

Lawi v Complete Wellness Med., P.C.

2020 NY Slip Op 33659(U)

October 28, 2020

Supreme Court, New York County

Docket Number: 805350/17

Judge: Joan A. Madden

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

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NICOLE LAWI,

Plaintiff,

INDEX NO. 805350/17

-against-

COMPLETE WELLNESS MEDICAL, P.C. and
DANIEL FENSTER, D.C.,

Defendants.
-----X

JOAN A. MADDEN, J.:

In this action for damages for chiropractic malpractice, defendants move for summary judgment.¹ Plaintiff opposes the motion and cross-moves for partial summary judgment on liability.²

On September 12, 2016, defendant Dr. Daniel Fenster, a chiropractor and clinical director of defendant Complete Wellness Medical, P.C. (“Complete Wellness”), performed an electrical stimulation procedure on the left side of plaintiff’s lower back, and the next morning, she had a

¹The complaint also asserts a claim for lack of informed consent. “Expert medical testimony is required to prove the insufficiency of the information disclosed to the plaintiff.” Orphan v. Pilnik, 15 NY3d 907, 908 (2010); see Katz v. Sen, 111 AD3d 438 (1st Dept 2013). Plaintiff’s expert affirmation offers no opinion as to the lack of informed consent claim. It is therefore deemed abandoned and will be dismissed.

²Contrary to defendants’ objection, the Court can properly consider plaintiff’s untimely cross-motion for summary judgment, since defendants’ timely motion raises identical issues with respect to the chiropractic malpractice claim. See Jarma v. 902 Liberty Avenue Housing Development Fund Corp., 161 AD3d 691 (1st Dept 2018); Kershaw v. Hospital for Special Surgery, 114 AD3d 75 (1st Dept 2013); Filannino v. Triborough Bridge & Tunnel Authority, 34 AD3d 280 (1st Dept 2006), app. dismissed 9 NY3d 862 (2007).

burn on her back in the area of the procedure.³ Based on the opinions of her expert chiropractor, Dr. Bradley S. Cash, plaintiff alleges Dr. Fenster departed from the standard of care by failing to properly perform the procedure, in that he failed to protect the electrode pads that he reused, from exposure to air and drying out, failed to use electrode pads with adequate gel so as to properly secure the pads to plaintiff's skin, and failed to avoid contamination of the electrode pads.⁴ The expert opines that as a result of these departures, the adhesive quality of the electrode pads was reduced or degraded, creating gaps between the pads and plaintiff's skin, which caused electrical arching that burned plaintiff's skin.⁵

Plaintiff first saw Dr. Fenster on September 8, 2016, for complaints of lower back pain. After taking an x-ray and examining plaintiff, Dr. Fenster performed electrical stimulation therapy and chiropractic adjustments to her lower back. When plaintiff returned home on September 8, she applied ice to her back to alleviate the pain, as Dr. Fenster had advised.

Dr. Fenster testified that when a patient suffers from back pain from muscle spasms, electrical stimulation therapy is designed to fatigue and relax muscles to make them less painful.

³The complaint and bill of particulars incorrectly allege that Dr. Fenster applied a "TENS unit" to plaintiff's back. The parties do not dispute that he performed electrical stimulation therapy and used an electrical stimulation machine. Dr. Fenster testified that electrical stimulation therapy is muscle stimulation, and TENS therapy is nerve stimulation. Since the parties agree that Dr. Fenster performed electrical stimulation therapy, the complaint and bill of particulars are deemed amended to replace "TENS unit" with "electrical stimulation machine."

⁴Plaintiff agrees with defendant that the redacted affirmation of her expert chiropractor does not comply with CPLR 3101(d). The defect has been cured by the filing of an unredacted expert affirmation (e-filing document #82) with Dr. Cash's name and signature, which is also annexed to plaintiff's reply papers.

⁵To the extent the complaint and the bills of particulars allege other departures that are not addressed by plaintiff's expert, those departures are deemed abandoned or withdrawn, and the Court will not address them.

