

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GERALD CULHANE and CAROL
CULHANE,

Plaintiffs,

DECISION AND ORDER

v.

1:17-CV-00005 EAW

UNITED STATES OF AMERICA,

Defendant.

INTRODUCTION

Plaintiffs Gerald Culhane (“Mr. Culhane”) and Carol Culhane (“Mrs. Culhane”) (collectively, “Plaintiffs”) commenced this action on January 3, 2017, alleging a cause of action against the United States of America (“Defendant”) pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 (the “FTCA”). (Dkt. 1). Plaintiffs seek damages due to the alleged negligence of Defendant’s employees in failing to timely diagnose several cancerous growths Mr. Culhane suffered from while under Defendant’s care. (*Id.* at ¶ 11).

On August 20, 2013, Mr. Culhane saw his primary care physician at the Buffalo Veteran’s Administration Medical Center (“Buffalo VAMC”) complaining of a lump in his left neck that had been present for three months. A computed tomography (“CT”) scan was ordered, and on September 5, 2013, the results of the CT scan were reviewed and found to be unremarkable. However, a mass was obviously present in the CT images. Mr. Culhane was notified of the purportedly negative test results the same day, and there was no follow up on the lump. Over a year-and-a-half later, on April 27, 2015, Mr. Culhane

called the Buffalo VAMC to report that the lump on his left neck was growing and requested another medical evaluation. Another CT scan of his neck was performed on May 11, 2015, and it was discovered that a large, submandibular mass was present in both the 2013 and 2015 CT scans. The lump was determined to be keratinizing squamous cell carcinoma in the left palatine tonsil, and Mr. Culhane underwent 40 radiation treatments and seven cycles of weekly intravenous chemotherapy, which he completed on August 25, 2015. Although this initial treatment appeared successful, on January 24, 2017, a recurrence of the cancer was discovered in Mr. Culhane's tonsil. He underwent a radical tonsillectomy and a left modified neck dissection on March 23, 2017.

In addition, on January 13, 2014, Mr. Culhane was examined at the Buffalo VAMC Dermatology Clinic to evaluate a skin lesion on his right temple. A benign condition was diagnosed and liquid nitrogen cryotherapy used on the lesion. Mr. Culhane returned to the Dermatology Clinic on April 18, 2014, and a punch biopsy of the lesion was performed. On April 22, 2014, Henry D. Friedman, M.D. ("Dr. Friedman"), diagnosed a benign condition based on the sample taken, and Mr. Culhane was told that the lesion was non-malignant. On February 23, 2015, Mr. Culhane was evaluated by a dermatologist in Rochester, New York, for a different skin issue. (*Id.* at ¶ 59). The dermatologist performed a shave biopsy of the right temple lesion the same day and confirmed the diagnosis of a malignant melanoma. On March 24, 2015, a Mohs surgical excision of the malignant melanoma was performed at Strong Memorial Hospital in Rochester, New York.

Defendant concedes that it owed a duty to Mr. Culhane, and that the failure to diagnose Mr. Culhane with squamous cell carcinoma in September 2013 was a departure

from the standard of care. (Dkt. 52 at 14). The parties dispute proximate cause as to the squamous cell carcinoma. Specifically, while Plaintiffs concede that Mr. Culhane would have had to undergo chemotherapy and radiation regardless of when the squamous cell carcinoma was diagnosed, they contend that the recurrence of the cancer and the surgery Mr. Culhane underwent to treat the recurrence were a result of the delay in diagnosis. Defendant argues that the delay in diagnosis of the squamous cell carcinoma did not cause the recurrence, diminish Mr. Culhane's chance of a better outcome, or increase his injury. The parties also dispute whether there was a delay in diagnosis and treatment of the melanoma. Whereas Plaintiffs contend Defendant deviated from the standard of care as to the diagnosis and treatment of Mr. Culhane's cancers, Defendant maintains that the diagnosis and treatment of the skin lesion in 2014 was reasonable.

