SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART 11

----------X INDEX NO.: 805064/2014

CLIFFORD A. MIEROWITZ, As Executor
of the Estate of LUIS ARROYO

Plaintiff,

-against-

LUIS MENDEZ CASTELLANOS, M.D., &
LUIS MENDEZ CASTELLANOS, M.D., P.C.,

Defendants.

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MADDEN, J.

Defendants Luis Mendez Castellanos, M.D., and Luis Mendez Castellanos, M.D., P.C., together "Dr. Mendez"), move after a jury verdict in favor of plaintiff Clifford A. Mierowitz, as Executor of the Estate of Luis Arroyo, for a directed verdict or for judgment as a matter of law,[1] on the grounds that Dr. Mendez, as Mr. Arroyo's primary care physician, did not actively participate in Mr. Arroyo's treatment for his prostate condition, that he referred Mr. Arroyo to a urologist, Dr. Valenzuela for such care and treatment, and, thus, Dr. Mendez did not have a duty of care with respect to the care and treatment of Mr. Arroyo's prostate, and he is not responsible for any delay in diagnosing his prostate cancer. Plaintiff opposes the motion, arguing that plaintiff established prima facie proof on his case in chief that Dr. Mendez had a duty with respect to Mr. Arroyo's prostate condition, since, as Mr. Arroyo's primary care physician, he actively monitored Mr. Arroyo's prostate condition, participated in Mr. Arroyo's care regarding his prostate, and shares in the responsibility for a delay in diagnosing his prostate cancer. Four departures were submitted to the jury in connection with the care Dr. Mendez provided to Mr.

[1]At the close of plaintiffs' evidence in chief, defendants' motion for a directed verdict was reserved with the right to make the motion together with a motion to set aside the verdict if the jury returned a verdict in plaintiff's favor.

Arroyo related to his prostate conditions[2], and the jury found that in two instances Dr. Mendez departed from accepted medical practice, and that he bore 40% , and Dr. Valenzuela 60% , of the responsibility for the delay in diagnosis.

TRIAL EVIDENCE AND CONTENTIONS

The evidence at trial established that Dr. Mendez treated decedent, Luis Arroyo, as his primary care physician for various ailments,[3] including testing and communications regarding his prostate, from 2001 through the fall of 2012, and that Dr. Valenzuela treated Mr. Arroyo for prostate related conditions during such time period beginning in and around 2003 - 2004. Mr. Arroyo was diagnosed with prostate cancer in October, 2012 when Dr. Valenzuela performed a biopsy of Mr. Arroyo's prostate, and a November, 2012 MRI revealed that the cancer was incurable as it had metastasized to his bones, including his skull, spine and ribs, and his bladder,

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[2]The jury interrogatories including the following questions regarding Dr. Mendez's alleged departures:

1a. Did defendant Dr. Mendez depart from accepted medical practice by not following up to ensure an immediate biopsy was done when Mr. Arroyo's Prostate-Specific Antigen ("PSA") was 14.1 on July 7, 2011 ?

2a. Did defendant Dr. Mendez depart from accepted medical practice by not substantiating that Mr. Arroyo had a biopsy which was as indicated in Dr. Mendez's note of October 15, 2011?

3a. Did defendant Dr. Mendez depart from accepted medical practice in not following upon his February 14, 2009 referral of Mr. Arroyo to Dr. Valenzuela with respect to a differential diagnosis of ruling out prostate cancer?

4a. Did defendant Dr. Mendez depart from accepted medical practice in not referring Mr. Arroyo to another urologist after Dr. Valenzuela did not provide information with respect to his care and treatment of Mr. Arroyo after the 14.1 PSA level on July 7, 2011?

The jury found that Dr. Mendez departed from accepted practice and the departure was a substantial factor in causing injury to Mr. Arroyo with respect to questions 1(a) and 4(a).

[3]During Dr. Mendez's care and treatment, in addition to prostate problems, Mr. Arroyo suffered from a variety of ailments including diabetes, hypertension and left ventricle systolic dysfunction.

uter and rectum. Mr. Arroyo died from the cancer in April 2016.

