

Mooney v Surgicare Ambulatory Ctr., Inc.

2016 NY Slip Op 30448(U)

February 18, 2016

Supreme Court, Bronx County

Docket Number: 303405/2009

Judge: Douglas E. McKeon

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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX - PART IA-19A

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LAURA MOONEY,

Plaintiff(s)

- against -

INDEX NO:303405/2009

~~SURGICARE AMBULATORY CENTER, INC.,~~
~~RAHUL SINGH ANAND, M.D., MEDALLIANCE~~
MEDICAL HEALTH SERVICES, INC,
MONTEFIORE MEDICAL CENTER, RANDALL V.
EHRlich, M.D., RANDALL V. EHRlich, P.C.
and BORIS KHAIMOV, P.A.,

DECISION/ORDER

Defendant(s).

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HON. DOUGLAS E. MCKEON

Motion by SurgiCare Ambulatory Center, Medalliance Medical Health Service Incorporated and Randall Ehrlich, M.D. for summary judgment and motion by defendant B Rahul Singh Anand, M.D., also for summary judgment are consolidated for disposition and decided as follows:

This is a medical malpractice action wherein plaintiff alleges causes of action in medical malpractice and lack of informed consent. Plaintiff alleges that Dr. Anand was negligent in performing a femoral nerve block for a left knee arthroscopic surgical procedure performed by Dr. Randall Ehrlich at SurgiCare Ambulatory Surgery Center on November 2, 2006. Plaintiff also alleges that Dr. Anand negligently failed to obtain a proper informed consent for the nerve block he performed.

At relevant times, plaintiff was a 22 year old female who underwent a left knee arthroscopy and partial medial and lateral meniscectomy on November 2, 2006 at SurgiCare. The arthroscopic procedure was performed by orthopedist Dr. Ehrlich and Dr. Anand provided anesthesia and performed the left femoral nerve block. Accordingly to the operative note, the November 2, 2006 procedure went well. The Department of Anesthesiology Acute Pain Management Service Form was completed by Dr. Anand documenting that he obtained informed consent from plaintiff. He testified that he informed plaintiff of the risks of the femoral nerve block including bleeding, hematoma, nerve injury and pain. Dr. Anand documented that the patient was scared to have general endotracheal anesthesia. At the conclusion of the procedure the record documents that plaintiff was awake, alert and oriented and the vital signs were within the baseline range. When she was discharged, she demonstrated the ability to use crutches. Six days later, plaintiff was seen by Dr. Erlich in his office. There are no complaints of pain in the leg documented by Dr. Ehrlich.

In support of the motion, Dr. Anand has provided the Court with the expert affirmation of Mark Kronenfeld who opines there were no deviations from accepted medical practice by Dr. Anand in his performance of the nerve block and that any alleged act or omission by Dr. Anand was not a proximate cause of plaintiff's injuries. Any injury the plaintiff sustained to the left femoral nerve was a known complication of the procedure and plaintiff has since returned to her

normal activities as a soccer player and soccer coach. Furthermore, informed consent was appropriately obtained so that Summary Judgment is warranted.

Dr. Kronenfeld specifies that Dr. Anand injected the Lidocaine in an appropriate place near the patient's femoral nerve but not so close to cause injury. The fact that the procedure was done without the patient experiencing any pain or discomfort is evidence that it was preformed appropriately. It's not until almost 6 months after the surgery on March 21, 2007 that Dr. Ehrlich documents plaintiff's complaints of medial thigh pain and paresthesia. Dr. Kronenfeld opines that this condition is not due to any deviation by Dr. Anand during the left femoral nerve block on November 2, 2006 and that even if she did sustain a partial left femoral neuropathy it was a known risk and complication of the nerve block and can occur absent any deviation from good and accepted practice.

During the procedure at SurgiCare, Dr. Ehrlich was assisted by PA Boris Khaimov a physician assistant. On November 8th Dr. Ehrlich noted that plaintiff was six days post knee surgery with minimal discomfort, a full range of motion, full motive strength and neurovascularly intact. On March 21, 2007 plaintiff reported that her knee was fine but she had left medial thigh pain and paresthesia since the surgery. Dr. Ehrlich advised that the anesthesiologist recommended an EMG and neurological consultation and that the patient obtain an appointment with a neurologist so the EMG results could be forwarded. Plaintiff did not return. She was seen by neurologist Phyllis Bieri on May 15, 2007. Studies performed

on the lower extremities revealed acute and chronic motor axon loss which was consistent with a partial left femoral neuropathy. No care or treatment was provided by co-defendant Montefiore Medical Center.

