

**Brooks v April**

2016 NY Slip Op 31303(U)

June 30, 2016

Supreme Court, New York County

Docket Number: 805144/2013

Judge: Joan B. Lobis

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 6**

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TARA KEATING BROOKS and CHRISTOPER BROOKS,

Plaintiffs,

Index No. 805144/2013

-against-

**Decision and Order**

ROBERT S. APRIL, M.D. and ROBERT S. APRIL, M.D.,  
P.C.,

Defendants.

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Currently, in this medical malpractice action, defendants move for summary judgment. Defendants made their motion for summary judgment two weeks after this Court's sixty-day deadline expired. As good cause, counsel states that he underwent surgery during this period. In light of this fact and the brief delay, the Court considers the motion. Plaintiffs oppose the motion except as it relates to the claim for lack of informed consent.<sup>1</sup> For the reasons below, the Court dismisses the claim for lack of informed consent and otherwise denies the motion.

On October 23, 2010, plaintiff Tara Keating Brooks, a thirty-five-year-old attorney, fell and hit her head, briefly lost consciousness, and sustained facial cuts and a head injury. Dr. Benjamin Zaremski, an internist, referred her to defendant Dr. Robert April, a neurologist, for treatment. She first presented to defendant on November 2, 2010, and complained of a persistent headache over her right occipital and frontal regions, lower lip numbness on the right side, mental fogginess, and other problems. Ms. Keating Brooks had experienced migraines when she was

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<sup>1</sup> Plaintiffs do not concede the issue explicitly, but provide no opposition to that portion of the motion.

fifteen and seen a neurologist, but she had not complained of serious migraines since that time. The doctor noted her family history, which included the fact that her mother and her maternal aunt had suffered from migraines.

Dr. April conducted a neurological examination of Ms. Keating Brooks. He noted that her pupils were reactive and her reflexes were normal. The doctor additionally noted that the patient “saw stars” when he shook her head. An EEG did not show any brain abnormalities and a CT scan did not reveal any accumulation of blood. Based on this and his other observations of her, defendant concluded that Ms. Keating Brooks was experiencing post-concussion syndrome which would subside with time. The examination also allegedly indicated that Ms. Keating Brooks did not have a neurological problem as the result of her fall.

There is conflicting information as to whether Dr. April noted a positive Babinski reflex,<sup>2</sup> which in adults often indicates a brain or nervous system disorder. One document states “No Babinski reflex” and another states “Left Babinski” with the word “Left” scratched out and an “O” written in the margin. In a December 14, 2010 email to another of her treating doctors, he later stated, “Typo in my notes there was no Babinski sign.” Plaintiffs allege that the radiology reports from December 2010 note Ms. Keating Brooks’ history of Babinski reflex.<sup>3</sup>

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<sup>2</sup> A Babinski reflex is an upward movement of a person’s big toe when the underside of his or her foot is scratched. Generally, the reflex disappears around the age of two.

<sup>3</sup> The Court could not locate these statements in the records. Neither party directed the Court to the specific pages in the medical records that allegedly support their statements. This constitutes a violation of this Court’s Part Rules, which are available on the New York Courts website.

At her follow up appointment on November 8, 2010, Ms. Keating Brooks stated that she continued to suffer dizziness, confusion, headaches, pain where she sustained her injury, and other symptoms. She also told Dr. April that she had fallen twice since her appointment on November 2. The parties dispute whether Ms. Brooks informed the doctor that she had balance problems; the doctor's records indicate that he did not observe a balance problem and that she suffered no mental impairment. When at her November 15, 2010 appointment Ms. Brooks indicated that she still suffered from headaches and felt she was not functioning at her usual level, Dr. April advised her to stay home from work and to rest did not prescribe further radiological testing.

Two weeks later, Ms. Keating Brooks telephoned Dr. April to report a dramatic worsening of her symptoms. She stated that her headache had become unbearable and she could not tolerate light, and that she lost a majority of her field of vision. She asked to see him immediately, but Dr. April informed her that he was unavailable. He advised her to rest and see him the following morning. At her appointment on December 1, 2010, Ms. Keating Brooks informed Dr. April that she felt somewhat better. Dr. April's examination indicated that the patient was alert, that she had normal blood pressure, that her pupils were reactive and her reflexes normal, with no Babinski sign. An EEG revealed no brain dysfunction, and Dr. April concluded that she had experienced a migraine and prescribed her medication accordingly. Dr. April stated that she could have a brain MRI but it was not necessary. She said she would contact him if her condition worsened. After December 1, 2010, Ms. Keating Brooks did not treat with Dr. April again.

