IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

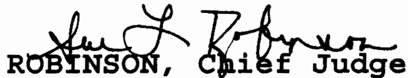
THOMAS HABEL and PATRICIA HABEL,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civ. No. 03-194-SLR
	)	
TEMPLE UNIVERSITY HOSPITAL, JACK I. JALLO, M.D., and ELI M. BARON, M.D.	)	
	)	
Defendants.	)	

Jennifer Kate Aaronson, Esquire, of Potter, Carmine, Leonard & Aaronson, P.A., Wilmington, Delaware. Counsel for Plaintiffs.

John D. Balaguer, Esquire, of White and Williams, LLP, Wilmington, Delaware. Counsel for Defendants.

MEMORANDUM OPINION

Dated: March 10, 2005
Wilmington, Delaware



ROBINSON, Chief Judge

I. INTRODUCTION

Plaintiffs Thomas and Patricia Habel[1] filed this medical malpractice action against defendants Temple University Hospital ("Temple"), Jack I. Jallo, M.D. ("Dr. Jallo"), and Eli M. Baron, M.D. ("Dr. Baron")[2] on February 23, 2003. (D.I. 1) Plaintiffs filed an amended complaint on February 27, 2003. (D.I. 4) Defendants filed their answer on March 28, 2003. (D.I. 12) Discovery was exchanged and depositions were taken. (D.I. 24, 25, 26, 27, 32, 33, 34, 37, 38, 44, 55, 56, 57) Defendants moved for summary judgment July 9, 2004. (D.I. 62, 63, 64) The matter is fully briefed. (D.I. 67, 68, 69)

II. JURISDICTION

The court has jurisdiction pursuant 28 U.S.C. § 1332(a), as plaintiffs are Delaware citizens, defendants are incorporated or have their principal place of business in Pennsylvania and the amount in controversy exceeds $75,000, excluding interest and costs.

III. BACKGROUND

On March 1, 2001, plaintiff Thomas Habel was admitted to Temple for surgery to adjust a Baclofen pump, an implantable

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[1]Plaintiffs are husband and wife. Patricia Habel alleges loss of consortium. (D.I. 1, 4)

[2]Because plaintiffs concede that summary judgment is appropriate for Dr. Baron, a discussion of his liability is unnecessary and summary judgment will be entered on his behalf.

automated drug delivery device.[3] (D.I. 4) Habel suffers from thoracic syrinx, a disorder causing weakness and spasticity in his lower extremities. He has been confined to a wheelchair since 1985. In 1989, a programmable pump was implanted in his spine to deliver Baclofen[4] into the spine (intrathecally) to control spasticity. (D.I. 68 at B-36) Habel was receiving Baclofen intrathecally and orally since 1989. Since the implant in 1989, Habel has undergone multiple surgical procedures to repair or replace the Baclofen pumps.

In 2001, Habel continued to have problems with the Baclofen pump malfunctioning, and it was determined that surgery was necessary to correct the problem. (D.I. 64 at A-45) During the March 1, 2001 surgery, Dr. Jallo was assisted by several neurosurgical residents. (D.I. 68, B-16, B-17) The catheters connecting the Baclofen pump to Habel's spine were replaced and the pump was reprogrammed to deliver a smaller daily dosage and

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[3]The record is unclear on whether the pump was actually repaired or replaced. (D.I. 68 at B-12, B-13) That issue, however, is not a material fact.

[4]Plaintiff's expert explained the pharmocology of Baclofen: "[B]aclofen is a medication that we use in neurosurgery very extensively, principally on the oral side, that is we prescribe it as an anti-spasmodic. It is very potent. It is a rather complicated drug. It is a cousin to GABA or gamma-aminobutyric acid analog. And its mechanism is such that it is thought that it reduces spasticity in patients, regardless of the source of the spasticity, multiple sclerosis or stroke or syringomeyelia, by increasing the polarization of the receptor of the impulses coming down, and in that way polysynaptically or monosynaptically block the spasticity. (D.I. 64 at A-38 - A-39)

reduced concentration of Baclofen.[5] It was discovered that the catheters had detached from the pump and, as a result, Habel was not receiving any Baclofen for an undetermined period of time. (Id. at B-18, B-59)

Following surgery and while in the recovery room, it was noted that Habel was deeply sedated and unresponsive. He was transferred to the intensive care unit. (Id. at B-33) Because a Baclofen overdose was suspected, another drug, Physostigmine, was given to arouse him. (D.I. 64 at A-47) The Baclofen infusion was stopped. (D.I. 68 at B-49) Dr. Jallo's operative notes reflect that Habel suffered an operative seizure caused by a Baclofen overdose during surgery. (Id. at B-23, B-26, B-27) Dilantin was administered for the seizures. (Id. at B-51) Three days after surgery, Habel was discharged from Temple.

Although Habel was neurologically stable at discharge, he soon began having problems with his memory and concentration. Neurological testing showed memory and concentration deficits. Habel contends that the Baclofen overdose caused blood loss to the brain, known as hypoxia, which led to a cognitive deficit. (D.I. 67)

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[5]During his deposition, Dr. Jallo described the procedure as follows: "we removed multiple old catheters, removed his pump, placed in a new catheter, washed out his pump, reconnected everything." (D.I. 68 at B-7)

IV. CHOICE OF LAW

A federal district court sitting in diversity applies the choice of law rules of the state in which it sits. Shinners v. K-Mart, 847 F. Supp. 31, 32 (D. Del 1994). Delaware has applied the "most significant relationship test" to such conflicts. Travelers Indeminty Co. v. Lake, 594 A.2d 38, 44-47 (Del. 1991); Blakesley v. Wolford, 789 F.2d 236 (3d Cir. 1986). Applying Travelers, the court finds that Pennsylvania has the most significant relationship to the events and parties. Specifically, plaintiffs are Delaware residents who voluntarily traveled to a Pennsylvania hospital, Temple, for medical care to be rendered by physicians practicing in Pennsylvania.

