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

BENJAMIN DANDY,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	NO. 03-3043
	:	
UNITED STATES OF AMERICA,	:	
Defendant.	:	

MEMORANDUM

BUCKWALTER, S.J. June 7, 2005

I. FINDINGS OF FACT

1. This is a claim filed under the Federal Tort Claims Act against the United States of America. Title 28 U.S.C. § 1346(b) provides that claims may be filed against the United States,

> ... for money damages ... for personal injury or death caused by the negligent or wrongful act or omission of an employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

2. Plaintiff Benjamin Dandy, an African-American, is a veteran who claims injury as a result of surgery performed on his left big toe at the Veteran's Administration Medical Center in Philadelphia, PA (hereinafter VA) on April 2, 1999.

3. He also claims that he did not give his informed consent for the operation.

4. Plaintiff was seen by Dr. Jeffrey Schneider at the VA in the spring of 1999, complaining of pain in his left big toe. Tr. 186:15-20.

5. After examining plaintiff and x-rays of plaintiff's foot taken that day, Dr. Schneider showed plaintiff the x-rays and discussed treatment options with him. Tr. 186:23-188:6.

6. Dr. Schneider suggested to plaintiff a bone fusion procedure using a screw placed inside the toe, which plaintiff rejected. Tr. 188:7-11; 189:3-8; 197:14-20.

7. Dr. Schneider then described an arthroplasty procedure, and removal of an accessory piece of bone from. Tr. 188:16-190:19. The arthroplasty involved removing a piece of bone from the length of the toe. Tr. 190:6-19. There is no claim that removal of the accessory bone was negligent.

8. Plaintiff told Dr. Schneider that the medication he was taking for his pain was not working and that he wanted to go ahead with the arthroplasty surgery. Tr. 191:4-25.

9. After discussing the treatment options with plaintiff and plaintiff making his choice, Dr. Schneider filled out the VA consent form (Ex. D-9), in plaintiff's presence. Tr. 192:19-25; 193:3-25. The consent form describes the proposed procedure in lay terms ("cutting and removal of bone and soft tissue"), and it refers to the risks of "pain, painful scarring, swelling, infection, recurrence, and need for additional surgery." Ex. D-9.

10. Dr. Schneider testified that he told plaintiff specifically of the risks of the surgery, including pain, and a recurrence of the cocked up condition of his toe. Tr. 196:8-20.

11. Dr. Schneider then read the handwritten portions of the form aloud to plaintiff (Tr. 200:3-20), gave the completed form to plaintiff and asked him to read it. Tr. 198:20-199:4.

12. Plaintiff then signed the form in Dr. Schneider's presence. Tr. 199:5-10. Dr. Susan Gamble testified that the VA consent forms are never signed without being filled out in full. Tr. 177:14-18.

13. Dr. Schneider then gave the completed and signed consent form to plaintiff to carry with him through the pre-operative procedures. Tr. 203:4-25.

14. Finally, some weeks later, on the day of the surgery, Dr. Schneider testified that he was present in the surgery holding area while a nurse took the consent form out of plaintiff's preoperative package and asked him which foot and which toe he was about to have surgery on, and what the surgery would be, in layman's terms. Tr. 205:16-206:16.

15. Dr. Schneider specifically recalled the nurse's name and that she asked plaintiff whether he knew that the surgery would involve cutting of bone and soft tissue, and plaintiff answered yes. Tr. 206:4-16.

16. Plaintiff's recollection of the VA consent form, Ex. 9, consists of statements such as, "I don't remember"; "I can't recollect"; "I'm pretty much sure it wasn't there"; but he did simply testify, "I just signed it." Tr. 103:9-105:24.

17. Dr. Susan Gamble has been the Chief of Podiatry at the VA hospital since 2000. Tr. 126:1-4. She supervised the surgery performed on plaintiff's left big toe in 1999. Tr. 131:15-22.

18. The surgery performed on plaintiff was for a painful cock up hallux, which is a big toe that bends upward. Tr. 132:14-19. The pain was caused by arthritis, or rubbing of the bones inside the joint of the toe. Tr. 135:19-24; 137:4-7.

