

Boyles v St. Peter's Hosp.
2015 NY Slip Op 32692(U)
March 31, 2015
Supreme Court, Dutchess County
Docket Number: 2764/11
Judge: James D. Pagonis
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS
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WILLIAM BOYLES and BONNIE BOYLES,

Plaintiffs,

DECISION and ORDER

- against -

Index No. 2764/11

ST. PETER'S HOSPITAL, THE
ANESTHESIOLOGY GROUP, P.C., and
DERRICK R. WURL, M.D.,

Defendants.

-----X

PAGONES, J D., A.J.S.C.

Defendant St. Peter's Hospital moves for an order, pursuant to CPLR 3212, dismissing plaintiffs' amended complaint. Defendants The Anesthesia Group of Albany, P.C. and Derrick R. Wurl, M.D. also move for an order, pursuant to CPLR 3212, dismissing plaintiffs' amended complaint. Plaintiffs cross-move for an order, pursuant to CPLR 3042(b), allowing plaintiffs to amend their bill of particulars and denying the defendants' motions.

The following papers were read:

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Upon the foregoing papers, the motions and cross-motion are decided as follows:

By way of background, this action was commenced by the filing of a summons and complaint on April 22, 2011. The Complaint seeks to recover money damages for injuries and losses allegedly sustained as the result of the negligence and malpractice of the defendants in connection with the administration of anesthesia in conjunction with the plaintiff William Boyles' bilateral knee replacement on October 28, 2008, and his post-operative care. The plaintiffs' amended complaint sets forth a cause of action for medical malpractice, lack of informed consent and loss of consortium.

On a motion for summary judgment, the test to be applied is whether triable issues of fact exist or whether on the proof submitted judgment can be granted to a party as a matter of law (*see Andre v. Pomeroy*, 35 NY2d 361 [1974]). The movants must set forth a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact (*see Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the movants set forth a

prima facie case, the burden of going forward shifts to the opponents of the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (*see Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

Defendant St. Peter's Hospital's Motion for Summary Judgment

In order to establish liability for medical malpractice, a plaintiff must prove that the defendant deviated or departed from accepted community standards of practice and that such departure was a proximate cause of the plaintiff's injuries (*see Salvia v. St. Catherine of Sienna Med. Ctr.*, 84 AD3d 1053 [2nd Dept 2011]). On a motion for summary judgment, a defendant has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby (*see Heller v. Weinberg*, 77 AD3d 622 [2nd Dept 2010] *leave to appeal denied by* 16 NY3d 707). In opposition, a plaintiff must submit evidentiary facts or materials to rebut the defendant's prima facie showing, so as to demonstrate the existence of a triable issue of fact (*see Stukas v. Streiter*, 83 AD3d 18 [2nd Dept 2011]).

The expert opinion of Jeffrey M. Katz, M.D. that St. Peter's Hospital did not depart from good and accepted medical practice, coupled with the deposition testimonies of Dr. Wurl, Susan Robbiano, CRNA, Kendra Pember, R.N., Dr. Burdick, the plaintiffs and the medical records annexed to defendant St. Peter's

Hospital's motion are sufficient to establish St. Peter's Hospital's prima facie entitlement to judgment as to plaintiffs' first cause of action (see *Arkin v. Resnick*, 68 AD3d 692 [2nd Dept 2009]). Dr. Katz indicates that the medical care and treatment provided by St. Peter's Hospital to William Boyles between October 28, 2008 and November 3, 2008, "was at all times entirely appropriate and consistent with accepted medical standards and practice." Dr. Katz further states that "[a]t no time did St. Peter's Hospital deviate or depart from accepted standards in connection with the care and treatment it provided to William Boyles." Additionally, defendant St. Peter's Hospital makes a prima facie showing of entitlement to judgment as matter of law as to plaintiffs' second cause of action, i.e. lack of informed consent, by establishing that the plaintiff William Boyles injuries were not due in whole or in part, to having undergone some affirmative violation of his physical integrity in the absence of informed consent (see *Brady v. Westchester County Healthcare Corp.*, 78 AD3d 1097 [2nd Dept 2010]).

The Court, in an effort to promote judicial economy, will next address the remaining defendants' motion for summary judgment, prior to looking to plaintiffs' opposition papers.

