

**Bohlman v Galler**

2014 NY Slip Op 32455(U)

September 17, 2014

Supreme Court, Suffolk County

Docket Number: 00662/2012

Judge: William B. Rebolini

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Short Form Order

**COPY****SUPREME COURT - STATE OF NEW YORK****I.A.S. PART 7 - SUFFOLK COUNTY****PRESENT:****WILLIAM B. REBOLINI**  
**Justice**

Michael J. Bohlman,

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Plaintiff,

Motion Sequence No.: 004; MDMotion Date: 5/14/14

-against-

Submitted: 8/13/14Robert M. Galler, D.O. and  
New York Spine and Brain Surgery, P.C.Motion Sequence No.: 005; XMDMotion Date: 7/2/14Submitted: 8/13/14

Defendants.

Attorney for Plaintiff:Attorney for Defendants:Weitzman & Kletzkyn, LLP  
845 Third Avenue, 6<sup>th</sup> Floor  
New York, NY 10022Eric Schneiderman  
New York State Attorney General  
By: Alexia Capute Dodd,  
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New York, NY 11788Attorney for Defendants:Fumuso, Kelly, DeVerna,  
Snyder, Swart & Farrell, LLP  
110 Marcus Boulevard, Suite 500  
Hauppauge, NY 11788Clerk of the Court

Upon the following papers numbered 1 to 38 read upon these motions for summary judgment: Notice of Motion and supporting papers (004), 1 - 28; Notice of Cross Motion and supporting papers (005), 29 - 34; Answering Affidavits and supporting papers, 35 - 36; 37 - 38; it is

**ORDERED** that motion (004) by defendants Robert M. Galler, D.O. and New York Spine and Brain Surgery, P.C. pursuant to CPLR 3212 for summary judgment dismissing the complaint is denied; and it is further

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**ORDERED** that cross motion (005) by plaintiff Michael J. Bohlman pursuant to CPLR 3212 for summary judgment on the issue of liability is denied.

In this medical malpractice action, Michael Bohlman seeks damages for personal injuries allegedly caused by the defendants, Robert M. Galler, D.O. and New York Spine and Brain Surgery, P.C., for their alleged negligent departures from the good and accepted standards of medical practice while providing care and treatment to the plaintiff. On November 8, 2007, defendant Galler performed decompressive hemilaminectomy and discectomy with right-sided posterior lumbar fusion at the L4-5 level of plaintiff's lower spine. Plaintiff alleges that Galler negligently placed a pedicle screw in and through the L5 vertebral body allowing the tip of the screw to extend into the retro peritoneal area and impact the posterior wall of the plaintiff's inferior vena cava.<sup>1</sup> Due to the alleged improper placement of the screw, the plaintiff was required to undergo unnecessary surgery to remove the screw which caused deformity of the right iliac vein and further required placement of a covered stent over the deformed right iliac vein, repair of the inferior vena cava, and treatment with anticoagulation therapy. Plaintiff remained under defendants' care and treatment through January 2011.

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 (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]; *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 [2nd Dept 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 [2nd Dept 1981]).

In motion (004), the defendants submitted, inter alia, copies of the summons and complaint, defendants' answer and demands, and plaintiffs' verified bill of particulars; copies of the unsigned deposition transcripts of Michael Bohlman and Robert Galler; attorney's affirmation; affidavit of Stephen Burstein, M.D.; and plaintiff's medical records from John T. Mather Hospital, Dr. Chernoff, Dr. Galler, Stony Brook University Hospital, pain management; reports by Zwanger-Pesiri Radiology, various excerpts from records including electronically signed reports which are not in admissible form,

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<sup>1</sup>The inferior vena cava is formed by the junction of the two iliac veins, Tabers' Cyclopedic Medical Dictionary, 18th Edition.

and records of James Farmer, M.D., Cornell-Weil, New York Presbyterian, and Hospital for Special Surgery.

In motion (005), plaintiff submitted, inter alia, an attorney's affirmation, records from Dr. Farmer, Dr. Stern, and Hospital for Special Surgery, excerpts of medical records, and the unredacted affidavit of plaintiff's expert.

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 [2nd Dept 1998], *app denied* 92 NY2d 818, 685 NYS2d 420 [1999]). 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*, 224 AD2d 674, 638 NYS2d 700 [2nd Dept 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 [2nd Dept], *app denied* 92 NY2d 814, 681 NYS2d 475 [1998]; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [2nd Dept 1994]).

To rebut a prima facie showing of entitlement to an order granting summary judgment by the defendant, the plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice, and containing an opinion that the defendant's acts or omissions were a competent-producing cause of the injuries of the plaintiff (*see, Lifshitz v Beth Israel Med. Ctr-Kings Highway Div.*, 7 AD3d 759, 776 NYS2d 907 [2nd Dept 2004]; *Domaradzki v Glen Cove OB/GYN Assocs.*, 242 AD2d 282, 660 NYS2d 739 [2nd Dept 1997]).