He testified that plaintiff's treatment involved the placement of two electrode pads,⁶ each measuring 2 inches by 2 inches, on the left side of her lower back, about 2 to 3 inches apart, one directly next to her spine and the other closer to her iliac crest; he then turned on the electrical stimulation machine and chose the frequency in response to plaintiff's feedback; and the duration of the treatment was approximately 15 minutes.⁷ He explained that the electrical current goes from the machine into the patient's body by transmitting through an electrical stimulation pad, wires from the machine are attached to the pads, and the pads are adhered to the patient's skin. He testified the electrode pads come with lubrication already attached to them; he rarely places lubrication (ultrasound gel) directly on the patient's skin, unless he has "trouble with the pads sticking"; the pads are disposable and he re-uses them approximately 10 to 15 times until they lose their adhesiveness; he replaces the pads himself; the pads are not sterilized or "wiped down" between patients, but if a patient is "hairy" or "dirty" he would clean or discard the pads; in accordance with "standard procedure," he does not clean the patient's skin before applying the electrode pads; and he stores the electrode pads by placing them into the machine which has a "top," and sticking them to plastic.

On September 12, 2106, plaintiff returned to Dr. Fenster and his notes indicate she reported she was "maybe a little better." After taking a second x-ray and discussing the results with plaintiff, he again performed electrical stimulation therapy and chiropractic adjustments to

⁶Plaintiff testified Dr. Fenster placed four electrode pads. Dr. Fenster testified he used two electrode pads and would only have used four if plaintiff needed treatment in two different areas of her back.

⁷Dr. Fenster testified that the "brand" of the machine was "Chattanooga" but he did not recall the model, and no longer had the machine, as he stopped performing electrical stimulation therapy in April 2017.

her lower back. She returned home and applied ice to her back on-and-off for 20 minutes throughout the day, using an ice gel-pack with a protective “sock” and felt nothing on her skin before going to bed that night.

Plaintiff testified that she woke up at 3 or 4 a.m. on September 9, 2016, with a “different type of pain,” she felt “weird bubbles” on her back that were “very uncomfortable,” and she could not lay on her left side. She went back to sleep and in the morning, her daughter used her cell phone to take a photograph of her back, and at 7:39 a.m. she sent the photograph and the following email to Dr. Fenster: “I was little uncomfortable and in some pain after I left yesterday am and I think I over iced my back yesterday and developed a 2nd degree burn. Please let me know if Dr. Fenster thinks I should cancel tomorrow’s visit and come in Friday at 8:15 am instead. I don’t think any of those patches will be able to go on my back.” At 8:00 a.m., Dr. Fenster responded: “we can work around it.”

At 1:26 p.m, plaintiff wrote to Dr. Fenster: “OK but no electrodes if that’s ok with the Doctor. I went to my primary care and they don’t think it’s from the ice, it may be from those patches on my back that stimulate, the electrodes.” Plaintiff testified she put triple antibiotic cream and bandaids on her back, and sent a photo and text message to Dr. Forman, a “good friend” who is a transplant specialist at Mr. Sinai Hospital, and he advised continuing with what she was doing but she should still seek medical treatment. Plaintiff testified she did not see a doctor at that time, because she had “terrible health insurance.”

Plaintiff did not return to Dr. Fenster, and on September 19, 2016, he sent her the following email: “Hi Nicole, Wanted to check back in with you on the burns– it does look to me like its from the ice - I’ve sen [sic] it many times before. Please let me know.” Plaintiff did not

respond to Dr. Fenster, but on October 24, 2016, she sent an email to his office manager, Jeanette, stating that two doctors “agree” it is not a burn from ice, and requesting a refund or credit for September 12, 2016 treatment. She testified she was not treated by the two doctors referenced in her email, and that they are Dr. Forman, the friend to whom she sent the text on September 9, 2016, and Dr. Lucas, a dermatologist, who is the father of her daughter’s best friend. It does not appear plaintiff received a response to her October 24, 2016 e-mail, and there were no further communications between plaintiff and Dr. Fenster or his office.

Plaintiff testified she first sought medical treatment for the injury in February 2017, when she saw her primary care doctor, Dr. Lash, for her “annual visit.” She asked Dr. Lash if there was anything she could do to “get rid of the scar” on her back, and told Dr. Lash that Dr. Fenster thought the burn was from ice, and Dr. Lash said it was not from ice, but from the electrodes on her back. On October 2, 2017, plaintiff saw Dr. Geronemus, a dermatologist, for a consultation, and his records indicate her “chief complaint” was a “scar, located on the left lower back.”⁸

Meanwhile, on September 21, 2017, plaintiff commenced the instant action. Defendants answered, and are now moving for summary judgment. Plaintiff opposes the motion and cross-moves for partial summary judgment on liability as to the malpractice claim, arguing that under the facts and circumstances presented, she is entitled to an inference of negligence against defendants based on the doctrine of *res ipsa loquitur*.

