

Dacey v Huckell

2015 NY Slip Op 30206(U)

February 11, 2015

Supreme Court, Wyoming County

Docket Number: 42471

Judge: Michael M. Mohun

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At a term of the Supreme Court held in and for the County of Wyoming, at the Court-house in Warsaw, New York, on the 11th day of February, 2015

PRESENT: **HONORABLE MICHAEL M. MOHUN**
Acting Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT: COUNTY OF WYOMING

EDWARD P. DACEY,

Plaintiff,

v.

DECISION AND ORDER
Index No. 42471

**CAMERON B. HUCKELL, M.D.,
KRISHNA MUKKAMALA, M.D., AND
KALEIDA HEALTH, d/b/a
BUFFALO GENERAL HOSPITAL,**

Defendants.

Defendant Kaleida Health having moved, by notice of motion dated April 28, 2014, for an order pursuant to CPLR §3212 granting it summary judgment and dismissing the action on the grounds that it is without merit; and defendant Krishna Mukkamala, M.D., having moved, by notice of motion dated April 30, 2014, for an order pursuant to CPLR §3212 granting him summary judgment and dismissing the action on the grounds that it is without merit, and Defendant Cameron B. Huckell, M.D., having also moved, by notice of motion dated May 1, 2014, for an order pursuant to

CPLR §3212 granting him summary judgment and dismissing the action on the grounds that it is without merit, and said motions having duly come on to be heard.

NOW, upon reading the pleadings of the parties; and on reading and filing the notice of motion of Kaleida Health [hereinafter, "Buffalo General"], supported by the affidavit of the John P. Danieu, Esq., attorney for Buffalo General, sworn to on April 28, 2014, together with the annexed exhibits and the memorandum of law; the expert affidavit of David B. Albert, M.D., sworn to on April 18, 2014; the notice of motion of Krishna Mukkamala, M.D., supported by the affidavit of Tomas J. Callocchia, Esq., attorney for Krishna Mukkamala, M.D., sworn to on April 30, 2014, together with the annexed exhibits; the expert affidavit of David M. Rothenberg, M.D., F.C.C.M., sworn to on April 28, 2014; the notice of motion of Cameron B. Huckell, M.D., supported by the affidavit of Jennifer L. Noah, Esq., attorney for Cameron B. Huckell, M.D., sworn to on May 1, 2014, together with the annexed exhibits; the expert affirmation of Eric Seybold, M.D., dated April 23, 2014; the responding affidavit of Paul A. Bender, Esq., attorney for the plaintiff, sworn to on August 18, 2014, together with the annexed exhibits; the undated expert affirmation of Daniel S. Husted, M.D.; the reply affidavit of John P. Danieu, Esq., sworn to on August 27, 2014; the reply affidavit of Tomas J. Callocchia, Esq., sworn to on August 27, 2014; the reply affidavit

of Jennifer L. Noah, Esq., sworn to on August 27, 2014; and the expert affidavit of Daniel S. Husted, M.D., sworn to on August 28, 2014; and after hearing Jennifer L. Noah, Esq., Tomas J. Callocchia, Esq., and John P. Danieu, Esq., in support of the motions of their clients, and Paul A. Bender, Esq., in opposition thereto, due deliberation having been had, the following decision is rendered.

The plaintiff, Edward P. Dacey, underwent a lumbar decompression and fusion of levels L1 to S1 at Buffalo General Hospital on January 16, 2008. Dr. Huckell performed the surgery. Dr. Mukkamala was the attending Anesthesiologist, aided by Dr. Celeste Martin, an anesthesiology resident at Buffalo General. Mr. Dacey arrived in the operating room at around 8:00 am. Dr. Mukkamala secured his airway, anesthetized him and applied a "Dupaco pillow" to his face in preparation for maneuvering Mr. Dacey into a prone position on the specialized "Jackson" table to be used for the operation. Hospital staff were then called in to help actually place Mr. Dacey face down on the operating table.

