

**Pormigiano v St. Luke's-Rossevelt Hosp. Ctr.
Found., Inc.**

2015 NY Slip Op 32434(U)

December 23, 2015

Supreme Court, New York County

Docket Number: 805366/13

Judge: Alice Schlesinger

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

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JOHN PORMIGIANO and CHRISTINA PORMIGIANO,

Index No. 805366/13

Plaintiff,
-against-

Mot. Seq. 001

ST. LUKE'S-ROOSEVELT HOSPITAL CENTER
FOUNDATION, INC., SANFORD LITWIN, M.D.,
and HUGH SHARP, CRNA,

Defendants.

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SCHLESINGER, J:

This medical malpractice action arises from allegations of negligent treatment of plaintiff John Pormigiano, at defendant St.-Luke's-Roosevelt Hospital Center Foundation, Inc. (the "Hospital") on August 5, 2011. On this date, plaintiff underwent surgery at the Hospital to revise a colostomy. Defendant Sanford Littwin, M.D. was the attending anesthesiologist and defendant Hugh Sharp was the Certified Registered Nurse Anesthetist who administered the anesthesia. Plaintiff alleges that as a result of the defendants' malpractice (described below), he suffered a severe compartment syndrome in his left leg requiring emergency surgery and bilateral carpal tunnel syndrome with chronic denervation, requiring surgery on the left arm and creating a need for future surgery on the right arm.

As set forth in paragraph 2 of the Bill of Particulars, plaintiff alleges that the defendants departed from good accepted medical practice:

- [i]n their failure to take proper measures to protect the patient when positioning for the procedure and monitoring the patient's position requirements throughout the surgery; in their failure to maintain records that contain evidence or

[*2]

documentation that proper care was taken to protect the patient from nerve injuries to his upper extremities; in their failure to take proper care to protect the patient from nerve injuries to his upper extremities; in their failure to maintain records that contain evidence or documentation that measures were taken to prevent nerve injury during the surgery; in their failure to take proper measures to prevent nerve injury during the surgery; in their failure to create, promulgate and enforce policies, procedures and protocols to prevent and timely treat intra-operative nerve damage.

In this motion, plaintiff seeks to compel production of six hospital protocols.¹ The protocols are: (1) Clinical Duties of Attendings; (2) Guidelines for the Ethical Practice of Anesthesiology; (3) Guidelines for Patient Care in Anesthesiology; (4) Physical Status Classification; (5) Anesthesia Technician Duties; and (6) Pre-Admission Testing Requirements for Patients who will be Attended by Anesthesiologist. At oral argument, the court directed defendants' counsel to submit these protocols in their entirety for an in camera review, to determine whether, and to what extent, the protocols are discoverable. The court has concluded such review, and the discussion below addresses each of the protocols separately.

Clinical Duties of Attendings

The motion is granted as to this protocol. There are numerous examples of this protocol's relevance to the alleged departures at issue. Two pertain to requirements that the attending anesthesiologist of record "will . . . instruct the residents in the operating room in the management and monitoring of their cases and will at all times ensure patient safety . . . [and] ensure that all anesthesiology documentation is

¹ Plaintiff originally sought the production of seven protocols, but at oral argument on this motion, the parties reached an agreement resolving the demand for the seventh protocol.

completed.” Further, the portions of the protocol that are not directly related to the alleged departures will not prejudice defendants upon disclosure. Thus, this protocol shall be provided to plaintiff in its entirety.

Guidelines for the Ethical Practice of Anesthesiology

The motion is granted as to this protocol. Like the prior protocol, there are numerous guidelines which appear to be relevant to the allegations in this case. Some include the following: “when directing non-physician anesthesia providers, anesthesiologists should provide or ensure the same level of preoperative evaluation, care and counseling as when personally providing these same aspects of anesthesia care . . . [and] when directing non-physician anesthesia providers or physicians in training in the actual delivery of anesthetics, anesthesiologists should remain personally and continuously available for direction and supervision during the anesthetic; they should directly participate in the most demanding aspects of the anesthetic care.”

Further, the protocol may be disclosed in its entirety, as doing so will not prejudice defendants. This finding is based in part on the fact that this protocol is based entirely on other, publicly available standards, such as the American Medical Association Principles of Medical Ethics and the American Society of Anesthesiologists (“ASA”) Ethical Guidelines.

Guidelines for Patient Care in Anesthesiology

The motion is granted as to this protocol. Much of this protocol is directly relevant to the alleged departures. The most pertinent examples include the following: “preparation of patients for anesthesia . . . recording an assessment and an anesthetic plan on the patient’s chart . . . on-site medical direction of any nonphysician who

participates in the delivery of anesthesia care to the patient [including certified registered nurse anesthetists] . . . re-evaluation of the patient immediately prior to induction . . . appropriate monitoring of the patient . . . [and] recording the pertinent events of the procedure.”

This protocol may be disclosed in its entirety, since the portions not directly relevant to the alleged departures are based on publicly available ASA guidelines and will not otherwise prejudice defendants.

Physical Status Classification

The motion is denied as to this protocol. This protocol contains a brief summary of six classifications pertaining to different conditions of patients. However, there are no allegations, for example, that the surgery at issue should not have been performed in the first place, or performed differently, based on the classification of plaintiff in this regard. Further, nothing in this protocol pertains to the alleged departures.

Anesthesia Technician Duties

The motion is denied as to this protocol. The duties set forth in this protocol pertain exclusively to the set up, clean-up, and storage of anesthesia supplies and equipment. Such duties clearly do not touch on the alleged departures in this matter.

Pre-Admission Testing Requirements for Patients who will be Attended by

Anesthesiologist

The motion is denied as to this protocol, for reasons similar to why denial as to the Physical Status Classification is warranted. This protocol sets forth duties regarding taking a patient’s history and obtaining a physical examination before surgery. But there are no allegations that defendants departed in their pre-surgery evaluations of

plaintiff. In this vein, the protocol does not relate in any way to the alleged departures in this matter.

Accordingly, it is hereby

ORDERED that plaintiff's motion is granted to the extent that, within 14 days of today, defendants shall provide to plaintiff full and unredacted copies of the protocols entitled Clinical Duties of Attendings, Guidelines for the Ethical Practice of Anesthesiology, and Guidelines for Patient Care in Anesthesiology.

Dated: December 23, 2015

DEC 23 2015


ALICE SCHLESINGER

J.S.C.