⁸The only medical records submitted with the motion and cross-motion, are the records of Dr. Fenster and Dr. Geronemus. The photographs of plaintiff’s injury that were marked for identification at her deposition and reviewed by her expert, have not been provided to the Court. The only photograph in the record is included with Dr. Fenster’s records, and is a minuscule and unrecognizable photocopy of plaintiff’s September 13, 2016 e-mail to Dr. Fenster.

Just as in a medical malpractice action, a defendant moving for summary judgment in a chiropractic malpractice action, must make a prima facie showing that there was no departure from good and accepted chiropractic practice or that any departure was not the proximate cause of the injuries alleged. . See Bongiovanni v. Cavagnuolo, 138 AD3d 12 (2nd Dept 2016); Metcalf v. O'Halleran, 137 AD3d 758 (2nd Dept 2016); Mitrovic v. Silverman, 104 AD3d 430 (1st Dept 2013). To satisfy this burden, defendant must present expert opinion testimony that is supported by the facts in the record, addresses the essential allegations in the complaint or the bill of particulars, and is detailed, specific and factual in nature. See Roques v. Nobel, 73 AD3d 204 (1st Dept 2010); Joyner-Pack v. Sykes, 54 AD3d 727 (2nd Dept 2008). Expert opinion must be based on facts in the record or those personally known to the expert, and the opinion of defendant's expert should specify "in what way" the patient's treatment was proper and "elucidate the standard of care." Ocasio-Gary v. Lawrence Hospital, 69 AD3d 403, 404 (1st Dept 2010). Defendant's expert opinion must "explain 'what defendant did and why.'" Id (quoting Wasserman v. Carella, 307 AD2d 225, 226 [1st Dept 2003]).

"[T]o avert summary judgment, plaintiff must demonstrate that the defendant did in fact commit malpractice and that the malpractice was the proximate cause of the plaintiff's injuries." Roques v. Nobel, supra at 207. To meet this burden, "plaintiff must submit an affidavit from a medical doctor attesting that the defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged." Id. If the parties' conflicting expert opinions are adequately supported by the record, summary judgment must be denied. See Frye v. Montefiore Medical Center, 70 AD3d 15 (1st Dept 2009); Cruz v. St Barnabas Hospital, 50 AD3d 382 (1st Dept 2008).

At the outset, the Court must address defendants' objection that the departures identified in plaintiff's expert affirmation are not included in her bill of particulars, so they are new theories of liability improperly raised for the first time in opposition to defendants' summary judgment motion. Although the purpose of a bill of particulars is to amplify pleadings, limit proof and prevent surprise at trial, "it need not set forth a matter that is evidentiary in nature, which is more appropriately obtained through depositions and expert disclosure." Colwin v. Katz, 90 AD3d 516, 516-517 (1st Dept 2011). In a medical malpractice action, the bill of particulars must simply "provide a general statement of the acts or omissions constituting the alleged negligence," but need not "set forth the manner in which the physician failed to act in accordance with good and accepted medical practice, since a physician is chargeable with knowing those medically accepted standards applicable to the proper care and treatment of the plaintiff." Toth v. Bloshinsky, 39 AD3d 848, 849 (2nd Dept 2007); accord Contreras v. Adeyemi, 102 AD3d 720 (2nd Dept 2013).