Defendants Medalliance, Dr. Ehrlich and SurgiCare argue that they did not depart from any standard of medical or surgical care and that none of their acts or alleged omissions contributed to plaintiff's injuries. In Support of the motion, the Court has been provided with the expert affirmation of Dr. Philip A. Robins, M.D., a doctor board certified in orthopedic surgery. Dr. Robins opines that Dr. Ehrlich's procedure took place below the knee and could not have caused injury to the area complained of by plaintiff. Dr. Robins opines that Dr. Ehrlich appropriately referred the plaintiff to a neurologist in addition to speaking with her anesthesiologist, Dr. Anand when on March 21, 2007 she complained of left medial thigh pain and paresthesia.

SurgiCare argues that it is not vicariously liable for any acts committed by Dr. Ehrlich who maintained privileges at SurgiCare. Plaintiff retained Dr. Ehrlich who was a private attending physician and not it's employee. Furthermore, Dr. Anand is also not an employee. Finally, if Randall Ehrlich, M.D., is granted summary judgment, summary judgment should also be granted to Randall V. Ehrlich, M.D., P.C, and Medalliance as the allegations against them are only based on vicarious liability via Dr. Ehrlich.

Dr. Ehrlich's motion is granted. Plaintiff agrees that the motion brought by

Dr. Ehrlich should be granted as he played no role in the femoral nerve block. As for the motion by SurgiCare and Dr. Anand, plaintiff argues that there are questions of facts sufficient to defeat the motion. Plaintiff has provided the Court with an affirmation of an expert physician board certified in psychiatry and neurology whose name has been redacted. This expert disagrees with Dr. Anand's expert, Dr. Kronenfeld, that this specific injury can be caused by improperly performing the femoral nerve block. Movants expert opines that this did not occur because the patient did not express any complaints of pain during the injection itself. However, this expert states that plaintiff was not awake during the procedure which is why there were no complaints. This expert states that Ms. Mooney testified that she complained of whole leg pain immediately after the procedure, and opines, within a reasonable degree of medical certainty, that the permanent injury to plaintiff's left femoral nerve was caused by Dr. Anand's performance of the left femoral nerve block.

The motion for Summary Judgement is granted as to the informed consent claim. An informed consent claim requires that expert opinion demonstrate that the consent was insufficient and a statement by the patient that she would not have undergone the procedure if she had been appropriately informed of all the risks. See Orphan v. Pilnik, 15 NY3d 907 (2010). Here, there is not comment from Ms. Mooney indicating that she would not have chosen the femoral nerve block. In fact, she specifically rejected the generalized anesthesia because of her personal fear. Furthermore, plaintiff's expert did not state what Dr. Anand should

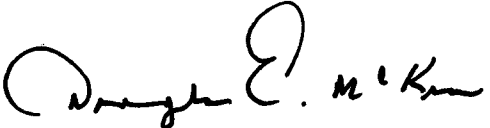
have told Ms. Mooney that he did not, nor did the expert claim that the femoral block was not indicated or that there were available alternatives which Dr. Anand did not discuss with her. As such, plaintiff's informed consent claim is dismissed.

To defeat the motion for summary judgment plaintiff must establish a question of fact that defendant departed from accepted medical practice and that said departure was a proximate cause of the injuries herein. In response to Dr. Kronenfeld's specific discussion of Dr. Anand's procedure in performing the femoral nerve block, plaintiff's expert merely concludes that whether procedure was properly or improperly performed is a matter of fact for jury determination. However, the expert does not criticize Dr. Anand's care or explain how Dr. Anand deviated from accepted standards of care in performing the nerve block on plaintiff. Furthermore, plaintiff's expert does not counter Dr. Kronenfeld's opinion that an injury like the one plaintiff suffered herein is a commonly accepted risk of a femoral nerve block and can occur even in the absence of negligence.

The Court finds that plaintiff's opposition is insufficient to defeat the movants *prima facie* showing of entitlement to summary judgement. As such, the motion for summary judgement by the remaining defendants is granted.

So ordered.

Date: February 18, 2016



Douglas E. McKeon, J.S.C.