Dr. Huckell made his first incision at 8:45 am, and the operation ended, the records show, at 3:07 pm. During the surgery, Mr. Dacey experienced substantial blood loss, as well as reduced blood pressures. In order to compensate for the blood loss and maintain blood pressures, copious amounts of blood, blood products and fluids were infused into Mr.

Dacey over the course of the operation. Also, after returning him to a supine position and removing the "Dupaco pillow" from his face at the conclusion of the operation, it was observed that Mr. Dacey had developed pronounced facial edema. Due to concerns of associated airway edema, Dr. Huckell and Dr. Mukkamala decided that endotracheal intubation should be maintained until the swelling had subsided. Mr. Dacey was then transferred to the Intensive Care Unit. On the morning of January 18, while still under intensive care, Mr. Dacey began to complain that he had become blind in his right eye, and nearly blind in his left. According to the medical records, the ophthalmologist called in to examine Mr. Dacey diagnosed the acute vision loss as the result of "transient ischemic optic neuropathy [hereinafter, "ION"] secondary to hemodynamic compromise" occurring during the surgery.

The complaint alleges causes of action for malpractice, claiming negligence and failure to obtain informed consent. The complaint identifies the time period during which the injury causing events occurred as "on or about January 16, 2008, and prior thereto." The plaintiff's Bills of Particulars assert that the defendants and "their agents and/or employees" were negligent and/or committed malpractice in failing to obtain informed consent, and "in failing to properly monitor blood levels and blood loss during the operative procedure [. . .] causing and allowing the Plaintiff to remain in a prone position for a prolonged period of time [. . .] and in

otherwise failing to adhere to the [applicable] standards of care.”

The defendants’ submissions are sufficient to meet their burdens upon the motions to show, prima facie, that they are entitled to judgment as a matter of law. In addition to the deposition testimony and records submitted, each of the defendants has offered the opinion of an expert in the relevant fields. Upon reviewing the case, each of the defendants’ experts reaches the conclusion that no malpractice occurred.

For Dr. Huckell, Eric Seybold, M.D., states that it was appropriate for Huckell to address all of the levels from L1 to S1 in a single operation, and that the surgery on the plaintiff was not excessively long. During the surgery, Huckell sufficiently communicated with the anesthesia team, and he appropriately relied on them with respect to infusions. According to Seybold, Huckell obtained informed consent from the plaintiff prior to the surgery even though he did not warn of the risk of blindness. The prevailing standard of care does not require that the risk of blindness must be disclosed, Seybold asserts. Moreover, in view of the extreme rarity of blindness following spine surgery and the other factors to be considered, in Seybold’s opinion, a reasonable patient in Mr. Dacey’s position would still have chosen to proceed with the operation even if the risk of blindness had been disclosed. Lastly, Seybold states that the prone positioning of Mr. Dacey during the surgery did not cause his blindness, and, in any case,

“there were no indications at any time during the surgery that the patient should have or could have been safely repositioned or that the surgery should have been stopped.”

For Dr. Mukkamala, David M. Rothenberg, M.D., F.C.C.M., also asserts that “intraoperative vision loss during lumbar surgery is an exceptionally rare and unpredictable risk.” According to Rothenberg, “[t]here is no scientific evidence to suggest that blood loss or prone positioning will cause intraoperative vision loss via ischemic neuropathy.” Although excessive blood loss and prone positioning are among the risk factors identified “in retrospective studies of reported cases of ION,” in Dr. Rothenberg’s opinion “these associated factors have never been proven to cause vision loss.” He states that “it is not understood what physiological mechanism causes the vision loss” that occurs in ischemic optic neuropathy. With respect to Dr. Mukkamala’s conduct during the operation, Dr. Rothenberg finds no fault. At all times, the anesthesia team “appropriately monitored and documented the patient’s blood pressure” and “hemoglobin and hemocrit values,” and responded correctly to the plaintiff’s blood loss and reduced blood pressures. Furthermore, in Dr. Rothenberg’s opinion, the records of the operation in fact show that the plaintiff “did not experience any sustained hypotension during the procedure.” Lastly, Dr. Rothenberg finds that the operation was conducted upon informed consent.