Contrary to defendants' objection, plaintiff's expert affirmation does not assert new theories of liability, not asserted in the bill of particulars. The bill of particulars alleges, *inter alia*, that Dr. Fenster failed to exercise reasonable care, caution and diligence in performing chiropractic services, including the application of an electrical stimulation machine on plaintiff's back; he failed to exercise due care, caution and vigilance in applying an electrical stimulation machine to plaintiff's back; and plaintiff suffered burns, skin discoloration and scarring to her lower back as a result of the electrical stimulation machine.⁹ In opposing defendants' motion,

⁹As noted above, the complaint and bill of particulars have been deemed amended to replace "TENS unit" with "electrical stimulation machine."

plaintiff's expert affirmation presents a "more detailed picture" of these allegations using information obtained during discovery, particularly Dr. Fenster's testimony as to his use of the electrical stimulation machine, the number of times he re-used the electrode pads, when he changed the pads, when he cleaned the pads and the patient's skin, when he applied additional gel to the pads and the patient's skin, and the manner in which he stored the pads. Anthony v. Smina, 159 AD3d 604, (1st Dept 2018); see Mehtvin v. Ravi, 180 AD3d 661 (2nd Dept 2020); Contreras v. Adeyemi, *supra*. These additional details neither conflict with, nor are distinct from plaintiff's theory of liability as to Dr. Fenster's negligence in performing the electrical stimulation procedure. See Marti v. Rana, 173 AD3d 576 (1st Dept), lv app den, 34 NY3d 906 (2019). Defendants and their counsel were obviously present during Dr. Fenster's deposition when he testified as to those details, and defendants have submitted a supplemental affidavit from their expert who specifically addresses the departures identified by plaintiff's expert. Under these circumstances, the Court finds that plaintiff has not attempted to assert a new theory of liability in opposition to defendants' summary judgment motion, and as such, the departures identified in plaintiff's expert affirmation can be considered in determining the motion. See Anthony v. Smina, *supra*; Contreras v. Adeyemi, *supra*.

In support of the motion, defendants submit an expert affidavit from Dr. Joseph Murphy, a board certified chiropractor, who reviewed the pleadings, the bills of particulars, the relevant chiropractic and medical records and films, the deposition testimony, and Dr. Fenster's chart. As noted above, in response to plaintiff's opposition and cross-motion for summary judgment, Dr. Murphy submits a supplemental affidavit. Notably, Dr. Murphy does not dispute that plaintiff suffered a burn on her back in the area of Dr. Fenster's treatment and as result, her back is

scarred, and while he states that a patient will not suffer a burn when the electrical stimulator machine is “working properly,” he explicitly acknowledges that burns can occur in “extremely rare” instances where the electrical stimulator machine malfunctions, the pads on the machine malfunction, or the current is set far beyond the patient’s subjective tolerance.

Dr. Murphy asserts that the opinions of plaintiff’s expert, Dr. Cash, are speculative, as the departures he identifies are not supported by facts or evidence in the record. As to the departure that Dr. Fenster failed to properly protect or store the electrode pads, Dr. Murphy opines that the standard of care only requires a practitioner to ensure that the electrode pads maintain sufficient adhesive properties, and where, as here, the electrode pads are re-used, the standard of care only requires the practitioner to ensure that they have sufficient adhesive properties and moisture so that they can continue to be re-used. He opines that the focus of the practitioner’s concern is the amount and sufficiency of electrode’s adhesive properties, not where it is stored, as a re-usable electrode eventually loses its adhesive qualities, regardless of how it is stored due to a “multitude of factors.” He opines the manner in which the electrode pads are stored is not pertinent provided the practitioner ensures that there is sufficient adhesiveness and moisture maintained by a re-usable electrode pad prior to each repeated use.

With respect to the departure that Dr. Fenster failed to use electrode pads with adequate gel, Dr. Murphy opines it is “beyond dispute” that Dr. Fenster would only re-use the pads to the extent they still maintained sufficient gel/moisture, as he explicitly testified that he would replace them once they no longer maintained “good contact.” Dr. Murphy opines that no facts in the record support Dr. Cash’s opposite conclusion, as there is no testimony from plaintiff, Dr. Fenster’s testimony refutes this conclusion, no treatment records address the issue, and plaintiff

and her expert concede they never inspected the electrodes used in plaintiff's treatment. He opines that the undisputed facts demonstrate that Dr. Fenster based his decision as to whether re-use or replace electrode pads, on his personal inspection and assessment of whether they maintained sufficient adhesive qualities and moisture for further use, and he did not depart from the standard of care based on the manner in which he stored the electrode pads. He also opines there is no evidence the electrodes had insufficient gel at the time they were used, since Dr. Fenster testified that the pads he used are pre-gelled, and for that reason the standard of care did not require him to apply gel/moisture to the treatment site or the electrode pad prior to use.

