

<b>Heffernan v Jasiewicz</b>
2008 NY Slip Op 33142(U)
November 10, 2008
Supreme Court, Suffolk County
Docket Number: 05-29200
Judge: Peter Fox Cohalan
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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 24 - SUFFOLK COUNTY

**PRESENT:**

Hon. PETER FOX COHALAN  
Justice of the Supreme Court

MOTION DATE 4-16-08  
ADJ. DATE 8-8-08  
MNEMONIC: # 003 - MD

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BRYAN J. HEFFERNAN,	:	LEVINE & GROSSMAN
	:	Attorneys for Plaintiff
Plaintiff,	:	114 Old Country Road
	:	Mineola, New York 11501
- against -	:	
	:	FUREY, KERLEY, WALSH, MATERA &
RONALD JASIEWICZ, M.D. and STONY	:	CINQUEMANI, P.C.
BROOK ANAESTHESIOLOGY, P.C.,	:	Attorneys for Defendants
	:	2174 Jackson Avenue
Defendants.	:	Seaford, New York 11783
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Upon the following papers numbered 1 to 27 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers (003) 1 - 15 ; Notice of Cross Motion and supporting papers 16 - 23 ; Answering Affidavits and supporting papers 24 - 25 ; Other Sur-Reply 26 - 27 ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is

**ORDERED** that this motion (003) by the defendants Ronald Jasiewicz, M.D. and Stony Brook Anaesthesiology, P.C. for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint, opposed by the plaintiff, is denied.

The amended complaint of this action sets forth causes of action sounding in medical malpractice and lack of informed consent on behalf of the plaintiff, Bryan J. Heffernan. The plaintiff alleges that commencing August 6, 2004 during a surgical procedure, and through and including August 16, 2004, that he was under the care of the defendants who failed to properly provide anesthesia services to him, including negligently and improperly placing an A-Line in his right wrist/forearm, and failed to inform him of alternatives to care and treatment, procedures and surgery and the reasonable foreseeable risks. The plaintiff claims he was caused to sustain personal and permanent injury when his right radial nerve was damaged, which condition was improperly and untimely diagnosed and treated thereafter. The plaintiff claims that as a result of the injury to the right radial nerve that he has been caused to sustain a right distal neuropathy together with compressive median neuropathy, numbness and tingling sensation in the right hand and first three fingers with pain and discomfort at the right wrist level and weakness in the right hand.

The defendants seek an order granting summary judgment dismissing the complaint asserted against them claiming that the care and treatment rendered by them was at all times within good and accepted standards of medical practice and such care and treatment did not proximately cause the plaintiff's injuries.

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (*Holton v Sprain Brook Manor Nursing Home*, 253 AD2d 852, 678 NYS2d 503 [1998], *app denied* 92 NY2d 818, 685 NYS2d 420). To prove a prima facie case of medical malpractice, a plaintiff must establish that defendant's negligence was a substantial factor in producing the alleged injury (see, *Derdiarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166 [1980]; *Prete v Rafla-Demetrious*, 221 AD2d 674, 638 NYS2d 700 [1996]) Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury (see, *Fiore v Galang*, 64 NY2d 999, 489 NYS2d 47 [1985]; *Lyons v McCauley*, 252 AD2d 516, 517, 675 NYS2d 375 [1998], *app denied* 92 NY2d 814, 681 NYS2d 475; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [1994]).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center*, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]).

In support of their motion, the defendants have submitted, inter alia, copies of the pleadings and amended pleadings and bill of particulars and amended bill of particulars;

copies of the transcripts of the examinations before trial of Bryan Heffernan, Ronald Jasiewicz, M.D. and Debra Heffernan; a copy of the medical record from Stony Brook Hospital; a copy of the anesthesiology pre-induction/operating room note; an attorney's affirmation and the affirmation of the defendants' expert, Joel Baskoff, M.D (hereinafter Baskoff).

Baskoff states in his affidavit that he is a physician licensed to practice medicine in the state of New York and is board certified in Anesthesiology. It is his opinion within a reasonable degree of medical certainty that the care and treatment rendered by defendants was at all times within good and accepted standards of medical practice and that the injuries sustained by the plaintiff were not proximately caused by any of the care and treatment rendered by Ronald Jasiewicz M.D. (hereinafter Jasiewicz).

