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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 3

Present: HON. UTE WOLFF LALLY
Justice

MD, MG

CYNTHIA BERLLY,

Plaintiff,

-against-

ROBERT I. GLUCK, M.D., ROBERT I. GLUCK, M.D., LLC and DAY-OP CENTER OF LONG ISLAND, INC.,

Defendants.

Motion Sequence #6, #7
Submitted March 9, 2011

INDEX NO: 2152/07

The following papers were read on these motions for summary judgment and leave to renew:

Notice of Motion and Affs.....1-3
Affs in Opposition.....4&5
Affs in Reply.....6&7
Affs in relation.....8&9
Order to Show Cause and Affs.....10-12
Affs in Opposition.....13&14

This motion by defendants Robert I. Gluck M.D., and Robert I. Gluck M.D., LLC, (collectively referred to as "Dr. Gluck") for an order directing the entry of a judgment dismissing the complaint as time-barred pursuant to CPLR 3211(a)(5) and 215(3) is denied.

The second motion by defendant Day-Op Center of Long Island, Inc. ("Day-Op") for an order pursuant to CPLR 2221(e) for leave to renew its prior motion for summary

judgment on the basis of new evidence, is granted. Upon renewal, Day-Op's prior motion for summary judgment dismissing the entire complaint as against the movant is granted.

Turning to Day-Op's motion first, the starting point is this Court's prior Order dated September 30, 2008 (Exhibit B to Christman affirmation in support of Day-Op's current motion). In that Order, after discussing the facts upon which the motion was based, this Court found as follows:

> There is no evidence that the nursing staff questioned the difference between the procedure in the consent form and the procedure performed by Dr. Gluck. And, according to Dr. Gluck, that was the circulating nurse's duty. Accordingly, a question of fact exists as to the independent negligence of a Day-Op employee . . .

At this time Day-Op seeks renewal based upon new evidence [CPLR 2221(e)] consisting of deposition testimony of nurse/anesthetist Steven Link (Exhibit O), deposition testimony of nurse Bridget Maley (Exhibit P), and its Quality Improvement Occurrence Form ("the Occurrence Form")(Exhibit I). The two depositions, taken in 2010 are from non-parties, and constitute new evidence not offered on the prior motion. The issue presented to this Court is whether the new evidence will change the prior determination (*Schenectady Steel Co., Inc. v Meyer Contracting Corp.*, 73 AD3d 1013).

The nurse/anesthetist, Steven Link, testified that a "time out" is a general term used "prior to surgery to make sure that we are all in agreement that it's the right patient, the right procedure, and then everything is ready to go (Links transcript at p. 35), and that Day-Op's Surgical Site Verification Checklist ("the SSV Checklist") "is effectively the 'time out'" for a surgical procedure (Links transcript, p. 39). Referring to the SSV Checklist, Link further testified that "patients in general are no part of this procedure" (Link transcript, p.

82-83). Instead, completion of the SSV Checklist is based upon documentation in the record (Link, p. 84).

The operating room nurse, Bridget Maley, testified that the SSV Checklist was Day-Op's protocol to be followed when someone was going to have surgery (Maley transcript, p. 19), and that a "time out" would be called "before the case begins" to "make sure the procedure we are doing is the correct procedure and on the right body part (Maley transcript, p. 21-11). She further testified that all of the procedures set forth on the SSV Checklist were performed prior to Dr. Gluck beginning plaintiff's surgery (Maley transcript, p. 24), including the "time out" (Maley transcript, p. 25).

On the front of the Occurrence Form filled out in connection with the surgeries performed on plaintiff on August 23, 2005, the space for "unanticipated return to OR" is checked off. The back of the form contains this statement:

> Time out Done, everyone in agreement with the operative procedure. Steve Link questioned diagnosis did not match procedure and Dr. Gluck stated it was all the same thing. Correct hand and finger operated on, tendon sheath sent for specimen.

Day-Op argues that this statement on the Occurrence Form proves Dr. Gluck was questioned by the nursing staff regarding the difference between the consent form and the diagnosis, the exact question posited by this Court in the prior Order. Nurse Maley admitted that she did not fill out the Occurrence Form until after the surgery, but it was based upon her "eyewitness account of Steve Link questioning Dr. Gluck before Dr. Gluck began this procedure as to whether or not the diagnosis matched the procedure" (Maley transcript, p. 28-31).