Dr. Murphy further opines that if Dr. Cash were correct, and the electrodes had inadequate gel/moisture, that would have impacted the effectiveness of the machine, since, as Dr. Cash points out, reduced adhesiveness results in poor contact, creating inadequate conductivity, which affects the machine's ability to transmit the electrical current to the patient, meaning the patient would not feel the electrical current and the machine's strength would not increase as it would normally when the setting is raised; here, however, plaintiff testified she could feel the effect of the machine, she participated in setting the current and her experience was similar to her prior experiences with similar equipment. Dr. Murphy opines that plaintiff's testimony suggests the conductivity was more than adequate, which is inconsistent with Dr. Cash's theory.

Dr. Murphy also opines that Dr. Fenster did not depart from the standard of care by failing to avoid contamination of the electrode pads, as the standard of care does not require a practitioner to wipe down a pre-treated re-usable electrode pad, and only requires the practitioner to use his or her judgment to identify any concerns for possible contamination, and in such circumstances, to ensure an electrode that is contaminated is not used in that condition.

He opines the record contains no facts giving rise to a concern as to potential contamination of the electrodes used for plaintiff's treatment, as the parties did not testify as to any dirt, skin products, or anything else present on plaintiff's skin or the electrodes; and Dr. Fenster did not testify about the prior use or condition of the electrodes, specifically whether they were definitely used before, the number of times they had been re-used and their condition during the prior re-uses.

As to causation, Dr. Murphy asserts no facts in the record support Dr. Cash's conclusion that plaintiff's injury was caused by the alleged departures, and he engages in hindsight reasoning and assumes that no other factors, events or traumas would explain the development of the injury. Dr. Murphy addresses Dr. Cash's opinion that photographic evidence confirms plaintiff's burn is in the precise location of Dr. Fenster's treatment, and confirms the size and shape of the burn is consistent with the size and shape of standard electrodes used for electrical stimulation treatments. Dr. Murphy opines that Dr. Cash's opinion is misleading, as the record merely indicates, without detail, that the injury is located in the lower left quadrant of plaintiff's back, which represents 25% of her back, and that the electrodes could have been placed in any number of specific locations within that area. He asserts that while Dr. Cash concludes the burn must have been caused by the treatment since the burn is located in the same area, the "very same logic" applies to the fact that plaintiff was applying ice on-and-off repeatedly for hours, to the same location. Dr. Murphy opines the only factual distinctions between these two possible explanations are that after Dr. Fenster's treatment, plaintiff had no complaints or visible signs of injury, she had no symptoms prior to her on-and-off icing over the course of an entire day, and the wound developed at some point following plaintiff's icing of her back, which ended when

she went to sleep at night. Noting that after an entire day of icing her back, plaintiff was still without visible signs of injury and symptoms, and given the “possibility” that plaintiff’s burn was caused by “other instrumentalities,” including ice, Dr. Murphy opines that it is “impossible to conclude with any degree of certainty that the burn was caused by the subject treatment.”

Dr. Murphy opines that nothing about the burn in this case and no facts in the record, support a reliable conclusion about the mechanism that caused the burn. He opines the record contains no evidence ruling out the possibility that the burn was caused by a defect in the machine, and even though Dr. Cash asserts the size and shape of the burn are consistent with the size and shape of the electrode, he provides no information as to such size and shape of the electrodes, which come in a variety of shapes and sizes.

Dr. Murphy further opines that plaintiff’s account of how and when she first observed the injury is inconsistent with Dr. Fenster’s treatment having been the cause of the injury, as she had no signs or symptoms of injury until discovering the “fully developed wound”; and given the amount of time between the treatment and the discovery of the injury the following morning, the injury is not causally related to Dr. Fenster’s care. Disagreeing with Dr. Cash’s opinion that burns do not always fully express themselves right away and progress over time, Dr. Murphy notes that according to Dr. Cash, there was no progression of the wound and/or gradual development of symptoms, yet he maintains plaintiff sustained a serious burn, and suffered no immediate symptoms throughout the entire day, without developing any visible signs of injury during that time, even though she was touching this area of her back throughout the day without observing or feeling any signs of injury.