Baskoff states that on August 6, 2004, the plaintiff was admitted to Stony Brook University Hospital and underwent surgery by Zelik Frischer, M.D. (hereinafter Frischer). The anesthesia for this procedure was started at approximately 8:36 a.m. and continued until approximately 6 p.m.. Jasiewicz served as the anesthesiologist for the procedure, but was relieved by a Dr. Liu at approximately 4:30 p.m. General and epidural anesthesia were used throughout the procedure, but at approximately 10:44 a.m., Jasiewicz inserted an arterial line in the radial artery to monitor the patient's blood pressure and to use for any blood draws that would be required. The radial artery line was discontinued at approximately 8:15 p.m.

Baskoff states that Jasiewicz met with the patient in the holding area outside the operating room prior to the surgery and explained the risks and benefits of the anesthesia, including the insertion of an arterial line advising as to its purpose and where it would be placed. He also states that the procedure used by Jasiewicz in inserting the arterial line was proper in that he affixed the hand and wrist to a padded armboard, inserted the radial catheter needle for arterial line placement, determined it was properly functioning, and monitored it, checking the perfusion at the distal portion. He further states that the Stony Brook Hospital anesthesiology notes record no problems with the arterial line during the insertion or during the procedure. Baskoff opines that, therefore, the injury to the radial nerve was not proximately caused by the insertion of the radial artery line.

The plaintiff testified at his examination before trial that he was twenty one years of age, unmarried, and was currently attending college to study physics and astronomy, and was currently working at AutoZone in the area of customer satisfaction. He stated that, prior to this surgery, he never experienced an injury or numbness, tingling, or weakness to his right arm or wrist. He testified that prior to his surgery Frischer did not mention that an arterial line would be inserted, nor did he mention any possible risks or complications. He stated he first experienced problems with his right wrist when he woke up from surgery, and felt a numbness throughout his entire right arm, and felt tingling in his fingertips, especially his index finger and thumb. He began to experience weakness and could not grab anything or hold on to anything. Prior to surgery, he stated, an intravenous was started in his right foot because he was informed he had bad veins and an intravenous couldn't be inserted elsewhere. At present, he stated, his hand does not feel like it is his, and if he bangs it or overuses it, it starts to hurt badly and cramps up, and he has difficulty lifting things and drops things.

Jasiewicz testified at his examination before trial that he is a physician licensed in the state of New York and is board certified in anesthesiology by the American Board of Anesthesiology and by the Osteopathic Board of Anesthesiology. He testified that the plaintiff was admitted to Stony Brook University Hospital on August 5, 2004 and was discharged on August 11, 2004. He stated that the plaintiff had surgery on August 6, 2004 and that he was the attending anesthesiologist assisted by the anesthesiology resident Michelle Delemos, M.D. (hereinafter Delemos). It was part of the anesthesiology plan to put in an arterial line to monitor the plaintiff's blood pressure through a potentially involved and lengthy operative procedure with the potential for significant blood loss.

Jasiewicz testified that an informed consent would have been obtained prior to surgery, but the arterial line consent was not listed in the hospital or anesthesia record, and there was no separate written consent for the arterial line because the anesthetic management and plan is imparted in the surgical consent. He testified that anesthetic treatment risks were discussed with the patient, "questions, risks and benefits" and the patient agreed to proceeding. He stated he did not have a recollection of the sum and substance of the discussion, but that it would be his custom and practice to discuss it with the patient in the operating room holding area and for him to tell the patient an IV catheter would be placed in the radial artery after cleaning the site and that it would be used for a continuous blood pressure monitoring.

Jasiewicz testified that risks such as potential nerve damage would not be routinely discussed with the patient, however, because it is an uncommon complication of the procedure-less than 1%. He stated that by "nerve damage" he meant an abnormality in the nerve, that it was not normal, and for a radial artery catheter, it would most likely be the radial and most likely the median nerve or ulnar nerve that could be damaged, but the ulna would be more proximal to the ulnar artery.

In the plaintiff's case, he stated, that arterial line was placed at 10:55 a.m. by either himself or by Delemos under his direct supervision after the surgeon determined that the procedure was going to be more involved. Jasiewicz testified he had inserted several hundred arterial lines, and that if he were supervising Delemos, he would be discussing the technique of placement of the arterial line and then when she was physically visualizing her placement of the arterial line, the right and left pulses in the wrist would be palpated to ascertain which had the better pulse to increase the chance of getting it on the least amount of attempts. If the right and left pulses were about equal, he stated he would place the line in the non-dominant hand. He would question the patient pre-operatively, and it would not be his custom and practice to make a note as to which was the dominant hand. He stated he could also check the H&P sheet, but in looking at the plaintiff's chart during his deposition, he stated that the dominant hand was not set forth in the H&P. If it was equivocal, he stated, he would use the left arm, which he then stated was the usual arm because of placement of the arterial line, transducer and tubing-positioning of equipment.

