

**Edelstein v Hospital for Joint Diseases Orthopedic  
Institute**

2004 NY Slip Op 30184(U)

August 11, 2004

Supreme Court, New York County

Docket Number:

Judge: Joan B. Carey

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: Honorable Joan B. Carey  
Justice

PART 40 D

PHILIP EDELSTEIN and MAXINE EDELSTEIN,

Plaintiffs,

Index No.: 123783/01

MOTION DATE \_\_\_\_\_

-v-

MOTION SEQ. NO. 02

MOTION CAL. NO. \_\_\_\_\_

HOSPITAL FOR JOINT DISEASES  
ORTHOPEDIC INSTITUTE and JEFFREY  
GOLDSTEIN,

Defendants.

**FILED**

**AUG 18 2004**

NEW YORK  
COUNTY CLERK'S OFFICE

The following papers, 1-10, were read on this motion by defendant Hospital for Joint Diseases Orthopedic Institute for leave to reargue certain branches of its prior motion which was for summary judgment dismissing the complaint insofar as asserted against it.

Notice of Motion /Order to Show Cause - Affidavits - Exhibits \_\_\_\_\_  
Answering Affidavits - Exhibits \_\_\_\_\_

Papers Numbered

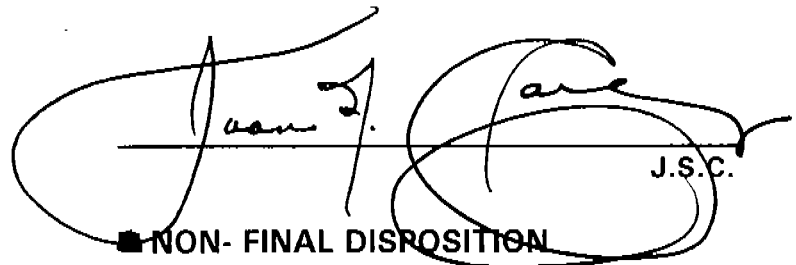
1-7

8-10

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying decision and order.

Dated: 08/11/2004

  
\_\_\_\_\_  
J.S.C.

Check one:  FINAL DISPOSITION

NON- FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK Part 40D

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PHILIP EDELSTEIN and MAXINE EDELSTEIN,

Plaintiffs,

Index No.: 123783/01

-against-

DECISION & ORDER

HOSPITAL FOR JOINT DISEASE ORTHOPAEDIC  
INSTITUTE and JEFFREY GOLDSTEIN,

Defendants.

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JOAN B. CAREY, J.:

**Introduction**

Motion by defendant Hospital for Joint Disease Orthopaedic Institute for leave to reargue those branches of its prior motion which were for summary judgment dismissing the plaintiffs' medical malpractice claims allegedly occurring on or after 1:00 am on July 9, 1999, and the plaintiffs' cause of action for lack of informed consent insofar as asserted against it.

**Facts & Procedural Posture**

The injured plaintiff, Philip Edelstein, was admitted to defendant Hospital for Joint Disease Orthopaedic Institute (the Institute) on July 6, 1999 as a private patient of defendant Jeffrey Goldstein, M.D.. On that date the injured plaintiff underwent a lumber laminectomy which was performed by Dr. Goldstein. During the course of the procedure an incidental durotomy (i.e. tear in sheath that encases spinal cord and fluid)

occurred, which was immediately repaired by Dr. Goldstein and two Institute residents who assisted in the surgery.

On July 9th, following two days of unremarkable post-operative hospitalization at the Institute, the injured plaintiff was involved in an incident at his bedside. At approximately 1:00 am, the injured plaintiff happened upon the floor alongside his bed. According to the registered nurse, an Institute employee, who assisted the injured plaintiff during the incident, the injured plaintiff, while being moved from his bed to an adjacent chair by the nurse, stated that his extremities were numb and that his knees were buckling. The nurse helped the injured plaintiff assume a kneeling position on the floor, and then assisted the injured plaintiff back on to his bed. The nurse contacted an Institute staff physician and informed this physician of the incident. This physician, in a note written at 6:30 am, stated "[n]o change in condition. No treatment necessary." This incident and the actions of the nurse and Institute staff were memorialized on an occurrence reporting form.

Approximately six hours later Dr. Goldstein performed a neurological examination on the injured plaintiff. This examination consisted of a manual motor test and sensory exam. This examination essentially entailed Dr. Goldstein's observation of the injured plaintiff's ability to move his legs. Dr.

Goldstein determined that the injured plaintiff's condition was consistent with post-operative recovery. At the time of this examination Dr. Goldstein did not know of the incident that had occurred earlier that day. When he was informed of the incident by a resident later that day, Dr. Goldstein was told that the injured plaintiff had fallen out of bed.

Dr. Goldstein again evaluated the injured plaintiff at 7:30 pm. The injured plaintiff informed Dr. Goldstein that the injured plaintiff could not extend his knees. Dr. Goldstein confirmed, through a physical examination, the injured plaintiff's inability to extend his legs, and appreciated weakness in the injured plaintiff's quadriceps. This marked the first time during the injured plaintiff's hospitalization that weakness was present in his quadriceps. X-rays, a CAT scan, a myelogram and a neurology consult were immediately ordered as a result of this examination.