Dr. Murphy opines that the “facts, medicine and logic” do not support Dr. Cash’s theory that a significant lesion developed while plaintiff was asleep causing symptoms and serious pain, as the facts do not show the type of gradual progression described by Dr. Cash, but to the contrary, Dr. Cash’s analysis and explanation of how this type of burn develops, actually refutes his ultimate conclusion, since it rests on the assumption that the injury “somehow instantaneously appeared and fully progressed during the short time period while plaintiff was asleep.” Dr. Murphy opines that such progression is inconsistent with Dr. Cash’s explanation of the process by which this type of injury develops. Pointing to plaintiff’s testimony that she observed no redness, swelling or lesions of any kind, and had no pain or symptoms while she was in Dr. Fenster’s office, on her way home, or any time during the day, Dr. Murphy opines that there would have some visible sign of injury at some time prior to her going to sleep, and based on his review of the photograph taken by plaintiff at approximately 7:00 a.m., a burn such as this would have expressed itself with a visible lesion, swelling, or, at a minimum, redness prior to plaintiff going to sleep the night before, assuming it was in fact causally related to Dr. Fenster’s treatment. He opines that if this injury were caused by Dr. Fenster’s treatment, it would have caused some degree of pain, discomfort or symptoms at some point during its development over the course of the day, which is “particularly true” given plaintiff’s testimony that she was repeatedly touching the area while applying ice. Dr. Murphy opines that based on his review of the photographs, the progression and development of the burn is inconsistent with it having been caused by Dr. Fenster’s treatment, and that plaintiff’s injuries were not proximately caused by such treatment.

Turning to plaintiff's expert, Dr. Bradley S. Cash is board certified in Physical Medicine and Rehabilitation. He reviewed the parties' depositions, Dr. Fenster's records, color photocopies of plaintiff's burn wound, the records of Dr. Geronemus, and Dr. Murphy's initial expert affidavit. He begins by pointing out that Dr. Murphy concedes that an electrical stimulation procedure should not cause a burn if it is performed properly, and states he agrees with Dr. Murphy, but the converse is also true, meaning that the presence of plaintiff's burn injury establishes that Dr. Fenster did not properly perform the procedure.

According to Dr. Cash, electrical stimulation works by injecting electrical current through at least one pair of electrodes to stimulate muscle fibers in the lumbo-sacral spine, and since the therapy uses electrical current applied to the skin via electrodes, the treatment poses a potential risk of electrical burns to a patient either by practitioner error in using the machine or some defect in the machine. Dr. Cash opines that based on the color photocopies of plaintiff's burn wound, it is "patently evident" the injury was caused by "some significant fault" with the electrode on the machine used by Dr. Fenster, as the size and shape of plaintiff's burn scar are consistent with the size and shape of a "standard electrode" used for electrical stimulation. He also notes that the records of Dr. Geronemus contain a computerized rendering showing that plaintiff's scar is located in the precise location Dr. Fenster testified he placed the electrodes.

While acknowledging that without the actual electrode used by Dr. Fenster, it is not possible to identify the defect that caused plaintiff's burn, Dr. Cash opines that based on the manner in which the burn occurred, the defect would necessarily have been either in the actual electrode itself, or in the deficiency of the gel on the electrode pad; notably, he finds no departure in the duration of the procedure. He opines that an actual defect in the electrode sufficient to

cause a burn, could include the use of expired electrode pads, re-use of electrode pads that were not properly stored or maintained causing the gel to dry out and resulting in inadequate conduction, or the failure to comply with annual maintenance checks of the machine to assure proper frequency and intensity. Dr. Cash opines it is “more likely” plaintiff’s burn was the result of a defect in conduction between the gel pre-applied to the electrode pad and the surface of her skin, since the gel is an interface between the electrode and the patient’s skin that binds the electrode securely to the skin so as to efficiently transmit and disperse electrical stimulation to the targeted area. Pointing to Dr. Fenster’s testimony that he did not apply additional gel to the electrode pad or plaintiff’s skin, Dr. Cash opines that the “most obvious infirmity” is degradation of the gel and/or inadequate preparation of plaintiff’s skin, as Dr. Fenster testified that he reused the electrode pads about 10 to 15 times until the adhesiveness became “not great” and the pads would be replaced when they no longer maintained “good contact.”

