IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIAN GAHM	:	CIVIL ACTION
	:	
v.	:	
	:	
THOMAS JEFFERSON UNIVERSITY	:	
HOSPITAL, el al.	:	NO. 94-2050

M E M O R A N D U M

Ludwig, J. February 29, 2000

Defendants Thomas Jefferson University Hospital, Sanford H. Davne, M.D. and Donald Myers, M.D. move for summary judgment. Fed. R. Civ. P. 56.[1] Jurisdiction is diversity. 28 U.S.C. § 1332.

This is a medical malpractice case. On March 29, 1992, plaintiff Brain Gahm was involved in an automobile accident. On August 10, 1992, Gahm was seen by Dr. Davne, with complaints of numbness in his right leg and foot. The following day Gahm was admitted to Thomas Jefferson University Hospital for a CT Scan and Myelogram, which confirmed a herniated disc. On April 22, 1992, Doctors Davne and Myers performed elective fusion and implant surgery, using a so-called bone screw.

Soon after surgery, Gahm's temperature exceeded 102 degrees. He had an oral infection, chest wall blisters, an unhealed surgical wound and a

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[1] "[S]ummary judgment should be granted if, after drawing all reasonable inferences from the underlying facts in the light most favorable to the non-moving party, the court concludes that there is no genuine issue of material fact to be resolved at trail and the moving party is entitled to judgment as a matter of law." Kornegay v. Cottingham, 120 F.3d 392, 395 (3d Cir. 1997).

hematoma with excessive drainage. Two months later, on June 16, 1992, he was discharged. His complaints are alleged to have persisted and to have resulted in residual physical impairment.

Plaintiff filed this action to recover for personal injuries attributable to the infection. According to the complaint, Doctors Myers and Davne implanted a defective medical screw in Gahm's spine.[2] In addition, they, together with the hospital, failed to diagnose and properly treat a post-operative infection, allowing it to become chronic.

Two counts remain – a negligence claim against the three defendants and a claim for informed consent against the two doctors.[3]

I. Thomas Jefferson University Hospital

Plaintiff's infection is alleged to have been caused by the negligence of the hospital and its staff.[4] Under applicable state law,[5] professional negligence in the nature of medical malpractice consists of (1) a duty owed to plaintiff, (2) a breach of that duty by the physician, (3) a casual connection with plaintiff's harm,

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[2] The issue of whether the screw was defective is moot, a class action settlement having been reached with the manufacturer, Acromed Corporation. See Pretrial Order 1117, Fanning v. AcroMed Corporation, MDL No. 1014, Civ. No. 97-381 (E.D. Pa. October 17, 1997).

[3] Upon motion, plaintiff's claim for intentional infliction of emotional distress was dismissed as uncontested. Order, August 26, 1999.

[4] Since the surgery was not performed by employees of the Thomas Jefferson University Hospital, plaintiff's claim against the hospital relates to the diagnosis and treatment of his infection.

[5] It is undisputed that Pennsylvania law governs the substantive issues.

and (4) a direct link between the harm and plaintiff's damages. Mitzelfelt v. Kamrin, 526 Pa. 54, 62, 584 A.2d 888, 891 (1990).

Hospitals may be held liable under the doctrine of corporate negligence. See Thompson v. Nason Hosp., 527 Pa. 330, 591 A.2d 703 (1991). "This theory of liability creates a nondelegable duty which the hospital owes directly to a patient. . . . [and] an injured party does not have to rely on and establish the negligence of a third party." Id. at 339, 591 A.2d at 707. "The cause of action arises from the policies, actions or inaction of the institution itself, rather than the specific acts of individual hospital employees." Moser v. Heistand, 545 Pa. 554, 560, 681 A.2d 1322, 1326 (1996). The duty has been delineated into four categories:

> (1) a duty to use reasonable care in the maintenance of safe and adequate facilities and equipment; (2) a duty to select and retain only competent physicians; (3) a duty to oversee all persons who practice medicine within its walls as to patient care; and (4) a duty to formulate, adopt and enforce adequate rules and policies to ensure quality care for patients.

Thompson, 527 Pa. at 339-340, 591 A.2d at 707 (citations omitted). "[P]laintiff is also required to present an expert witness who will testify, to a reasonable degree of medical certainty, that the acts of the physician deviated from good and acceptable medical standards, and that such deviation was the proximate cause of the harm suffered." See Mitzelfelt, 526 Pa. at 62, 584 A.2d at 892. The hospital must have "actual or constructive knowledge of the defect or procedures which created the harm." Thompson, 527 Pa. at 341, 591 A.2d at 708.

Plaintiff has presented expert reports from Doctors Holzman, Aragona, and McGuckin. Dr. Holzman notes that Meyers, "as well as [ ] others caring for Mr. Gahm," failed to consider the possibility of infection. Holzman Report at 7. The report of Dr. McGuckin states: "Gahm developed a hospital acquired infection at TJUH during his first admission on 4/22/92." McGuckin Report at 3. This evidence, plaintiff asserts, "necessarily implies a breach of the hospital's duty to use reasonable care in the maintenance of safe and adequate facilities and equipment as outlined in Thompson." Plaintiff's Response to Motion for Summary Judgment at 4.

