

<b>Looby v Saratoga Hosp.</b>
2013 NY Slip Op 34136(U)
February 8, 2013
Supreme Court, Saratoga County
Docket Number: 2009-0264
Judge: Thomas D. Nolan
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STATE OF NEW YORK

SUPREME COURT COUNTY OF SARATOGA

JAMES LOOBY,

Plaintiff,

-against-

THE SARATOGA HOSPITAL,

Defendant.

**DECISION AND ORDER**

**RJI No. 45-1-2009-0586**

**Index No.: 2009-0264**

**PRESENT: HON. THOMAS D. NOLAN, JR.**  
**Supreme Court Justice**

**APPEARANCES: GREGORY V. CANALE**  
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FILED

On January 9, 2007, plaintiff allegedly sustained a whiplash-neck injury while being prepped for arthroscopic knee surgery and contends, in this medical malpractice action, that defendant's employee, registered nurse, Robin O'Brien, was negligent by failing to appropriately safeguard him while the anesthesiologist, Dr. Kenneth Wurl, was administering epidural anesthesia.

Plaintiff, then 44 years old, elected to have a medial meniscus tear in his right knee repaired by Dr. Bruce Dick, an orthopaedic surgeon. The procedure was scheduled at Saratoga Hospital's ambulatory surgery center. According to plaintiff, he informed Dr. Dick that he

suffered vasovagal reactions when sedation and numbing agents were administered intravenously to him, and plaintiff related the same information to a hospital employee, identity unknown, in a pre-surgery interview about a week before the scheduled operation. On the morning of January 9, 2007, when he was being prepared for surgery, plaintiff contends he told nurse Robin O'Brien that he usually fainted when administered sedatives and requested that he be lying down when his epidural block was begun. And then, according to plaintiff, he made the same request to Dr. Wurl.

According to all involved, i.e., plaintiff, Dr. Wurl, and nurse O'Brien, while plaintiff was seated upright on the gurney with his legs dangling, O'Brien administered a sedative to him intravenously. Then Dr. Wurl, standing behind plaintiff, inserted the epidural needle into plaintiff's lower back. Plaintiff's heart rate dropped, and he experienced a vasovagal episode. Plaintiff recalls, just before he fainted, that the nurse was approximately 4 or 4 ½ feet away from him. The procedure was immediately stopped; Dr. Wurl extracted the needle; and plaintiff was placed supine on the gurney. Plaintiff recovered and the operation proceeded, under general anesthesia.

The next day, plaintiff had severe neck pain and called Dr. Dick who examined him two days post-surgery and who noted in his office notes that "a presumptive flexion, extension" injury to the plaintiff's neck. Physical therapy was prescribed. When his neck pain did not subside, plaintiff was seen by his family physician, Dr. Robert Nielson, who, after reviewing an MRI of his neck taken on January 18, 2007 showing chronic degenerative disc disease with stenosis at C5-6 and C6-7, stated plaintiff's chronic condition was "aggravated by the whiplash injury".

Relying on the deposition testimony of nurse O'Brien and Dr. Wurl, defendant disputes plaintiff's version of events and contends that plaintiff did not disclose, pre-surgery, his predisposition to faint and that when Dr. Wurl inserted the epidural needle, nurse O'Brien was standing directly in front of plaintiff.

Discovery has been completed. In its motion for summary judgment seeking dismissal of plaintiff's complaint, defendant Saratoga Hospital relies on the pleadings, plaintiff's medical records concerning the surgery and his followup care, and the depositions of plaintiff, Dr. Wurl, and nurse O'Brien, and the affidavit of Dr. David Kim, a Board-certified anesthesiologist. Defendant urges that, even accepting the facts as related by plaintiff, namely, that plaintiff advised a nurse on December 28, 2006 of his propensity for fainting; that plaintiff advised the hospital's intake staff on January 9, 2007 of his propensity for fainting; that plaintiff advised both nurse O'Brien and Dr. Wurl of his propensity for fainting on January 9, 2007; and that nurse O'Brien was standing approximately 4 - 4 1/2 feet away from plaintiff when he passed out, its nursing staff, specifically nurse O'Brien, was not negligent and did not deviate from any standard of care. Dr. Kim, defendant's retained expert witness, states that there is no standard rule establishing where the assisting nurse should be positioned during an epidural procedure, that even if nurse O'Brien had not been standing directly in front of plaintiff, she was still not negligent. Dr. Kim additionally opines that the attending anesthesiologist is always in control of hospital staff, and that if nurse O'Brien should have been in a different position, the attending doctor would be responsible for the error. In any event, defendant contends that since Dr. Wurl was not a hospital employee, but a physician employed by an independent medical group, his negligence, if any, cannot be imputed to defendant.