Dr. Cash opines that when the electrode pads are overused or not stored properly and exposed to air, the pre-applied gel can dry out, which reduces their adhesive quality and creates gaps between the pad and the patient’s skin that can result in electrical arcing that can cause a burn injury. He opines that when the pads are re-used, they should be properly stored and sealed to protect them from exposure to air and drying out, but Dr. Fenster testified that he stored the pads under the plastic cover of the machine. Dr. Cash notes that the pads come packaged in plastic by the manufacturer and are sealed to prevent exposure to air and drying out. He opines that Dr. Fenster’s failure to properly protect the pads from drying out, and his use of electrode pads with inadequate gel so as to properly secure them to the plaintiff’s skin, are departures from the standard of care. Dr. Cash further opines that based on the materials he reviewed, the nature

of plaintiff's burn injury, and standard and accepted procedure for applying electrode pads to patients undergoing electrical stimulation therapy, it is "most probable" that the failure to assure that the gel on the electrode pads was sufficiently hydrated, the failure to protect the pads from drying out, and the failure to assure that the pads were adequately adhered to plaintiff's skin, were the competent producing causes of plaintiff's burn injury.

As an alternative explanation for plaintiff's burn injury, Dr. Cash opines the facts also support contamination between the electrode pads and plaintiff's skin, as the pads can become contaminated by dirt, skin oils or other contaminants which can cause inadequate adherence of the pads to the skin and poor conduction, creating gaps between the pad and the skin, resulting in arcing and burn injury. He opines it is "incumbent" on the practitioner to be sure the skin and the pad are clean and free of any foreign substances that might interfere with adhesion and conductivity of pad, which is "particularly important" here, where the pads were re-used. Pointing to Dr. Fenster's testimony that if the prior patient were hairy or dirty he might wipe off the electrode pad with an alcohol pad, but it was not his standard practice to do so, Dr. Cash opines such practice allowed the use of pads that might be contaminated by a foreign substance not visible to the naked eye or difficult to discern, and notes that the use of alcohol itself can dry out the pads.

Addressing Dr. Murphy's opinion as to the absence of proof that plaintiff's burn injury was caused by Dr. Fenster's treatment, Dr. Cash asserts that Dr. Murphy ignores "hard evidence and makes factual assumptions and arrives at conclusions that are medically incorrect," particularly with respect to the time interval between the burn and plaintiff's "full appreciation" that she had been burned. Dr. Cash opines that a patient's reaction to pain is subjective and

patients often register pain in markedly different degrees depending on individual tolerance for pain. He also opines that as electrical stimulation therapy progresses, a patient may experience a reduction of sensation or numbness, as plaintiff testified, which can mask underlying pain; similarly the application of an ice pack will also cause a reduction in pain by producing numbness that masks the underlying condition producing the pain; and both factors support a reduction of plaintiff's ability to appreciate whatever pain she might be experiencing at the time of the procedure and later when applying the ice gel pack.

Objecting that Dr. Murphy fails to address the pathophysiologic progression of plaintiff's burn injury, Dr. Cash opines that burn wounds are not static as they occur, since they are medically known to express themselves over time in what is known as secondary burn progression, where the full nature and extent of the burn injury, cutaneously and subcutaneously, does not occur immediately, but takes time as it progresses to become fully apparent, which is typically several hours to days. Dr. Cash opines that in the case of plaintiff's burn resulting from deep muscle electrical stimulation, the actual consequential burn was likely subcutaneous initially, progressing from deep to more superficial to create the "visible" burn wound shown in the photographs, when in actuality the burn is much deeper in the tissue and not visible externally, which explains why the burn was not fully appreciated immediately after it occurred. He further opines that even if the initial burn were superficial, secondary burn progression would result in the wound taking time to fully express its degree of severity, and consequently the gradual recognition of the burn severity over the hours between the treatment until plaintiff realized how serious it was is "fully consistent with the medically known and recognized progression of burn injuries." Dr. Cash points out that while Dr. Murphy repeatedly states that

plaintiff's burn injury was not caused by Dr. Fenster or the electrical stimulation device, he provides no explanation how a burn injury of this type, in the location where the electrode had been placed, could have occurred.