On December 2, 2010, Ms. Keating Brooks consulted with neurologist Dr. Paul-Henri Cesar at New York Presbyterian-Columbia. Dr. Cesar found generally normal results, but Ms. Brooks' MRI's on December 7 and 9, 2010 both showed evidence of a bleed in the left parietal lobe. Dr. Guy McKhann at New York Presbyterian-Cornell, a neurosurgeon who treated Ms. Keating Brooks on December 9, 2010, wrote in his report to Dr. Cesar that it was

hard to put together exactly how this is related to her prior head trauma on October 23rd particularly given the change [in] symptoms and the negative head CT scan on November 2nd. Certainly it is possible that she has an underlying lesion that her head trauma may have in some way destabilized and predisposed to the hemorrhage. Alternatively, the trauma could have resulted in a venous thrombosis and hemorrhage. There may be an underlying lesion causing the hemorrhage.

In his December 15, 2010 report to Dr. Cesar, Dr. McKhann opined that Ms. Keating Brooks' October 23 fall and her "left dominant parietal hemorrhage approximately two weeks ago" would complicate and potentially prolong her recovery from the hemorrhage. As to the etiology of the hemorrhage, he wrote that his "best guess is that [it] may have been a local cortical vein that thrombosed several weeks following her concussive trauma resulting in a venous hemorrhage in the left parietal lobe." His February 2, 2011 notes indicate that the hemorrhagic focus was smaller, with no significant mass effect, and that the hemorrhage had evolved from the early to late subacute stage. According to Ms. Keating Brooks' deposition testimony, after he performed a craniotomy Dr. McKhann informed her that "he believe[d] . . . that after I fell, the blood was altered and there was a rupture of the AVM."

On May 20, 2011, Clinical Assistant Professor Dr. Maksim Shapiro indicated that based on the timing, location, and imaging evidence he believed the hemorrhage was unrelated to Ms. Keating Brooks' October 23, 2010 injury. His May 31, 2011 follow-up letter documented that

her May 24, 2011 MRI/MRA showed the sequela of her left parietal hemorrhage and “a completely resolved hematoma.” A femoral cerebral angiogram on June 13, 2011 revealed that Ms. Keating Brooks had a micro arteriovenous malformation (AVM). AVM, a rare defect in the circulatory system which can increase the risk of hemorrhages and strokes, causes blood vessels in the brain or on its surface to divert blood from the arteries to the veins, bypassing brain tissue. At deposition Ms. Keating Brooks’ claimed that Drs. McKhann, Shapiro, and others told her that, had an MRI with a contrast been performed earlier they could have caught and treated it before it bled. She further stated that these doctors explained that a CT, which was the test Dr. April had ordered, does not reveal the existence of an AVM.

As a result of this finding, Ms. Keating Brooks consulted with Dr. Robert Solomon, a neurosurgeon at New York Presbyterian-Columbia. In late July Dr. Solomon performed a craniotomy with resection of the AVM. Following the procedure, she began to experience seizures. Now, she suffers from epilepsy. She asserts that she still has mental deficits including problems with her memory and that her aversion to light and noise make it impossible for her to enjoy most social outings. She has a service dog who anticipates her seizures so she knows to take medication to ward them off and who provides assistance in other situations as well. Formerly a successful attorney, she was unable to maintain a full time work schedule. At the time of her deposition she was not employed but had applied for a position with the Securities and Exchange Commission through its disability program which she intended to accept pending clearance and appropriate accommodation. She states that she has severe short term memory problems. She claims her husband’s ability to seek promotions has been compromised because he travels selling pharmaceuticals and has had to curtail this activity to take care of her. Because of her seizures, if

she becomes pregnant the pregnancy will be high risk, and the medication she must take may cause birth defects.