19. Plaintiff also had an accessory bone in the bottom of his toe. Tr. 137:14-24. The accessory bone was removed, and an arthroplasty performed on the toe joint. Tr. 137:25-138:13.

20. The arthroplasty involved removing some of the bone in the joint and allowing the space to fill in with scar tissue. Tr. 139:9-17.

21. The arthroplasty procedure was recommended for plaintiff because it is a simpler procedure than bone fusion, involves less recovery time, and based upon plaintiff's drug history, Dr. Gamble felt that plaintiff's compliance with post operative directions would be an issue. Tr. 141:14-22.

22. Plaintiff's expert, Dr. Robert Bloch, also testified that a patient's history of drug use should be considered when deciding what procedure to perform. Tr. 80:25-81:2.

23. Plaintiff was a non-compliant patient, as his treating physician and expert, Dr. Robert Bloch, testified. Tr. 76:3-5; 77:3-78:13.

24. The arthroplasty was performed by Dr. Jeffrey Schneider, supervised by Dr. Gamble, and concluded uneventfully. Tr. 144:18-25; 204:23-205:5.

25. Plaintiff did develop a keloid, or hypertrophic scar (abnormal amount of scar tissue extending beyond the confines of the original skin incision) during recovery, and complained that it was painful. Tr. 145:22-24; 208:1-10. Keloids are more common among African-Americans. Tr. 243:3-4.

26. Keloids are not always painful. Tr. 208:11-15.

27. Dr. Schneider testified that he did not know that plaintiff would develop a keloid, and that plaintiff's records did not indicate that he had a history of keloid scarring. Tr. 208:22-209:2.

28. The keloid also caused plaintiff's toe to cock up again. Tr. 209:15-22.

29. The VA treated the keloid with steroid injection and cream, and prescribed physical therapy, which plaintiff did not attend. Tr. 146:6-18.

30. The VA paperwork that formed the medical records during the time plaintiff was seeing the VA for his care in 1999 was all handwritten and lots of times the paperwork was lost, misfiled, and in this case, at times, inaccurate. For example, a note was written that referred to plaintiff's April 2, 1999 surgery as a bunionectomy, which it was not. Tr. 151:6-25.

31. There were a lot of errors in the records in the terms of description of what was done, and the identity of the particular operation. Tr. 255, 256.

32. In the medical records, there was no indication of what the foot actually looked like. Tr. 258.

33. P-14, a post operative note signed by Dr. Schneider, indicates that the post operative diagnosis was hammertoe. Tr. 172, 173.

34. Prior to the post operative notes, there was no reference to hammertoe anywhere in the medical records. Tr. 258.

35. Mr. Dandy did not exactly have hammertoe. Tr. 173:9-11.

36. It is undisputed that the VA had accurate x-rays of plaintiff's toe at the time of the surgery (Exs. D-13 and D-14), and that the procedure performed was an arthroplasty on the left big toe. Tr. 24:23-25:6; 59:10-13.

37. As Dr. Rosenthal, the expert for the VA, testified, the fact that some of the VA records are incomplete or inaccurate does not mean that the surgery was negligently performed. Tr. 255:3-11.

38. The VA provided an explanation for the missing and sometimes inaccurate notes, including the fact that the VA is a teaching hospital, and patients are not followed by the same doctor for each discrete condition. Tr. 127:21-128:17. Before the paperless record-keeping system, this sometimes resulted in the records of follow up inaccurately identifying the condition or treatment as a new doctor sees the patient for the first time. Tr. 150:7-151:13. This record keeping, unsatisfactory as it was, appears to have had no effect on plaintiff's treatment or care.

39. Dr. Bloch, the plaintiff's treating physician and expert witness, testified that the arthroplasty procedure and the hemiphalinjectomy (a subset of arthroplasty) was done correctly, but during trial testimony, added that a little too much bone was taken but other than that, it was done properly. Tr. 63.

40. Dr. Bloch's principal opinion was that the procedure performed on plaintiff (arthroplasty) was not the proper one. Tr. 24:23-25; 25:1-17.

41. Dr. Bloch opined that the surgery that should have been done was a fusion. Tr. 26:22-25; Tr. 27:1-5.

42. Dr. Bloch also testified that an arthroplasty can be done on a big toe, but should not have been done in this case. Tr. 35:8-21.

