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

PRESENT: JOAN B. LOBIS Justice

PART 6

Zakoura, Maria

-v-

Grossi, Robert

INDEX NO. 113789/05

MOTION DATE 5/5/11

MOTION SEQ. NO. 004

MOTION CAL. NO.

The following papers, numbered 1 to 27 were read on this motion to/for Summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-20
Answering Affidavits — Exhibits	21-26
Replying Affidavits	27

Cross-Motion: ☐ Yes ☑ No

FILED

JUL 08 2011

NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION and Order

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7/6/11

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

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MARIA ZAKOTURIA, as Administratrix of the goods, chattels and credits which were of WILLIAM ZAKOTURIA, deceased, and MARIA ZAKOTURIA, individually,

Plaintiffs,

Index No. 113789/05

-against-

Decision and Order

ROBERT J. GROSSI, M.D., MANHATTAN MEDICAL, P.C. and SAINT VINCENT'S CATHOLIC MEDICAL CENTERS ST. VINCENT'S-MANHATTAN,

Defendants.

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JOAN B. LOBIS, J.S.C.:

In Motion Sequence Number 004, defendant St. Vincent's Catholic Medical Centers of New York s/h/a Saint Vincent's Catholic Medical Centers St. Vincent's-Manhattan (the "Hospital") moves for summary judgment (C.P.L.R. Rule 3212) dismissing the action in its entirety. Plaintiff opposes the motion.

This action sounding in medical malpractice and lack of informed consent involves the care provided to plaintiff's decedent William Zakoturia for approximately five hours after Robert J. Grossi, M.D., performed a right carotid endarterectomy on November 19, 2003. The records indicate that after the uncomplicated endarterectomy, Dr. Grossi confirmed that Mr. Zakoturia had no neurological complications and at approximately 10:40 a.m., left Mr. Zakoturia to be transferred to the recovery room from the operating room. Hospital employees were responsible for monitoring Mr. Zakoturia's neurological signs between 11:30 a.m. and 3:00 p.m., in the recovery room and the surgical intensive care unit ("ICU"). A progress note at 11:30 a.m., by Grace Montenegro, M.D.,

indicates that Mr. Zakoturia was neurologically stable, his left pupil was slightly dilated and sluggish to light, and he complained of pain in his lower jaw. Dr. Montenegro's note called for hourly neurological checks. A post-anesthesia nursing data sheet indicates that the Glasgow Coma Scale, pupil evaluation, and arm and leg strength were checked every half hour between 10:55 a.m. and 1:00 p.m., and the results were normal. At 1:00 p.m., Mr. Zakoturia was transferred from the recovery room to the ICU. At 3:00 p.m., Nurse Joan Derrig performed a neurological evaluation and found that he was not moving his left side.

Dr. Grossi testified at his examination before trial ("EBT") that, at approximately 3:00 p.m., he encountered Maria Zakoturia in the ICU and she notified him that Mr. Zakoturia could not move one side of his body and was confused and semiconscious. Dr. Grossi testified that he was surprised that a Hospital employee had not notified him first about his patient's neurological deficits. At about ten minutes after 3:00 p.m., Dr. Grossi determined that Mr. Zakoturia needed immediate surgical re-intervention. At or about 3:20 p.m., Mr. Zakoturia was transferred back to the operating room. During the surgery, Dr. Grossi determined that Mr. Zakoturia had experienced a massive stroke and brain herniation caused by thrombosis of the internal carotid artery. The damage from the stroke was severe and, despite the second surgery, Mr. Zakoturia had no brain function and died about two days later from his injuries.

Plaintiff alleges, inter alia, that Hospital employees failed to properly monitor Mr. Zakoturia's neurological signs after the surgery was completed. Both sides agree that a patient who undergoes a carotid endarterectomy has an increased risk of experiencing carotid artery thrombosis

and/or stroke after the endarterectomy, and that, because of the increased risk, post-carotid endarterectomy patients must be closely monitored for neurological deficits.

One of the major issues in this case is the lack of notes reflecting that the Hospital's various employees were indeed performing the neurological assessments that they testified that they were performing. The Hospital maintains that Dr. Montenegro performed five separate neurological evaluations between 11:30 a.m. and 3:00 p.m., and that Nurse Jeannine McGregor-Ryan performed two neurological evaluations at 1:00 p.m. (upon Mr. Zakoturia's arrival to the ICU) and 2:00 p.m. Mr. Zakoturia's neurological problems were not discovered until Nurse Derrig found that he was not moving his left side at 3:00 p.m.; Nurse Derrig apparently performed the 3:00 p.m. neurological assessment because Nurse McGregor-Ryan was on a lunch break.