Defendants allege summary judgment is proper because there are no triable issues of fact as to malpractice or proximate cause. They rely on the affirmation of David M. Kaufman, M.D., a New York licensed doctor board certified in internal medicine, psychiatry and neurology. Dr. Kaufman opines to a reasonable degree of medical and neurological certainty that defendants adhered to the accepted standards of medical practice and that there is no causal connection between any alleged departures and Ms. Keating Brooks' injuries. He states that Dr. April properly ordered a CT scan of the patient's brain when Ms. Keating Brooks treated with him on November 2, 2010. He opines that a CT without contrast, which Dr. April ordered, was within the standard of care. According to Dr. Kaufman, Dr. April's direction that Ms. Keating Brooks continue taking Aleve for her headaches and rest as much as possible was not a deviation. He states that in light of the unremarkable results of the CT scan, which in particular ruled out a hematoma, Dr. April's decision to schedule a follow up appointment one week later was also proper. According to Dr. Kaufman, the diagnosis of post-concussion syndrome was reasonable in light of Ms. Keating Brooks' symptoms, and the fact that she had a history of migraines made it reasonable to conclude her recovery would take longer than normal.

Dr. April's assessments and plans on November 8, 2010 and November 15, 2010 were within the standard of care, Dr. Kaufman opines, given the normal November 2 CT scan results, the normal results of the MRI she underwent when she was a teenager, and the nature of her continuing complaints. The doctor's advice to Ms. Keating Brooks on November 30 that she

should go to his office the following morning in light of her acute change in symptoms was within the standard of care and that Dr. April's December 1, 2010 determination that Ms. Keating Brooks was suffering from migraines was proper given her symptoms and the facts that she was alert and showed no sign of brain dysfunction. He asserts that Dr. Cesar's neurological examination and diagnosis of Ms. Keating Brooks was essentially the same as Dr. April's assessment the day before. He points out that Dr. Cesar ordered an MRI but did not treat it as urgent, scheduling it for five days after the December 7 appointment. He further points out that when the MRI revealed a brain hemorrhage, Ms. Keating Brooks was referred to Dr. McKhann who noted that her hemorrhage likely occurred on November 30 at the time of her acute headache. He alleges that Dr. McKhann did not believe the October 23 trauma was related to the hemorrhage. He asserts that the subsequent treating doctors did not find a connection between the two events and treated them as distinct episodes which complicated her recovery. He stresses that Dr. April treated the patient for only one month out of the seven months between the patient's trauma and the cerebral angiogram which revealed Ms. Keating Brooks' AVM. As Dr. Kaufman states, a brain AVM is a congenital condition and therefore there is no causal connection between its formation and the patient's fall on October 28, 2010 or her medical treatment. He opines that Ms. Keating Brooks' current problems, which began after her craniotomy, resulted from that procedure, and that even if her AVM had been diagnosed earlier, an earlier craniotomy would have carried the same risks.

Plaintiffs oppose the motion, relying on the redacted affirmation of a New York licensed physician board certified in psychiatry and neurology. Initially, the expert opines, Dr. April did not take an appropriate medical history. Assuming that the note stating Ms. Keating Brooks had a positive Babinski reflex is accurate, the expert concluded – and, based on the

inconsistencies in the record, the expert states this possibility must be considered – Dr. April improperly failed to consider neurological injury or damage. The expert states that in each of her follow-up appointments with Dr. April, Ms. Keating Brooks reported a worsening of her symptoms, and that the doctor’s failure to adjust his treatment or investigation constitutes another departure from the standard of care. In addition, the expert states, although a diagnosis of post-concussion-syndrome is possible given Ms. Keating Brooks’ fall and subsequent symptoms, the failure to provide a differential diagnosis, considering other possible causes, was a deviation. The expert provides a long list of other possible causes of her symptoms. In addition, the expert states, good medical practice would have entailed determining whether Ms. Keating Brooks fell because she tripped, or fell because of an underlying condition.

The expert alleges that it was a deviation for Dr. April to assume the patient’s unusually slow recovery was due to her past problem with migraines, as she had not experienced recurrences of migraines in twenty years and her 2010 headaches were not similar to her prior migraines in critical respects. According to the expert, the reliance on a twenty-year-old MRI test result, was unjustifiable, and Ms. Keating Brooks’ recurrent falls are not symptoms of a migraine. The expert points out that one of the medications Dr. April prescribed to Ms. Keating Brooks on December 1, 2010, the date of her final appointment with him, Sumatriptan and Cambia, which the expert claims were contraindicated in this circumstance. Prior to that, the expert states, Dr. April departed from the standard of care by instructing her to take Aleve and other medications without first excluding the possibility of a hemorrhage. It was a departure for Dr. April to shake Ms. Keating Brooks’ head to determine whether there was a bleed, the expert explains, because this test is not proper where the patient recently sustained head trauma. Further, the expert intimates,

the head shaking could have caused harm to Ms. Keating Brooks. When Ms. Keating Brooks called from her office on November 30, 2010, the expert contends, it was a departure for Dr. April not to treat her immediately and perform further diagnostic tests at once. The expert states that Dr. April should have ordered a cerebral MRI and MRA, a CTA, or a conventional cerebral angiography, and that the EEG he did order was not indicated, and points out that Dr. Cesar, who treated Ms. Keating Brooks on the date of her last visit with Dr. April, immediately ordered the appropriate tests.