**Defendants Anesthesia Group of Albany, P.C. and Derrick R. Wurl,
M.D.'s Motion for Summary Judgment**

It is a familiar principle of New York law that, in order to establish the liability of a physician for medical malpractice, a plaintiff must prove that the physician deviated from good and

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accepted medical practice, and that the departure was a proximate cause of the plaintiff's injuries (see *Myers v. Ferrari*, 56 AD3d 78 [2nd Dept 2008]). Consequently, on a motion for summary judgment in a medical malpractice action, the defendant physician must come forward with evidence in admissible form establishing prima facie, either that he or she did not deviate from good and accepted medical practice, or that, if there was a departure, it was not the proximate cause of the plaintiff's injuries (see *Germaine v. Yu*, 49 AD3d 685 [2nd Dept 2008]; *Williams v. Sahay*, 12 AD3d 366 [2nd Dept 2004]).

In support of their motion, defendants offer the affidavit of defendant Derrick R. Wurl, M.D. Dr. Wurl states that it is his opinion "within a reasonable degree of medical certainty that the care and treatment I provided the plaintiff before, during and after surgery including the pre-operative evaluation and testing, obtaining the plaintiff's informed consent, type of anesthesia selected, the administration and maintenance of anesthesia, and post-operative monitoring was all in accordance with good and accepted medical standards, and I did not deviate in any way from the applicable standard of care." Additionally, Dr. Wurl states that "...the only injuries alleged by the plaintiff that could arguably be linked to the care and treatment I provided was the transient weakness, respiratory difficulty, and body paralysis experienced by the plaintiff post-surgery." However, he states that these symptoms are known risks/complications that can occur with the administration of an

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epidural absent negligence and/or medical malpractice. Moreover, Dr. Wurl concludes that the care and treatment rendered to the plaintiff William Boyles by Anesthesia Group of Albany, P.C. was in accordance with accepted medical standards.

Defendants also offer the affidavit of Anthony Reuben (Robin) Brown, M.D., a board certified anesthesiologist. Dr. Brown, after reviewing the relevant legal documents and medical records, found, within a reasonable degree of medical certainty, that the overall care and treatment of the plaintiff William Boyles before, during and after the surgery by the moving defendants, including the pre-operative evaluation and testing, obtaining the plaintiff William Boyles' informed consent, type of anesthesia selected, the administration and maintenance of the anesthesia, and the post-operative monitoring was all in accordance with good and accepted medical standards, and did not deviate therefrom in any respect." Dr. Brown echoes the statement of Dr. Wurl concerning the only injuries linked to the procedure were known risks/complications of the administration of an epidural.

Further, in addition to the consent form signed by the plaintiff William Boyles (contained within Exhibit "P"), the defendants submit deposition testimony and the affidavit of Dr. Wurl regarding his discussion with plaintiff Mr. Boyles concerning the administration of anesthesia, the alternatives and the reasonably foreseeable risks and benefits associated with the administration of anesthesia (see *Etminan v. Sasson*, 51 AD3d 623

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[2nd Dept 2008]).

Since defendants have made a prima facie showing of entitlement to judgment as a matter of law (see *Zuckerman v. City of New York*, 49 NY2d 557 [1980]), plaintiffs must show that genuine triable issues of material fact exist in order to defeat defendants' motions (*id.*).

Plaintiffs' Cross-Motion and Opposition

The Court will first address the plaintiffs' opposition to defendants' motions. Plaintiffs submit the redacted affirmation and affidavit of a Registered Nurse (who is also an attorney, thus, making the affirmation admissible pursuant to CPLR 2106). Based upon her or his review of the records and familiarity with the standard of care that existed in 2008, the nurse indicates that there were serious departures from the standard of care in the perioperative phases of surgery, including post-op management of the plaintiff by his caregivers at St. Peter's Hospital. Specifically, the registered nurse states that the defendants departed from the standard of care by: (1) failing to take an adequate and accurate nursing history of the plaintiff; (2) failing to investigate the plaintiff's symptoms of urinary retention and inability to have a bowel movement; (3) failing to adequately and properly care for, treat, monitor and supervise the plaintiff; (4) failing to conduct a proper and thorough nursing assessment and examination of the plaintiff and his complaints; (5) failing to use the chain of command to

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communicate his complaints; (6) failing to use the chain of command to order appropriate tests and other diagnostic studies; (7) failing to utilize the chain of command to communicate appropriate consultations with medical specialists; and, (8) failing to formulate an appropriate and effective nursing intervention treatment and plan.