Defendants' expert, Stephen Burstein, M.D., averred that he is a physician licensed to practice medicine in New York State and is board certified in neurological surgery. He opined within a reasonable degree of medical certainty that Dr. Galler acted appropriately and did not depart from the standard of medical and surgical practice in his care and treatment of the plaintiff. He stated the plaintiff, a 34 year old male, presented to Dr. Galler in October, 2003, with a back injury after lifting something heavy at work. He set forth the care and treatment provided and indicated that the plaintiff was thereafter seen at Mather Memorial Hospital emergency department in late November 2003. A lumbar MRI revealed a herniated disc (HNP) at L4-5. Dr. Burstein set forth plaintiff's care and treatment over the following three years, including his treatment with Dr. Chernoff.

Dr. Burstein continued that a lumbar MRI on October 1, 2007 revealed disc dessication (state of extreme dryness) and HNP at L4-5 with spondylolysis at L5, and that Drs. Marc and Ira Chernoff advised the plaintiff he may eventually need spinal fusion to permanently join two vertebrae to help his low back pain. On November 2, 2007, plaintiff presented to Dr. Galler for neurosurgical consultation. On November 7, 2010, the plaintiff was admitted to Stony Brook University Hospital where he was operated on by Dr. Galler on November 8, 2010. A decompressive hemilaminectomy

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with discectomy at L4-5, with underbody fusion, pedicle screw fixation, and intertransverse fusion at L4-5, with allograft and autograft were performed. The plaintiff was discharged home on November 13, 2007 and followed with Dr. Galler postoperatively. A lumbosacral spine x-ray on January 28, 2008 showed good fusion and position of the instrumentation. On August 4, 2008, an MRI was ordered which did not reveal any new disc herniations. The plaintiff had increased pain in his back, so Mobic and physical therapy were ordered, with pain management injections to be considered if there was no improvement in one month. In September 2008, the plaintiff continued to have low back and severe left leg pain with weakness, so he was referred to Dr. Groth for pain management and treatment of lumbar radiculopathy. By March 2009, when the plaintiff returned to Dr. Galler, his back pain had worsened and he had left leg and foot numbness. MRI and CT scans were ordered, showing the previous posterior spine fusion surgery with two pedicular screws extending into the right aspect of L4 and L5 vertebral bodies, with orthopedic hardware present within the disc space.

Dr. Burstein continued that by June 2009, the plaintiff was still complaining of pain in his left buttock radiating to his left foot. In that Dr. Galler felt there was no role for neurosurgical intervention, the plaintiff was sent to Dr. Raanan for pain management injections and EMG/nerve conduction studies, which, Dr. Burstein stated, were essentially normal. In February 2010, when the plaintiff returned to Dr. Galler, it was felt no neurosurgical intervention was necessary and that the plaintiff reached his maximum medical improvement. After a motor vehicle accident in July 2010, the plaintiff was seen by Dr. Galler's physician's assistant who determined that a lumbar x-ray showed good position of the hardware and bone graft.

On January 10, 2011, stated Dr. Burstein, the plaintiff was seen by Dr. Marc Chernoff for left sided low back, leg and hip pain with numbness in his left foot since May 18, 2010. Dr. Burstein stated that a post-operative x-ray revealed the pedicle screw was slightly through the L5 vertebral body, and came close to the iliac vessel. He did not indicate the date of such x-ray. Dr. Burstein continued that Dr. Chernoff spoke with Dr. Panasci who reviewed the 2009 CT scan, and that Dr. Chernoff's note indicated the CT demonstrated the right L5 pedicle screw was adjacent to the iliac vein. On January 25, 2011, a CT with contrast of the lumbar spine was performed, interpreted, and compared to the prior CT of June 4, 2009, and showed unilateral right-sided pedicle screws at L4 and L5 without hardware failure. The tip of the right screw in the L5 projected over the outline of the right iliac vein. Additional CT views on January 27, 2011, ordered by Dr. Chernoff and interpreted by Dr. Panasci, demonstrated that the tip of the right pedicle screw in L5 extended into the retroperitoneal area but artifact degraded images. It appeared to be related to the posterior wall of the inferior vena cava, but it was not believed it extended into the lumen of the vena cava to a significant degree. On February 21, 2011, Dr. Chernoff planned to get a second opinion at the Hospital for Special Surgery because, if the screw eroded into the vessel, it could rupture and cause death, as the screw is adjacent to the wall of the vessel.