Plaintiff's proffer as to the hospital is not sufficient to survive summary judgment. There is no basis for a finding that the hospital deviated from an appropriate standard of care. Dr. McGuckin is critical of the hospital for misclassifying the infection. However, she does not offer an opinion that the hospital was negligent or that the hospital's services, or lack of them, increased the chances of plaintiff's infection. See Mitzelfelt, 526 Pa. at 63-64, 584 A.2d at 892-93 citing Hamil v. Bashline, 481 Pa. 256, 269, 392 A.2d, 1280, 1286 (1978) (expert testimony required that defendant's action increased the risk of harm or injury).

This is a case in which expertise is essential. Expert medical testimony is necessary "when there is no common fund of knowledge from which laymen can reasonably draw the inference or conclusion of negligence." See Jones v. Harrisburg Polyclinic Hosp., 496 Pa. 465, 472, 437 A.2d 1134, 1138 (1981). It

is not an obvious or commonplace set of circumstances in which the doctrine of res ipsa loquitur could allow the fact-finder to infer negligence and causation. See Jones, 496 Pa. at 471-475, 437 A.2d at 1137-39. Hospital infection control is a highly technical and complex area of knowledge. Accordingly, without an expert report stating that the hospital was negligent, the motion for summary judgment must be granted.

II. Doctors Davne and Myers

Defendants Davne and Myers move for partial summary judgment on the counts of negligence and for summary judgment on the count of informed consent.[6]

A. Negligence

Davne and Myers move for summary judgment on the issue of negligence in the implantation of the bone screws – not on the issue of negligence related to diagnosing or controlling the infection. Since plaintiff does not attempt to support the claim that bone screw implantation was negligently performed, summary judgment will be granted as to that issue.

B. Informed Consent

[6] Defendant Meyers filed his own motion and joined Dr. Davne's motion.

Lack of informed consent requires "expert information as to the nature of the harm which may result and the probability of its occurrence." Jozsa v. Hottenstein, 364 Pa. Super. 469, 473, 528 A.2d 606, 607-608 (1987). "Once expert medical testimony establishes that there was a risk of any nature to the patient that he or she was not informed of, and after surgery the patient suffers from that undisclosed risk, it is for the jury to decide whether the omission was material to an informed consent." Id. at 474, 528 A.2d at 608. In addition, expert testimony is required to "establish[ ] the causative element." Maliszewski v. Rendon, 374 Pa. Super. 109, 115, 542 A.2d 170, 173 (1988).

Plaintiff contends that his consent was not informed because he was not advised of: (1) the investigative nature of the surgery, (2) the stock options the doctors owned with the bone screw manufacturer, (3) the risk of an "investigational" device being implanted in his spine, and (4) the experimental aspects of the procedure of which he was a part. See Plaintiff's Responses to Doctors' Motion for Summary Judgment. These assertions generally arise from the use of non-FDA approved bone screws during surgery. However, on October 17, 1997, a class-wide settlement between the Plaintiffs' Legal Committee and AcroMed Corporation received court approval. See Pretrial Order 1117. The settlement included those claims –

> based in whole or part on products liability theories, including claims based upon the regulatory status of the device . . . . claims for failure to warn of the regulatory status of the device . . . . includ[ing] informed consent claims based on failure to disclose regulatory status.

Joint Statement of the Factual and Procedural History and Status of Remaining Claims at 3, March 26, 1999. As a result, the only ground left for lack of informed consent is the doctors' alleged failure to apprise plaintiff of the increased likelihood of infection.

While it is unclear what plaintiff was told or was made aware of prior to consenting to surgery,[7] plaintiff has not produced expert opinion on either the nature of the risk of infection or the probability of its occurrence. The sole expert submission that arguably concerns these points is Dr. Holzman's statement that "the risk of infection during the spinal surgery of April, 1992 was increased by the prior use of corticosteroids." Holzman Report at 6. His report does not adequately consider or discuss the risk of infection or its probability. Moreover, it leaves unanswered whether the use of corticosteroids was the cause, or contributed to the cause, of the infection or the extent to which it purportedly increased the risk. Plaintiff having the burden of proof at trial has not come forward with sufficient probative evidence to constitute a genuine issue of material fact on informed consent.

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Edmund V. Ludwig, J.

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[7] No evidence has been presented as to whether plaintiff did or did not sign a surgery consent form. At his deposition, plaintiff conceded he was aware of the risk of surgical infection; however, he further stated he was "led to believe that it was a very low percentage." Deposition of Brian R. Gahm at 182, October 6, 1995.

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O R D E R

AND NOW, this 29th day of February, the following is ordered:

1. Defendant Thomas Jefferson University Hospital's motion for summary judgment is granted;

2. The motions of Sanford H. Davne, M.D. and Donald Myers, M.D. for partial summary judgment are granted.

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Edmund V. Ludwig, J.