43. Dr. Rosenthal, on the other hand, opined that the procedure performed by the VA on plaintiff's left big toe on April 2, 1999 was the appropriate procedure under the conditions present at the time, and that the procedure was performed correctly. Tr. 235:15-25.

44. He testified that, since plaintiff had a history of drug and alcohol abuse, his following doctors' orders post operatively was an issue and that the arthroplasty procedure was the right one to have done. Tr. 236:21-237:7.

45. Dr. Rosenthal also explained that the bones do not have to fuse to keep the toe in the correct position. Tr. 239:9-10. He testified that the arthroplasty procedure is an extremely successful (more than 80 %) procedure in relieving pain (Tr. 240:3-9), and that a bone fusion is a much riskier procedure that requires total non-weight bearing during recovery to avoid non-fusion. Tr. 240:16-241:1.

46. Based upon his review of plaintiff's VA records, it was Dr. Rosenthal's view that the plaintiff's recovery was normal, and that the pain he experienced from the keloid scarring was normal post operative pain. Tr. 241:9-21.

47. Finally, Dr. Rosenthal did disagree with Dr. Bloch's opinion that an arthroplasty would never be appropriate and that no competent podiatrist would perform one; arthroplasty is a viable procedure and in certain instances is preferable. Tr. 244:15-25. It does not fall below the standard of care to have selected one of two viable options to treat a patient, he concluded. Tr. 245:1-6.

II. CONCLUSIONS OF LAW

The experts in this case both had training and experience in their particular field of podiatry. The plaintiff has the burden of proving that his contentions are more likely true and correct than not. Plaintiff has failed to meet his burden of proof both with respect to negligence and informed consent.

Simply put, the testimony of defendant's expert is more credible for several reasons. First, plaintiff's expert was his treating physician, which does not necessarily have a bearing on the weight of his opinion. But, it is hard to ignore the observation that plaintiff's expert seems to be throwing all the blame on the VA based upon a procedure which was correctly done by all accounts, and is not, as plaintiff's expert intimated at one point in his deposition, a totally uncalled for procedure on the big toe. Secondly, his testimony regarding standard of care (Tr. 47-51:4) was confusing. In this case, I give greater weight to the testimony of defendant's expert.

In short, plaintiff has not through his expert's testimony established that the acts of defendant fell below the acceptable standard of care.

With regard to the informed consent issue, both parties rely upon a series of Pennsylvania standing for the proposition that physicians must provide patients with "material information necessary to determine whether to proceed with the surgical or operative procedure or to remain in the present condition." Sinclair by Sinclair v. Block, 534 Pa. 563, 633 A.2d 1137, 1140 (1993). The nature of this "material information" means that the information provided by a physician must give the patient "a true understanding of the nature of the operation to be performed, the seriousness of it, the organs of the body involved, the disease or incapacity

sought to be cured, and the possible results." Gray v. Grunnagle, 423 Pa. 144, 223 A.2d 663, 674 (1966). A physician must "advise patients of those material facts, risks, complications and alternatives to surgery that a reasonable person in the patient's situation would consider significant in deciding whether to have the operation." Gouse v. Cassel, 532 Pa. 197, 615 A.2d 331, 334 (1992). This does not require the physician to disclose all known information, but simply to advise the patient of the facts, risks, complications and alternatives that a reasonable person in the patient's situation would consider significant in deciding whether to proceed with the surgery. Gouse v. Cassel, 615 A.2d 331, 334 (1992); Montgomery v. Bazaz-Sehgal, 798 A.2d at 748, quoting Duttry v. Patterson, 771 A.2d 1255, 1258 (2001).

It is clear from the findings of fact that defendant obtained plaintiff's informed consent before the operation.

An order follows.

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

BENJAMIN DANDY,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	NO. 03-3043
	:	
UNITED STATES OF AMERICA,	:	
Defendant.	:	

ORDER

AND NOW, this 7th day of June, 2005, it is hereby ORDERED that judgment is entered in favor of Defendant United States of America and against Plaintiff Benjamin Dandy.

This case is CLOSED.

BY THE COURT:

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RONALD L. BUCKWALTER, S.J.