Jasiewicz stated his notes did not indicate whether the plaintiff's right or left pulse was stronger. The anatomy would be fixed with tape by placing the arm on a padded arm board, placing the patient's arm less than 90 degrees, putting a roll under the wrist to increase the

potential for ascertaining the radial artery via catheterization. The tape would then be removed after the arterial line was placed to prevent ischemia or injury. If it was a difficult placement with several attempts, he would have noted it on the anesthesia record. It was not his custom and practice to note on the record whether he or another anesthesiologist inserted the line. Jasiewicz testified there were no complications with the arterial line noted in the record, such as a hematoma or bleeding at the site, pallor and color, or distal capillary fill of the nail beds. His notes indicated he saw the plaintiff in the post anesthesia care unit (PACU) after surgery, but he did not recall having any contact with the plaintiff after that date.

Debra Heffernan testified at her examination before trial that she is the plaintiff's mother. She knew of no injuries to his right arm prior to the surgery of August 6, 2004 performed by Frischer at Stony Brook Hospital. She did not remember any discussion with Frischer or any other physician concerning the risks of anesthesia or the type of anesthesia which would be used during surgery. When her son came home from the hospital she remembered he complained of pins and needles in his entire arm into his shoulder. When she spoke about it to two of Frischer's associates, she was told it could be due to the anesthesia and it should go away. About two weeks later Frischer ordered a neurological follow with a Dr. Guido for the numbness and pain in her son's right hand and his inability to use his two fingers, the thumb and forefinger. She testified that Dr. Guido advised her that her son had radial nerve damage from the A-line used during surgery.

The Stony Brook Hospital records submitted by the defendants contains a neurology note dated August 11, 2004 found on the neurology adult inpatient consultation/admission history and physical sheet which states that "since surgery on 8/6/04 patient has had right wrist/hand numbness and weakness ever since. Patient has never had this before. Surgery was concerned that this may be due to an A-line that was placed during the surgery." The note further states "Noted weakness of right wrist immediately post op. No prior Hx of this. Radial line was inserted in right wrist. Finding was positive for wrist drop." A further note indicates an "18 yo white male with lower brachial plexus weakness s/p surgery-may be secondary to positioning during surgery." A further note states "Probable stretch injury of brachial plexus occurring during the perioperative period. Weakest muscles are apparently... (radial) but weakness extends proximally to biceps, triceps as well."

The final progress note/discharge form reveals "Neurology evaluated pt. for numbness in R hand-radial nerve distribution." The consultation request and report dated August 7, 2004 reveals "R 1<sup>st</sup> thumb finger tip numbness-could be due to median nerve compression secondary to fluid administration-IV or nerve injury during A-line placement. Will continue to observe."

Based upon the foregoing, the defendants have not demonstrated prima facie entitlement to summary judgment dismissing the complaint as the hospital record submitted by the defendants and the expert opinion of Baskoff raise conflicting facts and opinions. These factual issues preclude summary judgment.

Baskoff presents a fairly conclusory and unsupported opinion that there was no injury to the radial nerve caused by the A-line catheter placement, which, he states, did not proximately cause the plaintiff's problem. However, the hospital record sets forth working diagnoses and medical opinions by the neurology consultants who examined the plaintiff in the hospital setting forth radial nerve injury, median nerve compression and brachial plexus injury as impressions.

Baskoff does not set forth the basis for his conclusion that no radial or other nerve injury occurred from the A-line other than stating that the procedure used by Jasiewicz in inserting the arterial line was proper in that he affixed the hand and wrist to a padded armboard, inserted the radial catheter needle for arterial line placement, determined it was properly functioning, and monitored it checking the perfusion at the distal portion. However, Baskoff does not address the technique for inserting the needle and catheter, how the nerve was protected or avoided during insertion, the site of the placement of the line relative to the location of the nerves, how the line was secured, and how he determined that there was no nerve injury. Baskoff's conclusory affirmation does NOT address these issues to eliminate the factual issues raised in the defendants' moving papers. Thus, summary judgment is precluded.

In that the defendants have failed to establish entitlement to summary judgment dismissing the complaint, the burden has not shifted to the plaintiff who opposes this motion (*Zuckerman v City of New York*, supra).

Accordingly, motion (003) by the defendants for summary judgment dismissing the complaint is denied.

Dated: September 10, 2008



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J.S.C.

\_\_\_\_\_ FINAL DISPOSITION      X   NON-FINAL DISPOSITION