Based on the foregoing, the parties have presented conflicting expert opinions that raise issues of fact as to the departures and causation. Significantly, defendants' expert, Dr. Murphy, does not dispute that plaintiff suffered a burn injury on her back in the area of Dr. Fenster's treatment, and he explicitly acknowledges that a burn can occur in "extremely rare" instances where the electrical stimulator machine or the electrode pads on the machine malfunction, or the current is set far beyond the patient's subjective tolerance, but burn will not occur when the machine is "working properly." Dr. Murphy opines, however, the record contains no evidence that the machine or the pads on the machine used by Dr. Fenster malfunctioned in any way, and since plaintiff did not become aware of the burn on her back until the morning after the procedure, it could not have caused by the Dr. Fenster's treatment.

On the other hand, plaintiff's expert, Dr. Cash, opines that Dr. Fenster departed from the standard of care by failing to properly perform the procedure, in that he used electrode pads that did not sufficiently adhere to plaintiff's skin, which created a gap between the electrodes and plaintiff's skin, causing a defect in electrical conduction or arching, which burned her skin. Opining that the pre-applied gel on the pads had dried out or the pads were contaminated, so the pads were no longer "sticky," Dr. Cash points to Dr. Fenster's testimony as to reusing the electrode pads 10 to 15 times and storing them inside the machine, and his practice not to apply additional gel to the pad or the patient's skin, nor clean the pads between patients, nor clean the patient's skin prior to the procedure. Dr. Cash also provides a medical explanation for the lapse

in time between the procedure and plaintiff's awareness of the burn injury, based on the "recognized progression of burn injuries."

Dr. Murphy disagrees with Dr. Cash, opining that standard of care does not require the practitioner to wipe down a re-usable electrode pad or the patient's skin, or to apply gel to the pad or the patient's skin. He also opines that plaintiff's testimony suggests that the conductivity was more than adequate, as she testified she could feel the affects of the machine and participated in the setting of the current, as she had done during prior procedures. He also opines the lack of gel/or moisture on the electrode pads would impact the effectiveness of the machine by reducing conductivity, meaning the patient would not feel the electrical current and the machine's strength would not increase as it normally would when the setting is raised. He does not, however, directly address Dr. Cash's opinion that a gap between the electrodes and plaintiff's skin created electrical arching that burned her skin.

While Dr. Cash objects that Dr. Murphy fails to provide an alternative explanation for plaintiff's burn injury, Dr. Murphy's supplemental affidavit addresses this issue by opining that plaintiff's icing of the same area of her back after the procedure just as likely caused the injury. Moreover, while Dr. Cash opines that the size, shape and location of plaintiff's burn injury is consistent with the size, shape and location of electrode used by Dr. Fenster, he provides no details to such size, shape or location. Dr. Cash reviewed and relies on photographs of plaintiff's burn wound or scar, but not a single visible photograph of plaintiff's injury is part of the record before the Court. Moreover, neither Dr. Cash nor Dr. Murphy mentions or addresses Dr. Fenster's testimony as to the location of the electrodes on plaintiff's back and that the electrode pads he used were 2 inches by 2 inches, which means they were square. Rather, Dr. Murphy

incorrectly states that “there are no facts in the record regarding the size and shape of the electrodes used,” and asserts that electrodes do not have a standard shape and size, but are different shapes and sizes, and provides photocopies of the various types.

Finally, plaintiff’s reliance on the doctrine of *res ipsa loquitur* to establish liability as a matter of law on her malpractice claim, is misplaced given the experts’ conflicting opinions as to the possible causes of plaintiff’s burn injury. See Sklarova v. Coopersmith, 180 AD3d 510 (1st Dept 2020).

Thus, in view of the conflicting expert opinions, issues of fact exist as to the departures and causation, which preclude summary judgment. See Frye v. Montefiore Medical Center, *supra*; Cruz v. St Barnabas Hospital, *supra*. Defendants’ motion and plaintiff’s cross-motion are therefore denied.

Accordingly, it is

ORDERED that defendants’ motion is granted only to the extent of dismissing the lack of informed consent claim; and it is further

ORDERED that in all other respects defendants’ motion for summary judgment is denied; and it is further

ORDERED THAT plaintiff’s cross-motion for partial summary judgment is denied.

DATED: October 28 2020

ENTER:



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