For Buffalo General, David B. Albert, M.D., points out that all of the hospital employees who participated in the operation were under the supervision of the attending physicians, Huckell and Mukkamala. The attending physicians, not hospital staff, obtained informed consent from the plaintiff and made all of the decisions with regard to the nature of the procedure, its length and the positioning of the plaintiff during it. It was not inappropriate for Dr. Celeste Martin, a second-year anesthesia resident employed by the hospital, to assist Dr. Mukkamala in the operation under Mukkamala's supervision. Moreover, Dr. Martin "did not provide any direction or use independent medical judgment regarding the administration of medications, blood products or other fluids during the plaintiff's procedure." In Dr. Albert's opinion, as the attending anesthesiologist, Mukkamala was the one who was "ultimately responsible for monitoring and maintaining a patient's hemodynamics during surgery," and nothing occurred during the surgery which would have required Dr. Martin or any other hospital employee to exercise independent medical judgment in order to intervene in the care being administered to the plaintiff. The staff followed the orders of the attending physicians and "appropriately provided blood products and/or fluids when requested" in the course of the plaintiff's surgery. In Dr. Albert's opinion, "no action or inaction by Dr. Martin or the hospital staff were [sic] the proximate cause of any injuries claimed by the

plaintiff.”

Having found on the basis of these expert opinions that the defendants have made a prima facie showing that they are entitled to judgment, the burden now shifts to the plaintiff to show that material issues of fact remain to be determined, necessitating a trial (Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 [1986]). With regard to the papers submitted by the plaintiff in opposition to the motions, the Court notes, initially, that the defendants have objected to the expert affirmation submitted by Daniel S. Husted, M.D., on the grounds that it is unsworn; as a physician licensed in the State of Florida, not in New York, Dr. Husted is not authorized by CPLR §2106(a) to submit an affirmation in lieu of an affidavit. Responding to this objection, plaintiff’s counsel served upon defense counsel before the return day of the motions an affidavit from Dr. Husted restating the information contained in his affirmation. Thus, since the plaintiff has now “corrected this technical defect in reply by submitting the identical evidence in proper form,” the Court has determined that it will consider Dr. Husted’s opinion over the defendants’ objections (Matos v Schwartz, 104 A.D.3d 650, 653 [2nd Dept., 2013]).

Dr. Husted believes that the plan to proceed with a fusion of the region from L1 to S1 was “overbroad” and “unwarranted” in view of Mr. Dacey’s health problems and chief complaints. More importantly, it is his

opinion that “the procedure should have been curtailed and terminated or otherwise limited in its scope upon realization of circumstances presented during the operative procedure . . .” In particular, Dr. Husted asserts that “the decision by Dr. Huckell to continue with the operative procedure, in spite of the significant blood loss in the early stage of the operation, was a deviation from acceptable standards of care.” In addition, he indicates that Dr. Mukkamala should have observed the developing facial edema during the operation and should have informed Dr. Huckell, as well as taken steps – such as repositioning the patient’s head – in order to alleviate the developing condition.

While Dr. Husted appears to agree with Dr. Rothenberg that the precise physiological mechanism by which ION is caused is not fully understood, he states that “[t]he greatest surgical risk for ischemic optic neuropathy is related to prolonged spinal procedures where the patient is placed in a prone position for a prolonged period of time,” and that “ION is most commonly associated with acute blood loss.” He explains that “[t]here is a predisposition for ION related to the ratio of nerve heads to capillary blood supply.” He indicates that it is well known that decreased blood supply during surgery can “put the optic nerve at greater risk.” He also states that facial edema is a “precipitating factor” for ION, and that “increased tissue edema may interfere with perfusion of the optic nerve heads, creating a

