



MondayMonday

Keeping Up With The Dr. Jones's

August 5, 2013

Thoughts from the Javits Center; Tuesday, July 30, 2013, 7:15 a.m.: Helpless. We are completely helpless. We cannot save any; we cannot help any. They are all on their own. This is the worst feeling in the world, far worse than our own experience so many years ago. We remembered our anger then; anger that this exam was keeping us from our destiny; anger that not only had we graduated from Flatbush Law well-versed in every imaginable vagary of New York practice, but we had been clerking for two years (and you know what that meant, at least then.) How dare you challenge our ability to be lawyers; we are lawyers. You had bent our brains out of shape, hammered them into what you wanted them to be and now, you aren't quite sure that we meet the mark? Is this nothing but an initiation rite; the lawyer's equivalent of swallowing goldfish? We had sacrificed everything. We could no longer read for pleasure or write for fun. Civilians couldn't understand what we said and during family dinners, mothers and spouses would accuse us of "sounding like a lawyer" when we argued. We owed money



everywhere, while our college chums had been earning it. We had chosen a profession, unlike medicine, where making a living was not at all guaranteed even after all this rigamarole was over. We wanted our lives back. As we vividly recalled this past Tuesday morning, among the tense faces and blank stares, we told ourselves then that this exam was as good as over. We regain our souls here and now. That is precisely what the First Daughter told us as she left the car last Tuesday morning for the bar exam. And then we cried.

Medicine is not a static science. Indeed, some may argue that it is not a science at all, but an art which applies science, among other modalities. At any rate, the doctor who sleeps on his obligation to remain current or only applies his efforts to current billing software, might run afoul of what are more contemporary standards than he or she bargained for.

Case in point, *Mancuso v. Friscia*, 2013 NY Slip Op 05515 (2d Dep't, July 31, 2013). Defendant physician and his hospital moved for summary

judgment against plaintiff, a 44-year old woman suffering from Stage I breast cancer. At the time of that diagnosis, four out of five of plaintiff's paternal aunts, had died of breast cancer, including one who had been diagnosed with the disease at age 40. The fifth paternal aunt was similarly diagnosed after plaintiff's diagnosis. Plaintiff underwent a mastectomy of the cancerous breast, followed by a prophylactic mastectomy of the healthy breast a year later. Plaintiff followed with defendant physician for the six following years, the physician checking for tumor markers. Those markers elevated in 2007 and plaintiff was diagnosed with ovarian cancer.

Despite her paternal family history and her ethnicity (Ashkenazic Jewish on her father's side), plaintiff's physician never recommended genetic testing for the BRCA gene or prophylactic removal of her ovaries, which could have prevented the onset of ovarian cancer.

Does that departure sustain an action for medical malpractice, at least at the SJ stage? It does. No surprise that defendants' expert "failed to provide any information as to what the accepted medical practices were during the period at issue with regard to BRCA genetic testing[.]" We all know what the answer would have been. SJ denied.

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