Plaintiff claims that there was a 15 month delay in diagnosis of Mr. Arroyo's prostate cancer, and that Dr. Mendez was responsible, along with Dr. Valenzuela for the delay. Plaintiff bases this contention, in part, on the fact that Dr. Mendez tested Mr. Arroyo's Prostate-Specific Antigen (PSA), levels 11 times while caring for Mr. Arroyo, and that elevated results are suspicious for cancer. Plaintiff contends that a biopsy should have been performed at least as of July, 2011, when Mr. Arroyo's PSA level was 14.1. Plaintiff further contends that as Dr. Mendez communicated and discussed the significance of the results with Mr. Arroyo, and communicated the PSA results to Dr. Valenzuela, and inquired of Dr. Valenzuela regarding the implications of the results and the actions he, Dr. Valenzuela, was taking with respect to his care and treatment of Mr. Arroyo's prostate condition, cleared Mr. Arroyo for certain procedures regarding his prostate, that Dr. Mendez owed a duty to Mr. Arroyo regarding his prostate condition, and, in particular, with respect to the diagnosis of cancer.

The evidence at trial showed that Dr Mendez first referred Mr. Arroyo to Dr. Valenzuela in 2003/2004 regarding his complaints of blood in his urine and proturia (protein in the urine), and that Dr. Valenzuela continually saw Mr. Arroyo for various conditions related to his prostate through November, 2012. The evidence also showed that while Dr. Mendez tested Mr. Arroyo 's PSA levels 11 times, and discussed the results with Mr. Arroyo, Dr. Mendez sent the test results to Dr. Valenzuela who also communicated the results to Mr. Arroyo.

In support of their contention that Dr. Mendez did not owe a duty of care to Mr. Arroyo regarding his prostate condition, and that Dr. Mendez fulfilled his duty as Mr. Arroyo's primary care physician by referring Mr. Arroyo to Dr. Valenzuela, defendants point to Dr. Valenzuela's

testimony that the ultimate determination of the care and treatment of Mr. Arroyo's prostate condition was within his discretion. Defendants also points to testimony of Dr. Mendez that while he asked for reports regarding the condition of Mr. Arroyo's prostate from Dr. Valenzuela, that the main reason for these requests was to ensure that he had the information from these reports in Mr. Arroyo's chart; and that since, Mr. Arroyo was under the care of a proper specialist, he did not need to follow "what the specialist is doing every time he sees the patient." (Trial Transcript [TT] at 194). Defendants also rely on Dr. Mendez's testimony that he did not have responsibility, nor did he share responsibility with Dr. Valenzuela for diagnosing Mr. Arroyo's prostate cancer (Id at 159), and that of plaintiff's expert that it was the treating urologist, Dr. Valenzuela, who had responsibility for determining when and if, to perform a biopsy (Id at 159, 286).

In opposition, plaintiff points to the following evidence in support of his argument that Dr. Mendez owed Mr. Arroyo a duty of care with respect to his prostate condition by jointly participating in the care of Mr. Arroyo regarding this condition; the 11 times that Dr Mendez tested Mr. Arroyo's PSA, including during the period of Dr. Valenzuela's treatment, and that Dr. Mendez communicated the PSA results to Mr. Arroyo; that he monitored the prescription drug, Dutasteride, prescribed to Mr. Arroyo for his enlarged prostate; and that he cleared him for two procedures. The procedures were a 2007 referral to Dr. Valenzuela, and clearance by Dr. Mendez, for a transurethral resection of the prostate (TURP), and a 2010 referral to Dr. Valenzuela for a laser vaporization treatment of the prostate.

With respect to the PSA test results, Dr. Mendez testified that he sent the results in referral letters to Dr. Valenzuela. Dr. Mendez further testified that in his opinion, PSA results of

0 to 4 were normal; 4-10 suspicious for cancer or other prostate problems; and that over 10 was deeply suspicious for cancer. TT at 78-79;94-95. According to Dr. Mendez, with respect to elevated levels, he sent the following PSA results to Dr. Valenzuela; 6.5 in February, 2009; 7.2 in July 2010; 14.1 in July, 2011; and 75.8 in July, 2012. Dr. Mendez testified he was concerned about the elevated PSA levels, and concerned as to whether Mr. Arroyo PSA results were indicative of cancer. TT at 148. Specifically, Dr. Mendez testified that his February, 2009 referral letter to Dr. Valenzuela regarding the PSA levels of 6.5, contained an annotation to "rule out prostate cancer."TT at 177. In addition, a March, 2008 referral, includes a notation to a BPH, a Benign Prostatic Hyperplasia, that is to an enlarged prostate, Dr. Mendez wrote a "BPH only?" or "Prostate enlargement only?" TT at 169-172. Dr. Mendez testified that he did not receive any response from Dr. Valenzuela regarding these inquiries. In particular, when Mr. Arroyo's PSA level rose to 14.1 in July 2011, on a later date, after Mr. Arroyo saw Dr. Valenzuela, Dr. Mendez asked Mr. Arroyo whether Dr. Valenzuela had performed a biopsy, and relied on Mr. Arroyo's answer that Dr. Valenzuela performed one and that the results were negative. The evidence showed that Dr. Valenzuela had not in fact performed a biopsy, and Dr. Mendez admitted that he did not inquire of Dr. Valenzuela to ascertain whether a biopsy had been performed and whether the results were negative or implicated cancer or other problems.