compartment-like syndrome and contributing to ION.” Furthermore, “[s]imple preventative measures have been known for some time including avoiding direct pressure on the orbits, avoiding hypotension and avoiding intra and post operative anemia.” He notes that Mr. Dacey experienced a number of the conditions known to be associated with an increased risk of ION during the course of the operation, and he faults the doctors in the operating room for deviating from minimum standards of care by failing to take preventative measures. He concludes that these deviations from the standard of care “were a substantial factor in causing Mr. Dacey’s vision loss.” Lastly, Dr. Husted does not agree with Dr. Rothenberg that the incidence of vision loss during non-ophthalmology surgery is so rare that it is unnecessary to disclose it to the patient when obtaining consent. On the contrary, in Dr. Husted’s opinion, the recognized standard of care required the disclosure of the risk. By failing to disclose it in this case, Dr. Huckell failed to obtain informed consent from Mr. Dacey for the surgery in Dr. Husted’s view.

In the Court’s estimation, Dr. Husted’s affidavit establishes that material questions of fact remain to be determined with respect to the plaintiff’s causes of action against Dr. Huckell and Dr. Mukkamala. Dr. Husted clearly states that Huckell and Mukkamala not only deviated from the accepted standard of care in several respects during the surgery, but also

that those deviations contributed to causing Mr. Dacey's blindness. As noted, Dr. Husted also states that the accepted standards of care required that the risk of blindness be disclosed to Mr. Dacey before the surgery. Assuming this is correct, given the catastrophic nature of suffering blindness as a complication of elective back surgery, the Court finds that it is a question to be left for the jury whether a reasonable patient in Mr. Dacey's position would nonetheless have chosen to proceed with the operation had the risk of blindness been disclosed to him. Accordingly, the motions of Dr. Huckell and Dr. Mukkamala shall be denied.

With respect to motion of Buffalo General, the Court finds that the plaintiff has not succeeded in showing that material questions remain to be determined. The record before the Court establishes that the hospital staff acted upon the orders of the attending physicians in this case, and it is well settled that "a hospital is protected from liability where its professional staff follows the orders of private physicians selected by the patient" (Cline v. Moore, 45 Misc.3d 427 [Sup. Ct., Erie Co., [2014]; Dengler v. Posnick, 83 A.D.3d 1385, 1387 [4th Dept., 2011]). This is not a case where the plaintiff has shown that the orders of the attending physicians were "so clearly contraindicated by normal practice that ordinary prudence" placed a duty upon hospital staff to inquire into the correctness of the orders (Dengler, id.). Therefore, the motion of Buffalo General shall be granted.

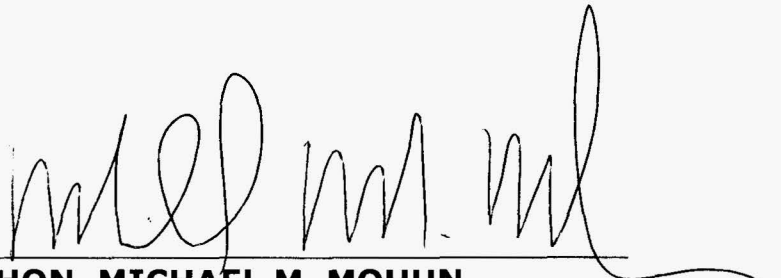
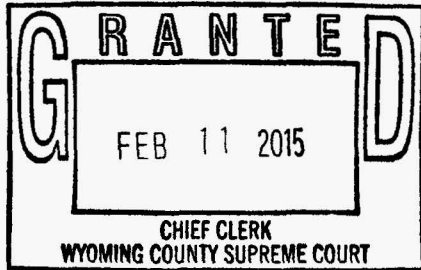
NOW, THEREFORE, it is hereby

ORDERED that the motion of defendant Cameron B. Huckell, M.D., for summary judgment is denied; and it is further

ORDERED that the motion of defendant Krishna Mukkamala, M.D., for summary judgment is also denied; and it is further

ORDERED that the motion of defendant Kaleida Health, d.b.a. Buffalo General Hospital, for summary judgment is granted and the causes of action against Kaleida Health contained in the complaint are hereby dismissed.

DATED: February 11, 2015
Warsaw, New York



HON. MICHAEL M. MOHUN
Acting Justice of the Supreme Court