Plaintiff does not dispute the accuracy of any of the new evidence. She simply argues that once everyone in the operating room agreed that the operative procedure set forth on the consent form was "the same thing" as the diagnosis, somebody should have confirmed that new procedure with her. This line of reasoning does not provide a basis for a finding of liability against Day-Op in this case.

Where a private physician attends his patient at the facilities of a hospital, it is the duty of the private physician, not the hospital, to obtain the patient's informed consent (*Sela v Katz*, 78 AD3d 681; *Sita v Long Island Jewish-Hillside Medical Center*, 22 AD3d 743). The primary duty of a hospital's nursing staff is to follow the orders of an independent physician; the hospital will be protected from tort liability where the staff follows the doctor's orders, unless the staff commits independent acts of negligence, or knows that the private physician's orders are contraindicated by normal practice (*Sela v Katz, supra; Cham v St. Mary's Hosp. of Brooklyn,* 72 AD3d 1003, 1004; *Martinez v La Porta*, 50 AD3d 976; see *Cerny v Williams*, 32 AD3d 881, 883; see also *Toth v Community Hospital at Glen Cove*, 22 NY2d 255, 265). On this record nothing other than conclusory allegations have been presented as to independent acts of negligence, and no evidence whatsoever has been presented as to contraindications.

While the hospital may be liable where it knew or should have known that the private physician using its facilities would act without the patient's informed consent [*Salandy v Bryk*, 55 AD3d 147, 152 (triable issues of fact presented as to whether hospital knew that physician would act without the patient's consent in ordering a blood transfusion)], this case does not meet that standard. "Nurses are not authorized to determine for themselves

what is a proper course of medical treatment;" they "may not invade the area of the physician's competence and authority to overrule his orders" (*Toth v Community Hospital at Glen Cove*, *supra* at 265). Day-Op's staff in the operating room here had no basis to question Dr. Gluck's statement that the diagnosis was the same as the procedure on the consent form. Under these circumstances, no basis for liability against Day-Op has been shown, and consequently Day-Op's motion for summary judgment dismissing the complaint against it in its entirety must be granted.

Dr. Gluck moves for judgment dismissing the complaint on the grounds that plaintiff's complaint essentially alleges claims for battery rather than claims for medical malpractice and lack of informed consent. If this argument is successful it would mandate dismissal of plaintiff's claims on the grounds that the one-year limitations period [CPLR 215(3)] for such claims expired before this action was commenced.

Traditionally, medical treatment beyond the scope of a patient's consent was considered an intentional tort or a battery [*Cerilli v Kezis*, 16 AD3d 363 (biopsy performed over express objections of plaintiff); *Cross v Colen*, 6 AD3d 306 (express rejection of first of two procedures); *Messina v Matarasso*, 284 AD2d 32 (unconsented breast procedure performed during cosmetic surgery on face)].

The more modern approach recognizes that the physician is an actor, "who in good faith intends to confer a benefit on the patient," and in the course of his or her performance the physician may negligently exceed the scope of the patient's consent [*Ponholzer v Simmons*, 78 AD3d 1495, 1496 (bone graft taken from hip rather than cadaver is medical malpractice)]. Negligence standards which deal with the use of skill and due care better

accord with the realities of the physician/patient privilege [*Dries v Gregor*, 72 AD2d 231, 236 (lack of informed consent found where partial mastectomy performed and consent was for biopsy); see generally *Moricky v Beth Israel Medical Center*, 198 AD2d 33 (laminectomy performed at different level of spine than that consented to was medical malpractice, not battery); *Spinosa v Weinstein*, 168 AD2d 32, 41 (after 34 surgical procedures, plaintiff's feet were scarred and painful; summary judgment dismissal of assault and battery claim, but not podiatric malpractice claim); see also *Rigie v Goldman*, 148 AD2d 23 (re action for lack of informed consent in connection with removal of impacted wisdom tooth; the claim was a species of malpractice based upon negligence)].

This Court agrees with the modern approach. To the extent that the procedure performed by Dr. Gluck exceeded the consent given by plaintiff, the nature of the claim is one of negligence, not an intentional tort. Consequently, Dr. Gluck's attempt to characterize plaintiff's claims against him for medical malpractice and lack of informed consent as claims for battery is rejected, as is his first affirmative defense, and the motion for judgment dismissing the complaint on the basis of the expiration of the limitations period is denied.

Dated: May 10, 2011

UTE WOLFF LALLY, J.S.C.

ENTERED
MAY 16 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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