In connection with the elevated PSA levels, plaintiff claimed, and the jury found, that Dr. Mendez departed from accepted medical practice in not following up to ensure an immediate biopsy was done when Mr. Arroyo's Prostate-Specific Antigen ("PSA") was 14.1 on July 7, 2011; and in not referring Mr. Arroyo to another urologist after Dr. Valenzuela did not provide information with respect to his care and treatment of Mr. Arroyo after the July, 2011 PSA level.

DISCUSSION

CPLR 4401 provides, to the extent relevant, that a motion for judgment during trial may be made by any party "with respect to a cause of action or issue upon the ground that the moving party is entitled to judgment as a matter of law, after the close of evidence presented by an opposing party with respect to such cause of action or issue..."

Similarly, with respect to a motion to set aside the verdict, CPLR 4404(a) provides that "the court may set aside a verdict or any judgment entered thereon and direct that judgment be entered in favor of a party entitled to judgment as a matter of law ..."

In order to establish a case of medical malpractice, a plaintiff "must demonstrate that the doctor deviated from acceptable medical practice, and that such deviation was a proximate cause of the plaintiff's injury." James v. Wormuth, 21 NY3d 540, 545-546 (2013)(internal citations omitted). Generally, expert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause. Gaspard v. Aronoff, 153 AD3d 795, 796 (2d Dept 2017)(internal citations and quotations omitted). When both sides "present[ ] expert testimony in support of their respective positions, it [is] within the province of the jury to determine the experts' credibility." Id at 797 (internal citations omitted).

Here, as noted above, in this motion, the issue as framed by defendants, is whether Dr. Mendez owed a duty of care to Mr. Arroyo regarding his prostate condition. This is a question of law for determination by the court. Sawh v Schoen, 215 AD 291, 292 (1st Dept 1995). Precedent holds that "the duty of a physician may be limited to those medical functions undertaken by the physician and relied upon by the patient...the question is whether the physician owes a duty under

the circumstances of a particular scenario." Burtman v. Brown, 97 AD3d 156, 161-162 (1st Dept 2012)(internal citations and quotations omitted); Dallas-Stephenson v Waisman, 39 AD3d 303, 307 (1st Dept 2007)("whether a duty is owed in the first instance 'is a question for the court'"). Moreover, it is generally true that "the mere referral of a patient by one physician to another does not render the referring physician liable for the negligence of the treating physician" Mandel v. New York County Public Administrator, 29 AD3d 869, 870-871 (2d Dept 2006) (internal citations and quotations omitted). However, of significance here:

> joint liability may be imposed where the referring physician was involved in decisions regarding diagnosis and treatment to such an extent as to make them his or her own negligent acts. see Datiz v Shoob, supra; Tiernan v Heinzen, 104 AD2d 645 [1984]; cf. Wasserman v Staten Is. Radiological Assoc., 2 AD3d 713, 714 [2003] [internist who has no further involvement in treatment of plaintiff's ankle after referring her to an orthopedic specialist cannot be held liable for the subsequent failure to diagnose ankle condition]). Under the latter circumstances, a jury in a medical malpractice action may impose liability on both the referring physician and the physician to whom the referral is made, based on each one's relative responsibility and fault (see Walker v Zdanowitz, 265 AD2d 404 [1999]; Harrison v Dombrowski, 175 AD2d 37 [1991]; Riley v Wieman, 137 AD2d 309 [1988]).

Id.