The post-operative orders reflect that Kishore Alapati, M.D., a fifth-year Hospital resident who assisted Dr. Grossi in the carotid endarterectomy, wrote a note that called for neurological and vitals checks to be performed "per protocol." The note did not specify when or how often the checks were to be performed. Dr. Alapati testified that he could not recall the protocol in place in 2003. He did not see Mr. Zakoturia again after the surgery.

Dr. Montenegro testified at her EBT that, with post-endarterectomy patients like Mr. Zakoturia, it was her custom and practice to perform neurological assessments every hour. There are no notes reflecting any checks by her after 11:30 a.m., nor did she have any independent recollection of doing so. She testified that she reported the dilated, sluggish pupil to her chief

resident, but could not recall who that was, and there are no notes reflecting this consultation. Dr. Montenegro testified that it was the standard practice at the Hospital that if there were no neurological changes, she would not record her neurological assessment in the patient's chart.

Upon receiving Mr. Zakoturia at 1:00 p.m. in the ICU, Nurse McGregor-Ryan at first wrote that Mr. Zakoturia's upper and lower extremity strength was 5/5, or normal (upper and lower extremity strength is one type of neurological test). At some point this note was crossed out and replaced with "sedated." Nurse McGregor-Ryan testified that Mr. Zakoturia was sleepy or sedated. She testified that she would have performed a full neurological evaluation upon admission of a post-endarterectomy patient at 1:00 p.m., and again at 2:00 p.m. Nurse McGregor-Ryan testified that she could not recall making any other contemporaneous notes about her care and treatment for Mr. Zakoturia from 1:00 p.m. to 8:00 p.m. She could not recall whether the Hospital had any protocol in 2003 with respect to writing contemporaneous progress notes while caring for a patient. The only other note documenting Nurse McGregor-Ryan's neurological assessments is a progress note that she testified she wrote at the end of her shift at 8:00 p.m., after Mr. Zakoturia had already gone back for the second surgery and the stroke was diagnosed. The post-shift note indicated that Mr. Zakoturia was received in the ICU at 1:00 p.m. with equal and reactive pupils and answering "yes" and grunting to his name.

A defendant moving for summary judgment in a medical malpractice action must make a prima facie showing of entitlement to judgment as a matter of law by showing "that in treating the plaintiff there was no departure from good and accepted medical practice or that any

departure was not the proximate cause of the injuries alleged." Roques v. Nobel, 73 A.D.3d 204, 206 (1st Dep't 2010) (citations omitted). To satisfy the burden, a defendant in a medical malpractice action must present expert opinion testimony that is supported by the facts in the record and addresses the essential allegations in the bill of particulars. Id. If the movant makes a prima facie showing, the burden shifts to the party opposing the motion "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986) (citation omitted). "In order to meet the required burden, the plaintiff must submit an affidavit from a medical doctor attesting that the defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged." Roques, 73 A.D.3d at 207 (citations omitted).

The Hospital argues that plaintiff cannot prove that its employees departed from the standard of care in caring for and treating Mr. Zakoturia. The Hospital contends that thrombosis and stroke after an endarterectomy are well-known risks, regardless of how carefully a patient is monitored. The Hospital contends that Mr. Zakoturia was properly monitored, but his risk of a stroke could not be eliminated. The Hospital's attorney argues that "Mr. Zakoturia uniformly exhibited satisfactory results to the wide variety of standard neurological checks which were being performed by several medical professionals each hour, such as sticking out his tongue, grinning, and demonstrating appropriate grip strength and feet movement."