In opposition, plaintiff submits his affidavit in which he essentially confirms his deposition testimony, and the deposition of Dr. Nielson, and an affidavit of Anne Marie Tomaski, registered nurse and retained expert. Accepting plaintiff's version of events, Nurse Tomaski opines first that nurse O'Brien should not have administered sedation to plaintiff unless he was in a reclining, prone, or secure position and second that she should have been positioned directly in front of plaintiff when the epidural procedure was being performed. In addition, the plaintiff's expert disputes Dr. Kim's opinion that there is no standard rule concerning the positioning of nursing staff when an epidural is administered and opines that the standard of care requires that two nurses, not one, be present when a sedative is intravenously administered - one to inject the medication and the second to monitor the patient - and that this standard was violated by defendant.

Plaintiff also cross-moves for an order granting permission to amend the complaint to conform to CPLR 3017 (c) by withdrawing the monetary ad damnum clause in the complaint and substitute the statutorily mandated phrase, namely that "the amount of damages sought exceeds the jurisdictional limits of all lower courts which would otherwise have jurisdiction".

Now, the general principles which apply to the summary judgment motion. To prevail plaintiff must, among other matters, prove two primary elements - a departure from accepted medical practices and a nexus between that negligent conduct, and his neck injury. Bell v Ellis Hosp., 50 AD3d 1240 (3<sup>rd</sup> Dept 2008); Merritt v Saratoga Hosp., 298 AD2d 802 (3<sup>rd</sup> Dept 2002); Rossi v Arnot Ogden Med. Center, 268 AD2d 916 (3<sup>rd</sup> Dept 2000), lv denied 95 NY2d 751 (2000). To meet its initial burden to demonstrate entitlement to summary judgment dismissing the complaint, defendant must tender admissible evidence demonstrating the absence of material

issues of fact regarding at least one of the core elements. Alvarez v Prospect Hosp., 68 NY2d 320, 326-327 (1986); Gage v Dutkewych, 3 AD3d 629 (3<sup>rd</sup> Dept 2004); Chase v Cayuga Med Center, 2 AD3d 990 (3<sup>rd</sup> Dept 2003); Torns v Samaritan Hosp., 305 AD2d 965 (3<sup>rd</sup> Dept 2003). Once such a threshold showing is made, the plaintiff, to avoid nonsuit, must produce non-conclusory and factually based proof, as opposed to “rote recitals” of allegations or speculative conclusions, to demonstrate a material issue of fact. Svoboda v Our Lady of Lourdes Mem. Hosp., 31 AD3d 877 (3<sup>rd</sup> Dept 2006); Anderson v Lamaute, 306 AD2d 232 (2<sup>nd</sup> Dept 2003); DiMitre v Monsouri, 302 AD2d 420 (2<sup>nd</sup> Dept 2003); Gong v Gjoni, 294 AD2d 648 (3<sup>rd</sup> Dept 2002).

And, as on all summary judgment motions, the court must view the evidence in the light most favorable to the party opposing the motion, here the plaintiff. Ortiz v Varsity Holdings, LLC, 18 NY3d 335, 340 (2011); Harrington v Fernet, 92 AD3d 1070 (3<sup>rd</sup> Dept 2012). In addition, when “generally competent conflicting expert opinions” are presented to the court, “credibility determinations” should not be made by the court since “[a]ny shortcomings as to those opinions affect the weight to be accorded to them by the trier of fact, not their admissibility”. Lopez-Viola v Duell, 99 AD3d \_\_, 2012 Lexis 7902 (3<sup>rd</sup> Dept 2012).

Initially, there is sufficient circumstantial evidence to support plaintiff’s claim that his neck strain was caused by the incident. The key factual issues are (1) where nurse O’Brien was positioned when the incident took place and (2) even if she were positioned directly in front of plaintiff, whether there was adequate staffing in place to safely perform the epidural. see Schallert v Mercy Hosp., 281 AD2d 983 (4<sup>th</sup> Dept 2001).

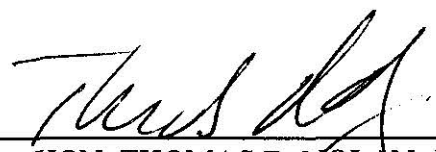
Defendant’s motion is denied, without costs.

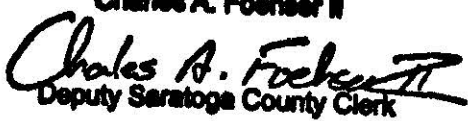
Plaintiff's cross motion is not opposed and is granted without costs. Plaintiff should serve the amended complaint within ten (10) days hereof.

This constitutes the decision and order of the court. The original decision and order is forwarded to counsel for plaintiff. All original motion papers are delivered to the Supreme Court Clerk/County Clerk for filing. Counsel for plaintiff is not relieved from the applicable provisions of CPLR 2220 relating to filing, entry and notice of entry of the decision and order.

So Ordered.

DATED: February 8, 2013  
Saratoga Springs, New York

  
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HON. THOMAS D. NOLAN, JR.  
Supreme Court Justice

**ENTERED**  
**Charles A. Foehner II**  
  
**Deputy Saratoga County Clerk**

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