Based upon the particular scenario presented during trial, and based on an analysis of the evidence presented in plaintiff's case in chief, I conclude that Dr. Mendez, as Mr. Arroyo's primary care physician, actively participated in the care of Mr. Arroyo's prostate conditions so that he owed Mr. Arroyo a duty of care with respect to such conditions. Mandel, supra (the referring internist jointly participated with the pulmonary specialist in monitoring and diagnosing plaintiff decedent's lung condition so as to owe a duty of care and to be jointly liable); Lindenbaum v Federbush, 144 AD3d 869, (2nd Dept 2016)(the primary care physician owed plaintiff a duty of care when he spoke with plaintiff about test results and advised him to

continue taking the prescribed medication). This conclusion is supported by the evidence that he tested Mr. Arroyo's PSA levels 11 times, including during Dr. Valenzuela's care; that he discussed the results and their implications with Mr. Arroyo, and communicated with Dr. Valenzuela regarding the results; the February, 2009 note to Dr. Valenzuela with respect to ruling out cancer; and the March 2008 referral note to Dr. Valenzuela asking "BPH only?"or "Prostate enlargement only?;" and Dr. Mendez's testimony regarding his concerns about the elevated PSA levels, and in particular about his questioning of Mr. Arroyo about a biopsy after the July, 2011 PSA of 14.1. This evidence clearly shows that Dr. Mendez was concerned about Mr. Arroyo's prostate condition, and the possibility of cancer. Dr. Mendez's screening, referrals, notes and questions to Dr. Valenzuela and communication to Mr. Arroyo establish that Dr. Mendez participated in Mr. Arroyo's care and treatment for his prostate condition, so that he owed Mr. Arroyo a duty of care in this regard.

The appellate cases cited by defendants in support of their position that Dr. Mendez did not owe Mr. Arroyo a duty of care regarding his prostate condition are not controlling as they are factually distinguishable.[4] See Burtman, supra, (plaintiff's primary care physician did not owe a duty to plaintiff where the mass at issue was not discernible on the first visit, and the second visit involved problem specific complaints to an unrelated condition); Avila v Garais, 45 AD3d 278 (1st Dept 2007)(the physician who treated the infant plaintiffs for minor illnesses, did not owe a duty of care with respect to lead-poison screening); Huffman v Linkow Institute for Advanced

[4] While defendants argue that Rodriguez v Lenox Hill Hospital, 24 AD3d 137 (1st Dept 2005), stands for the proposition that a psychiatrist has no duty for a patient's physical/medical condition, this argument is based on an inference from dicta in the Appellate Division decision holding that summary judgment was properly granted to a psychiatrist on the grounds that plaintiff's expert speculated that the medication the psychiatrist prescribed prevented decedent from complaining about or adequately reporting her symptoms. This holding is inapplicable to the issue herein.

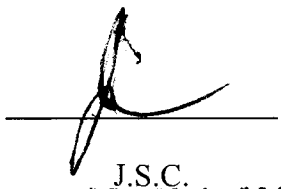
Implantology, 35 AD3d 214 (1st Dept 2006)(the restorative dentist who removed sutures from plaintiff did not owe a duty regarding implant surgeries); Yasin v Manhattan Eye, Ear & Throat Hospital, 254 AD2d 281 (2nd Dept 1998)(urologist who admitted plaintiff to the hospital was not responsible for actions of other treating physicians where he was not involved in the treatment rendered by the other physicians and provided appropriate urologic care); Pigut v Leary, 64 AD3d 1182 (4th Dept 2009)(anesthesiologist who intubated plaintiff had no duty to scan decedent's chart for irregularities outside his scope of treatment); Wasserman v Staten Island Radiological Associates, 2 AD3d 713 (2nd Dept 2003)(plaintiff's internist and general surgeon were not involved in the diagnosis of Reflex Sympathetic Dystrophy of her ankle and did not owe her a duty with respect to such diagnosis, nor did the radiologist who only reviewed x-rays of her ankle); Witt v Agin, 112 AD2d 64 (1st Dept 1985)(plaintiff's psychiatrist who was treating plaintiff for emotional issues did not have a duty to plaintiff with respect to a diagnosis of a brain tumor). Significantly, the factual allegations in the foregoing cases, are devoid of the participation and level of involvement of Dr. Mendez in regard to Mr. Arroyo's prostate condition, including the monitoring of test results, discussions with Mr. Arroyo, and communications with Dr. Valenzuela.

In view of the above, defendants' motion for directed verdict and for judgment as a matter of law is denied.

Accordingly, it is

ORDERED that the defendants' motion for directed verdict and for judgment as a matter of law is denied.

Dated: October 11, 2019



HON. JOAN A. MADDEN J.S.C.