The CAT scan and myelogram revealed, in Dr. Goldstein's opinion, evidence of a compression at the left L4 nerve root. Resultantly, an additional surgical procedure was performed on July 10th by Dr. Goldstein. This emergent procedure involved the exploration of the injured plaintiff's lumbar spinal wound, culminating in the removal of the surgical hardware installed during the July 6th lumbar laminectomy and the debriding of fluid from the surgical field.

No compression was detected by Dr. Goldstein during this procedure. However, Dr. Goldstein determined that the injured plaintiff had sustained a palsy (i.e. a partial paralysis). While unable to identify the cause of this palsy, Dr. Goldstein opined that the palsy developed at some point between the July 6th surgical procedure and the July 10th procedure. When asked during his deposition if the palsy sustained by the injured plaintiff between the two surgical procedures was the result of a fall from bed, Dr. Goldstein replied: "Something -- something happened in that time period. I can't say what the cause was. There are many things that could cause this kind of problem."

The injured plaintiff, who had no significant lower extremity weakness prior to the first procedure, was subsequently discharged from the Institute with substantial such weakness and paraparesis (i.e. partial paralysis of the lower limbs). Since his discharge, the injured plaintiff has ambulated with Lofstrand canes and braces.

The injured plaintiff and his wife derivatively commenced the instant action against Dr. Goldstein and the Institute to recover damages for medical malpractice and lack of informed consent. The plaintiffs alleged, among other things, that the Institute, through its employees, was negligent in the manner in which it assisted Dr. Goldstein during the July 6th surgery, and in providing post-operative care to the injured plaintiff.

Following the joinder of issue and the completion of discovery, the Institute moved for summary judgment dismissing the complaint insofar as asserted against it. The Institute argued that dismissal was warranted because its employees correctly followed the orders of Dr. Goldstein, the injured plaintiff's private attending physician. The Institute also asserted that its employees committed no independent acts of negligence that would expose the Institute to liability. These arguments were supported, among other things, by the affirmation of a licensed physician who was board-certified in orthopedic surgery.

In opposition to the motion, the plaintiffs argued, among other things, that multiple triable issues of fact existed concerning the manner in which the Institute provided post-operative care to the injured plaintiff. This contention was supported by the affirmation of a licensed physician board certified in neurological surgery. This physician opined that the Institute departed from good and accepted medical practice in failing to conduct an immediate physical and neurological examination of the injured plaintiff following the July 9th incident. This physician also opined that the Institute departed from good and accepted medical practice in failing to properly document the incident and communicate the same to Dr. Goldstein. This physician concluded that these departures were a proximate

cause of the injured plaintiff's injuries insofar as they prevented timely and appropriate intervention that would have led to diagnosis of a nerve root compression caused by a build-up of fluid at the surgical site.

By an order, dated May 19, 2004, the court partially granted the Institute's motion, dismissing all claims regarding the alleged negligence of the Institute occurring before 1:00 am on July 9, 1999, and denied the remainder of the motion. The court wrote, in pertinent part, that:

The [Institute] made a prima facie showing of entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against it. In opposition, the plaintiffs failed to raise a triable issue of fact with respect to the moving defendant's liability for the care received by the injured plaintiff during the subject operative procedure (i.e. lumbar laminectomy). Specifically, the plaintiffs failed to raise an issue of fact with respect to whether the orders of the attending physician who performed the subject surgical procedure (i.e. defendant Jeffrey Goldstein, M.D.) were 'clearly contraindicated' (see DeSena v New York Univ. Med. Ctr., 2 Misc3d 656, 2003 NY Slip Op 23920 [Sup Ct, NY County 2003]). Similarly, the plaintiffs failed to raise a triable issue of fact with respect to whether the staff physicians employed by the moving defendant, who assisted the attending physician during the subject surgical procedure, committed an independent act of negligence during the procedure that proximately caused the injured plaintiff's injuries (see Eisen v Mather Mem. Hosp., 278 AD2d 272 [2d Dept. 2000]; Filippone v St. Vincent's Hosp. & Med. Ctr. of NY, 253 AD2d 616 [1st Dept. 1998]).

However, the plaintiffs, on the strength of their expert's affirmation, raised triable issues of fact with respect to whether the moving

defendant departed from good and accepted medical practice in providing post-operative care to the injured plaintiff, and whether any such departures were a proximate cause of his injuries (see generally Smith v Cattani, 2 AD3d 259 [1st Dept. 2004]; Clemons v Glicksman, 1 AD3d 286 [1st Dept. 2003]). The plaintiffs' expert stated that the moving defendant's staff was negligent in providing care to the injured plaintiff following an early-morning July 9, 1999 incident during which the injured plaintiff happened upon the floor near his hospital bed. This alleged negligence consisted of failing to conduct an immediate physical and neurological examination of the injured plaintiff following the incident, improperly conducting the belated examination performed on the injured plaintiff, and failing to properly document the incident and communicate the same to the attending physician. These claimed departures would, if established, be actionable against the moving defendant as they would constitute independent acts of malpractice by its employees (see Hill v St. Claire's Hosp., 67 NY2d 72 [1986]; Bing v Thunig, 2 NY2d 656 [1957]; see generally Kavanaugh v Nussbaum, 71 NY2d 535 [1988]).