As for proximate cause, the expert states that early detection of an AVM enables medical professional to work to prevent a rupture, and that if Dr. April had ordered the proper tests Ms. Keating Brooks could have been diagnosed and treated in a timely fashion. The expert states that Dr. Kaufman, defendants' expert, fails to address that proximate cause lies in the failure to detect the AVM and therefore his arguments concerning the timing of the tests are unpersuasive. Although Dr. Kaufman is correct that the bleed did not directly result from the head trauma, an issue of fact as to proximate cause exists because Ms. Keating Brooks experienced symptoms of her AVM prior to the rupture and these symptoms indicated the increasing chance of a rupture.

Defendants reply that because the rupture definitely occurred on November 30, 2010, there is no proximate cause. They state that any complications occurring on or after the rupture must be dismissed. They argue that Dr. April did not depart from the acceptable standard when he diagnosed her with post-concussion syndrome. They submit a supplemental affirmation from Dr. Kaufman stating that because the November 2, 2010 CT scan and other tests did not

reveal the AVM, Dr. April would not have been able to locate it even had he performed the allegedly appropriate tests.

In considering a motion for summary judgment this Court reviews the record in the light most favorable to the non-moving party. *E.g.*, Dallas-Stephenson v. Waisman, 39 A.D.3d 303, 308 (1st Dep't 2007). This Court may grant the motion if, upon all the papers and proof submitted, it is established that the Court is warranted as a matter of law in directing judgment. CPLR § 3212(b). It must be denied where facts are shown "sufficient to require a trial of any issue of fact." *Id.* For a defendant to establish entitlement to summary judgment in a medical malpractice case, a physician must demonstrate that he did not depart from accepted standards of practice or that, even if he did, he did not proximately cause injury to the patient. Roques v. Noble, 73 A.D.3d 204, 206 (1st Dep't 2010). In claiming treatment did not depart from accepted standards, the movant must provide an expert opinion that is detailed, specific and factual in nature. *E.g.*, Joyner-Pack v. Sykes, 54 A.D.3d 727, 729 (2d Dep't 2008). Defense expert opinion should specify "in what way" a patient's treatment was proper and "elucidate the standard of care." Ocasio-Gary v. Lawrence Hosp., 69 A.D.3d 403, 404 (1st Dep't 2010). A defendant's expert opinion must "explain 'what defendant did and why.'" *Id.* (quoting Wasserman v. Carella, 307 A.D.2d 225, 226 (1st Dep't 2003)).

After carefully considering the parties' arguments and the experts' statements, the Court denies the motion for summary judgment on the malpractice claim. Although defendants establish their prima facie burden through Dr. Kaufman's affidavit and the medical records, plaintiffs have pointed out, through their expert, that numerous material issues of fact

exist. Among other things, there is a question as to whether Dr. April's reliance on a twenty-year-old MRI, his failure to perform a differential diagnosis and to ascertain the cause of her initial fall, and his failure to order MRI's and MRA's and other tests which allegedly might have detected Ms. Keating Brooks' AVM, constituted departures. Moreover, plaintiffs' expert has shown a triable issue of fact exists concerning whether prior testing could have revealed the existence of the AVM, and whether earlier detection could have prevented the rupture. Defendants' expert refutes that argument, stating detection would have been impossible, but this goes to the strength of plaintiffs' proximate cause argument only and this is insufficient to mandate summary judgement. As defendants sought the dismissal of Mr. Brooks' causes of action based on their argument that his wife's causes of action have no merit, in light of the Court's conclusions, this prong of their motion has no merit.

Accordingly, it is

ORDERED that the motion is granted to the extent of severing and dismissing the causes of action based on lack of informed consent and is otherwise denied.

Dated: June 30, 2016

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JOAN B. LOBIS, J.S.C.