Dr. Burstein continued that on March 30, 2011, the plaintiff was seen by Dr. James Farmer at Hospital for Special Surgery, who reviewed the CT scan of January 25, 2011 and determined that the right pedicle screw appeared to contact the right iliac vein and perhaps deform it. Dr. Farmer

referred the plaintiff for vascular consultation with Dr. Bush to determine whether the hardware should be removed. Dr. Bush, continued Dr. Burstein, felt there was a very small risk of the screw eroding through the vessel causing a significant bleed. Dr. Bush then indicated on August 25, 2011, that it was difficult to predict the extent of, or potential for, vein injury due to the screw. The least perceived risk would be to place a covered stent across the vessel, then proceed with the orthopedic procedure. Dr. Burstein indicated that on January 11, 2012, the plaintiff was admitted to New York Presbyterian Hospital by Dr. Bush who performed a venogram and inserted a covered stent over the right common iliac vein. On January 25, 2011, Dr. Farmer admitted the plaintiff to Hospital for Special Surgery for removal of the two pedicle screws and a rod. Dr. Farmer recorded in his operative note that the screw penetrated the vertebral body and was up against the iliac vein; the fusion was solid; and the hardware was removed. Thereafter, the plaintiff was placed on Coumadin therapy for six months. Dr. Burstein stated that on April 29, 2013, the plaintiff returned to Dr. Chernoff's office complaining of increasing lower back pain with radiation down his legs. He was unable to lift his legs, and he felt a popping in his lower back. The MRI, stated Dr. Burstein, revealed no stenosis or nerve root compression at L4-5, and no adjacent segment disease.

Dr. Burstein opined that Dr. Galler appropriately and correctly placed the right pedicle screw in the L5 vertebral body during the right-sided posterior lumbar fusion on November 8, 2007, and that he did not negligently place a pedicle screw into the posterior wall of the patient's inferior vena cava, or through the L5 vertebral body, and did not place the patient at risk of perforation to the inferior vena cava. He reviewed the radiological films from November 8, 2007 through May 25, 2010, and did not see any screw protrusion or perforation at L5. He continued that the depth that was tapped and measured in the pedicle would accommodate the right L5 pedicle screw without it perforating the anterior ventral body. He then contradicted this opinion by stating that when he reviewed the June 4, 2009 lumbar CT scan, that the right L5 pedicle screw was lightly perched or "proud," and that this slight protrusion of the screw, which was not penetrating any blood vessel, was not causing the plaintiff any harm. He then stated that even if the pedicle screw protruded through the right L5 vertebral body, the screw would not pose any problem or cause any harm to the plaintiff. Dr. Burstein opined that it was not necessary for the plaintiff to have undergone removal of the right L5 pedicle screw by Dr. Farmer. Dr. Burstein also stated that it is his opinion that Dr. Marc Chernoff scared the plaintiff into having the pedicle screw removed.

Based upon the foregoing, it is determined that the moving papers raise factual issues which preclude summary judgment from being granted to the defendants. Dr. Burstein's opinions that the subsequent surgery was not necessary and that there was no danger of the screw causing trauma or penetrating the blood vessel is inapposite to the opinions expressed by Dr. Farmer and Dr. Bush who felt that the surgery was necessary to remove the pedicle screw due to the potential of causing a bleed from erosion of the vessel, which was noted to be deformed by the screw. Dr. Farmer, upon performing the surgery, found the screw penetrated the vertebral body and was up against the iliac vein, contrary to Dr. Burstein's opinion that the screw did not penetrate through the anterior pedicle. Dr. Burstein's opinion that Dr. Galler appropriately and properly placed the screw was conclusory and unsupported with the basis for his opinion, other than that Dr. Galler stated that he properly measured and tapped the bone. If the screw was properly placed, as Dr. Bernstein opined, he offered

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no explanation for the finding by Dr. Farmer that the screw penetrated through the bone and that the tip of the screw was up against the iliac vein, raising further factual issues.

It is further determined that the plaintiff raised factual issues in the opposing papers which preclude summary judgment as well. Plaintiff's expert averred that he is a physician licensed to practice medicine in New York State specializing in neurological surgery in which he is board certified. He indicated the materials and records he reviewed and opined within a reasonable degree of medical certainty that the defendants departed from good and acceptable medical practice during the surgery of November 8, 2007 in failing to appreciate the positioning of the pedicle screw that passed through the plaintiff's vertebral body at L5. He stated that the screw was left positioned against the posterior wall of the claimant's right iliac vein. This, he continued, resulted in subsequent surgical procedures to correct this condition to remove the hardware, including the pedicle screw, and place a stent on the right iliac vein. Based upon the foregoing, defendants' and plaintiff's experts present opposing medical opinions.

Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions (*Shehebar v Boro Park Obstetrics and Gynecology, P.C.*, 106 AD3d 715, 964 NYS2d 239 [2d Dept 2013]; *Feinberg v Feit*, 23 AD3d 517, 806 NYS2d 661 [2d Dept 2005]; *Shields v Baktidy*, 11 AD3d 671, 783 NYS2d 652 [2d Dept 2004]).

Accordingly, the respective motions (004) and (005) for summary judgment are denied.

Dated:

September 17, 2014



HON. WILLIAM B. REBOLINI, J.S.C.

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