That branch of the motion which is for dismissal of the plaintiff's cause of action for lack of informed consent is denied, as the moving defendant failed to address any argument to this issue, and, similarly, the moving defendant's expert failed to address this issue in any manner.

The Institute now moves for leave to reargue those branches of its prior motion which were for summary judgment dismissing the plaintiffs' medical malpractice claims allegedly occurring on or after 1:00 am on July 9, 1999, and the plaintiffs' cause of action for lack of informed consent insofar as asserted against it. The Institute maintains that the court erred in determining that an issue of fact existed with respect to causation.

Specifically, the Institute argues that the plaintiffs' expert failed to causally link the alleged departures ascribed to its employees to the injuries sustained by the injured plaintiff. The plaintiffs oppose the present motion, asserting that the court did not overlook or misapprehend relevant facts, or misapply controlling principles of law in deciding the prior motion.

### Analysis

On motion for reargument, the movant must show that the court either overlooked or misapprehended relevant facts, or misapplied controlling principles of law in determining the prior application (CPLR 2221[d][2]; see e.g. Amato v Lord & Taylor, Inc., \_\_\_AD3d\_\_\_, 2004 NY Slip Op 6311 [August 9, 2004; 2d Dept.]; 300 West Realty Co. v City of New York, 99 AD2d 708 [1st Dept. 1984]).

In the case at bar, the court did not overlook or misapprehend relevant facts, or misapply controlling principles of law in determining the prior motion. The Institute failed to make a prima facie showing of entitlement to judgment as a matter of law on the ground that its alleged negligence was not a proximate cause of the plaintiffs' injuries, rather, it did so on the ground that the injured plaintiff's care was the responsibility of Dr. Goldstein and that the Institute's employees did not commit any independent acts of negligence. The

Institute's expert did not address the issue of causation in any meaningful way in his initial affirmation in support of the Institute's motion, and the Institute could not rely on the expert's subsequent affirmation submitted with its reply to meet its initial burden on the motion (see e.g. Rengifo v City of New York, 7 AD3d 773 [2d Dept. 2004]).

Additionally, even assuming, arguendo, that the Institute did make a prima facie showing of entitlement to judgment as a matter of law on the ground that its alleged negligence was not a proximate cause of the plaintiffs' injuries, the plaintiffs raised a triable issue of fact. The plaintiffs' expert specifically opined that the Institute's failure to conduct an immediate and complete physical and neurological examination<sup>1</sup> of the injured plaintiff following the July 9th incident, and its failure to properly document the incident and communicate the same to Dr. Goldstein, prevented timely and appropriate intervention that would have led to the diagnosis of a nerve root compression caused by a build-up of fluid at the surgical site. This expert also opined that timely and informed intervention

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<sup>1</sup>While the examination performed by Dr. Goldstein at 12:30 pm on July 9th failed to disclose any weakness in the injured plaintiff's quadriceps, this examination was not a complete physical and neurological exam, as called for by the plaintiffs' expert, but rather was simply a manual motor test and sensory exam. Additionally, at the time of this examination Dr. Goldstein did not know of the incident that had occurred earlier that day.

would have prevented significant sequelae that resulted in the permanent significant injuries that the injured plaintiff sustained.

In sum, the court did not overlook or misapprehend relevant facts, or misapply controlling principles of law in determining on the prior motion that triable issues of fact exist with respect to whether the Institute departed from good and accepted medical practice in providing post-operative care to the injured plaintiff, and whether any such departures were a proximate cause of his injuries.

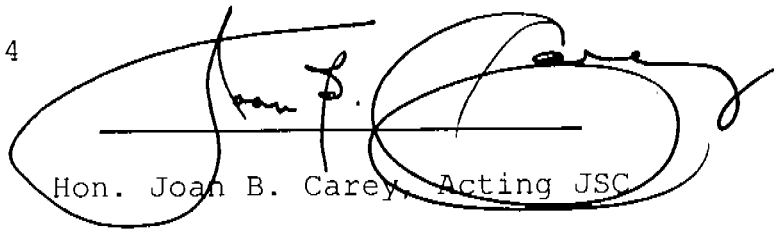
#### Conclusion

Based upon the foregoing, it is hereby

**ORDERED** that the motion of defendant Hospital for Joint Disease Orthopaedic Institute for leave to reargue those branches of its prior motion which were for summary judgment dismissing the plaintiffs' medical malpractice claims allegedly occurring on or after 1:00 am on July 9, 1999, and the plaintiffs' cause of action for lack of informed consent insofar as asserted against it is granted, and upon reargument the court adheres to its original determination; and it is further,

**ORDERED** that counsel for the parties are to appear on November 4, 2004 at 9:30 am at 111 Centre Street, Room 572, Part 40D, for trial.

Date: 08/11/2004



Hon. Joan B. Carey, Acting JSC

**FILED**

**AUG 18 2004**

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