After considering all of the evidence, the Court finds that Plaintiffs have failed to establish medical malpractice for failure to timely diagnose Mr. Culhane's malignant melanoma, but have established medical malpractice for failure to timely diagnose Mr. Culhane's squamous cell carcinoma. The Court finds that Plaintiffs have established their entitlement to recover a total of \$1,950,000 in damages for the injuries that they have proven they suffered as a result of Defendant's actions. This Decision and Order constitutes the Court's findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

PROCEDURAL BACKGROUND

Plaintiffs filed the instant matter on January 3, 2017. (Dkt. 1). Defendant filed its Answer on March 6, 2017 (Dkt. 9), and the case was referred to United States Magistrate

Judge Michael J. Roemer for all pretrial matters excluding dispositive motions. (Dkt. 10). Discovery closed on May 17, 2019 (Dkt. 40), and a pretrial conference was held on December 19, 2019, before the undersigned, where the parties stipulated to the dismissal of Plaintiffs' third cause of action with prejudice (Dkt. 63; Dkt. 64). A bench trial commenced on January 13, 2020. (Dkt. 73). After nine days of testimony spread out over the course of several months, the bench trial concluded on June 16, 2020. (Dkt. 93).

Following the bench trial, the parties submitted their written summations and proposed findings of fact and conclusions of law on July 22, 2020. (Dkt. 97; Dkt. 98; Dkt. 99; Dkt.100; Dkt. 101; Dkt. 102). Responsive proposed findings of fact and conclusions of law were submitted on July 31, 2020. (Dkt. 103; Dkt. 104; Dkt. 105).

FINDINGS OF FACT

The following section constitutes the Court's Findings of Fact pursuant to Federal Rule of Civil Procedure 52(a)(1). The Court has made its Findings of Fact based on the testimony and exhibits presented at trial, and has discussed only those issues considered "material to the resolution of the parties' claims." *Cliffstar Corp. v. Alpine Foods, LLC*, No. 09-CV-00690-JJM, 2016 WL 2640342, at *1 (W.D.N.Y. May 10, 2016) (citing *I.N.S. v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("[C]ourts . . . are not required to make findings on issues the decision of which is unnecessary to the results they reach.")). Moreover, "the distinction between law and fact is anything but clear-cut" and therefore, "for purposes of appellate review, the labels of fact and law assigned" should not be considered controlling. *Id.* (quotation marks and citations omitted).

I. Burden of Proof

“In a civil case, the plaintiff bears the burden of proving the elements of his claim by a preponderance of the evidence.” *Brown v. Lindsay*, Nos. 08-CV-351, 08-CV-2182, 2010 WL 1049571, at *12 (E.D.N.Y. Mar. 19, 2010). “To establish a fact by a preponderance of the evidence means to prove that the fact is more likely true than not true.” *Id.* (quoting *Fischl v. Armitage*, 128 F.3d 50, 55 (2d Cir. 1997)). “Under the preponderance of the evidence standard, if the evidence is evenly balanced, the party with the burden of proof loses.” *Richardson v. Merritt*, No. 12-CV-5753 (ARR), 2014 WL 2566904, at *5 (E.D.N.Y. June 4, 2014) (citing *Kosakow v. New Rochelle Radiology Assocs.*, 274 F.3d 706, 731 (2d Cir. 2001)). In other words, if the credible evidence on a given issue is evenly divided between the parties—that it is equally probable that one side is right as it is that the other side is right—then the plaintiff has failed to meet his burden. “An affirmative defense, by contrast, is a defense that the defendants must assert and prove, and for which they have the burden.” *Amerio v. Gray*, No. 5:15-CV-538, 2019 WL 5307248, at *2 (N.D.N.Y. Oct. 21, 2019); see *Barton Grp., Inc. v. NCR Corp.*, 796 F. Supp. 2d 473, 498 (S.D.N.Y. 2011) (“[A] defendant asserting an affirmative defense bears the burden of proof with respect to that defense.”), *aff’d*, 476 F. App’x 275 (2d Cir. 2012).

II. Undisputed Facts¹

The parties stipulate to the following facts. On August 20, 2013, Mr. Culhane went to see Caroline E. Fernandez, M.D. (“Dr. Fernandez”), his primary care physician at the

¹ The following facts are taken from the parties’ written stipulation, which was entered into evidence as Court Exhibit 1.

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.