V. STANDARD OF REVIEW

A court shall grant summary judgment only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of proving that no genuine issue of material fact exists. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 n.10 (1986). "Facts that could alter the outcome are 'material,' and disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the burden of

proof on the disputed issue is correct." Horowitz v. Fed. Kemper Life Assurance Co., 57 F.3d 300, 302 n.1 (3d Cir. 1995) (internal citations omitted). If the moving party has demonstrated an absence of material fact, the nonmoving party then "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)). The court will "view the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion." Pa. Coal Ass'n v. Babbitt, 63 F.3d 231, 236 (3d Cir. 1995). The mere existence of some evidence in support of the nonmoving party, however, will not be sufficient for denial of a motion for summary judgment; there must be enough evidence to enable a jury reasonably to find for the nonmoving party on that issue. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

VI. DISCUSSION

Under Pennsylvania law, to demonstrate a prima facie case of medical malpractice, a plaintiff must establish that: (1) the medical practitioner owed a duty to the plaintiff; (2) the practitioner breached that duty; (3) the breach of duty was a

proximate cause of, or a substantial factor in, bringing about the harm the plaintiff suffered; and (4) the damages suffered were the direct result of the harm. Montgomery v. South Philadelphia Medical Group, 656 A.2d 1385, 1390 (Pa. Super. 1995); Mitzelfelt v. Kamrin, M.D., 584 A.2d 888, 891 (Pa. 1990). Unless the matter in issue is so simple, and the "lack of skill or want of care so obvious, as to be within the range of ordinary experience and comprehension of even nonprofessional persons", the plaintiff must present an expert witness to testify. Montgomery, 656 A.2d at 1390; Brannan v. Lankenau Hospital, 417 A.2d 196 (1980). In so doing, the medical expert must testify that the conduct of the practitioner deviated from "good and acceptable medical standards, and that such deviation was a substantial factor in causing the harm suffered." Id.

Plaintiffs retained a neurosurgical expert, Pierre LeRoy, M.D., who authored a January 28, 2004 report and was deposed on May 18, 2004. (D.I. 64 at A-12) Plaintiffs claim this expert's opinion establishes that Dr. Jallo failed to conduct pre-operative testing of Habel's Baclofen pump, which was necessary to appreciate the potent dosage that the new pump would administer to a patient who was on hiatus from his medication. This breach, plaintiffs assert, resulted in a triad of complications when the pump was corrected and the Baclofen began

to flow, including: respiratory depression, unresponsiveness and seizure. (D.I. 67)

Defendants contend that Dr. LeRoy failed to establish that: (1) Jallo deviated from the applicable standard of care; (2) any alleged deviation led to a Baclofen overdose and operative seizure; and 3) any overdoses and seizure led to hypoxia and brain damage. (D.I. 63)

The court finds that Dr. LeRoy's testimony that pre-operative testing was required by the standard of care, but was allegedly not performed, is not enough to defeat summary judgment on the negligence prong. Specifically, plaintiffs have not demonstrated that the failure to perform pre-operative testing probably led to or proximately caused a Baclofen overdose and hypoxic event. Dr. LeRoy suggested this in his report, but was unwilling to affirmatively state this during his deposition. For example, Dr. LeRoy was repeatedly and directly asked to substantiate a causation opinion and failed to do so on every occasion: "It is difficult to specifically say how that happened"... . (D.I. 64 at A-50) When asked, "[b]ut you don't know what led to the overdose of Baclofen is that correct?," Dr. LeRoy responded, "It is difficult to say." (Id. at A-53) He was asked again and for a yes or no response, "yes or no, do you know what caused or do you have an opinion, to a reasonable degree of medical probability, about what caused the Baclofen overdose?"

LeRoy replied: "Well it is difficult to give you a yes or no from this standpoint..." (Id. at A-54; see also, A-55, A-58, A-59, A-63)

Similarly, Dr. LeRoy was asked whether the failure to perform pre-operative testing led to the Baclofen overdose. He continued to be equivocal and unable to provide the requisite proofs when he replied: "I think that's a hypothetical question..." (Id. at A-49) Again, defense counsel inquired, "Are you going to give an opinion to a reasonable degree of medical probability that in this case, had pre-testing been done, that the overdose that occurred would have been prevented?" In response, Dr. LeRoy was only able to say, "I think it would have been helpful." (Id. at A-50)

The record further reflects that Dr. LeRoy repeatedly refused to give an opinion on whether the Dr. Jallo's deviation more likely than not led to injury. Although defense counsel appropriately couched his causation questions to precisely account for the minimal burden of proof, Dr. LeRoy was unable to commit. Defense counsel rephrased and reconfigured his causation questions to allow Dr. LeRoy every opportunity to simply answer "yes," that the failure to perform preoperative testing probably led to an overdose and hypoxic event. (Id. at A-50) Dr. LeRoy failed on every occasion to render an opinion to a reasonable degree of medical probability.

VII. CONCLUSION

Having the benefit of the record at the close of discovery, the court concludes that plaintiffs have failed to carry their burden of proof as to causation. Therefore, no reasonable jury could find in their favor. An order consistent with this memorandum opinion shall issue.

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O R D E R

At Wilmington this 10th day of March, 2005, consistent with the memorandum opinion issued this same date;

IT IS ORDERED that:

1. Defendants' motion for summary judgment is granted. (D.I. 62)

2. The Clerk of Court is directed to enter judgment in favor of defendants and against plaintiffs.

United States District Judge