The plaintiffs also offer a redacted medical affirmation of a board certified neurologist. After a full review of both the legal and medical documents, plaintiffs' expert indicates that the defendants departed from good and accepted medical practice in the following manner: (1) they failed to obtain an adequate preoperative history; (2) they failed to obtain Mr. Boyles' informed consent; (3) they failed to monitor Mr. Boyles; (4) they failed to obtain an immediate CT scan of the lumbar spine and a follow up lumbar CT scan; and, (5) they allowed excessive unmonitored amounts of lidocaine to be infused into the spinal catheter.

In regard to the alleged departures, the neurologist indicates that defendants should have assessed Mr. Boyles to determine if he was a candidate for an epidural or spinal anesthesia based upon his pre-existing anatomical disorders of the spine. Additionally, he or she recognizes that Mr. Boyles signed a written consent for epidural and general anesthesia, however, consent was never obtained for the administration of spinal anesthesia. The redacted neurologist's affirmation continues by stating that an excessive amount of neosynephrine

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was given to Mr. Boyles to maintain his blood pressure. In regard to the failure to obtain a CT scan, the neurologist indicates that a prudent physician would have ordered and reviewed a lumbar spine CT scan to determine if there was any further damage to the spinal cord.

Summary judgment may not be granted in a medical malpractice action where the parties adduce conflicting opinions of medical experts (see *Adjetey v. New York City Health and Hosps. Corp.*, 63 AD3d 865 [2nd Dept 2009]; *Feinberg v. Feit*, 23 AD3d 517 [2nd Dept 2005]; *Shields v. Baktidy*, 11 AD3d 671 [2nd Dept 2004]). Where, as here, the parties offer conflicting expert opinions, issues of credibility arise requiring jury resolution (see *Feinberg v. Feit*, 23 AD3d at 519; *Dandrea v. Hertz*, 23 AD3d 332 [2nd Dept 2005]; *Shields v. Baktidy*, 11 AD3d 671 [2nd Dept 2004]). Further, contrary to the movants' contentions in reply, the plaintiffs' experts' opinions were based upon facts in evidence and were not conclusory or otherwise insufficient (see *Dandrea v. Hertz, supra*; *Shields v. Baktidy, supra*).

Accordingly, defendants' motions for summary judgment must be denied as conflicting expert opinions exist.

Turning next to plaintiffs' request for leave to amend their bill of particulars, pursuant to CPLR 3042(g). The Court would note that subdivision (g) of CPLR 3042 was re-designated as subdivision (b) by the New York State legislature in 1994 (see L.1994, c. 562, §2). CPLR 3042(b) states that a party may amend

the bill of particulars once as a matter of course prior to the filing of a note of issue. As the Note of Issue was filed on June 12, 2014, relief under CPLR 3042(b) is inappropriate.

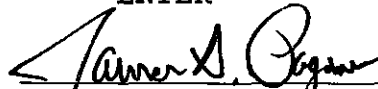
Accordingly, the branch of plaintiffs' motion seeking leave to file an amended bill of particulars is denied at this time.

Based upon the foregoing, defendant St. Peter's Hospital and defendants The Anesthesia Group of Albany, P.C. and Derrick R. Wurl M.D.'s motions are denied. Plaintiffs' cross-motion is also denied. Counsel are directed to appear for a Pre-Trial Conference on June 26, 2015 at 10:30 a.m. Adjournments are only granted with leave of the Court.

This constitutes the decision and order of the Court.

Dated: March 31, 2015
Poughkeepsie, New York

ENTER



HON. JAMES D. FAGONES, A.J.S.C.

TO: GEORGE M. LASORSA, ESQ.
LASORSA & BENEVENTANO, ESQS.
Attorneys for Plaintiffs
3 Barker Avenue
White Plains, New York 10601

RANDALL J. EZICK, ESQ.
MAGUIRE CARDONA, P.C.
Attorneys for Defendant St. Peter's Hospital
16 Sage Street
Albany, New York 12204

LIA B. MITCHELL, ESQ.
O'CONNOR, O'CONNOR, BRESEE & FIRST, P.C.
Attorneys for Defendants The Anesthesia Group of Albany,
P.C. and Derrick R. Wurl M.D.
20 Corporate Woods Boulevard
Albany, New York 12211