In support of its motion for summary judgment, the Hospital submits an affidavit from William Suggs, M.D., a physician duly licensed to practice medicine in the State of New York

and board certified in surgery with a qualification in vascular surgery. He states that he reviewed the pleadings, medical chart, and EBT transcripts in connection with his review of this case. Dr. Suggs states, within a reasonable degree of medical certainty, that the medical treatment rendered to Mr. Zakoturia by the Hospital was in every way proper and entirely consistent with good and accepted standards of medical care. He states that thrombosis and stroke are well-known risks for a post-endarterectomy patient, regardless of monitoring. He avers that hourly neurological checks are within the standard of care. He opines that "recording the specific results of an initial neurological evaluation, and thereafter entering the specific results of subsequent hourly evaluations only if there are significant changes in the patient's neurological status, is not a departure from good and accepted practice." Dr. Suggs contends that, although Mr. Zakoturia's left pupil was slightly dilated and sluggish to light at 11:30 a.m., in the hours before he was returned to the operating room at 3:20 p.m., he "exhibited satisfactory results to the various standard neurological checks which were being performed each hour, such as sticking out his tongue, grinning, and demonstrating appropriate grip strength and feet movement." Dr. Suggs sets forth that lower jaw pain is not suggestive of a neurological problem, but could be due to the placement of retractors during the endarterectomy.

It is unclear how, given the lack of contemporaneous notes reflecting any neurological status checks after 11:30 a.m., Dr. Suggs can conclude with any degree of medical certainty that Mr. Zakoturia exhibited satisfactory results to the standard neurological checks. None of the employees had an independent recollection of actually performing the neurological examinations. Dr. Suggs' opinion is based on his presumption that the Hospital's employees were conducting neurological

checks in accordance with what they testified was their custom and practice. Thus, it appears that this issue is one of pure credibility and should go to a jury. Since the Hospital did not eliminate all issues of fact that the neurological checks were performed according to the standard of care, the motion is denied.

Nevertheless, the court notes that plaintiff submitted her own expert affirmation in opposition to the motion which highlights the issues of fact that remain unresolved. Plaintiff's expert (name redacted) sets forth that he/she is a physician duly licensed to practice medicine in the State of New York and board certified in surgery with a qualification in vascular surgery. The expert states that he/she reviewed the pleadings, medical chart, and EBT transcripts in connection with his/her review of this case. Plaintiff's expert opines, inter alia, that it was a departure from the standard of care for Dr. Alapati not to specifically set forth how often the neurological examinations were to be performed on Mr. Zakoturia; that it was a departure for Dr. Montenegro to fail to document and/or perform periodic neurological examinations; ahd that it was a departure for Nurse McGregor-Ryan to fail to document her neurological checks and to fail to check the strength of Mr. Zakoturia's upper and lower extremities, even if he was sedated. Plaintiff's expert contends that these failures were a substantial factor in causing Mr. Zakoturia's carotid artery thrombosis to go untreated. The expert opines that there "was a complete and utter breakdown in observation and communication among the surgery residents, interns and nursing staff responsible for" Mr. Zakoturia. Even if defendant had made out a prima facie case, plaintiff has sufficiently rebutted it by raising issues of fact as to whether the neurological monitoring was done properly.

Plaintiff also asserts that the Hospital failed to advise her or Mr. Zakoturia "of the risk of failing to identify the technical cause of residual thrombosis and attendant cerebral infarct and death." The Hospital and its expert, Dr. Suggs, argue that Dr. Grossi, as the person performing the procedures, was responsible for procuring Mr. Zakoturia's informed consent and advising Mr. Zakoturia of the risks, benefits, and alternatives to the endarterectomy and subsequent re-intervention. Plaintiff offers nothing in opposition to this assertion.

"Lack of informed consent" is defined as

> the failure of the person providing the professional treatment or diagnosis to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable medical, dental or podiatric practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation.

Public Health Law § 2805-d(1). In general, when a patient is treated by his or her private physician in a hospital setting, it is the private physician's duty to obtain the patient's informed consent to the procedure. See, e.g., Sela v. Katz, 78 A.D.3d 681, 683 (2d Dep't 2010); Sita v. Long Is. Jewish-Hillside Med. Ctr., 22 A.D.3d 743 (2d Dep't 2005). Plaintiff has failed to address defendant's position that the Hospital had no duty to procure informed consent for a procedure performed by a private treating physician; accordingly, the Hospital is entitled to dismissal of this claim.

Accordingly, it is hereby

ORDERED that the branch of the motion seeking summary judgment on the claim for lack of informed consent is granted, and this claim is dismissed against the Hospital; and it is further

ORDERED that the branch of the motion seeking summary judgment on the claim for medical malpractice is denied; and it is further

ORDERED that the parties shall appear for a pre-trial conference, ready to pick trial dates, on July 19, 2011, at 9:30 a.m., in part 6.

Dated: July 6, 2011

JOAN B. LOBIS, J.S.C.