, whereas an opinion concluding the latter as was done in the case at bar suggests the claimed departure from the standard of care merely prevents the potential for a good result, a speculative opinion resting on hope and not facts.

Morever, even if Plaintiff's expert had opined that Bruce's failure to use

thrombolysis diminished decedent's chances for a better outcome after the complicated pineal cyst resection, this court's Sept 12 Decision would be no different. On this record, Defendants made a prima facie showing warranting summary judgment. That burden then shifted to Plaintiff to produce sufficient evidence to raise a material issue of fact. Infarcts and bleeding are known and accepted risks of this complicated surgery. That said, aside from a unsupported conclusion, Plaintiff's neurology expert was incapable of medically justifying the focused use of a "clot buster" when decedent was experiencing massive brain bleeding within hours after the craniotomy and, ultimately, Plaintiff's opposition failed to produce any evidence to raise any triable factual issue as to the proximate cause of decedent's death. *Pancilla v Romanzi*, 140 AD3d 516 (1st Dept 2016).

This constitutes this court's decision and order.

Dated: New York, New York
February 5, 2018

Hon. Martin Shulman, JSC