

<b>Buschke v Montefiore Med. Ctr.</b>
2018 NY Slip Op 31625(U)
May 7, 2018
Supreme Court, Bronx County
Docket Number: 20021/2013E
Judge: Lewis J. Lubell
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF THE BRONX - PART IA-19A**

-----X  
HERMAN BUSCHKE and  
BERTELLE SELIG-BUSCHKE,

Plaintiffs,

-against-

MONTEFIORE MEDICAL CENTER, JOHN  
HOUTEN, M.D., DAVID ALTSCHUL, M.D.,  
THE MOUNT SINAI MEDICAL CENTER,  
FELICIA AMBROSE, M.D., "JOHN DOE NO. 1"  
(a fictitious name intended to be the Neurologist  
who treated plaintiff at Mt. Sinai Medical Center on  
12/2/10; and "john Doe No. 2" (a fictitious name  
intended to be the PGY-11 resident who treated  
Plaintiff at Mt. Sinai on 12/2/10,  
CORPORATION,

Defendants.

-----X  
THE MOUNT SINAI HOSPITAL s/h/a  
THE MOUNT SINAI MEDICAL CENTER and  
ANNE FELICIA AMBROSE, M.D. s/h/a  
FELICIA AMBROSE, M.D.,

Third-Party Plaintiffs,

-against-

DARIUZS BULCZAK, M.D. and VIRTUAL  
RADIOLOGIC PROFESSIONALS, LLP,

Third-Party Defendants.

-----X  
HON. LEWIS J. LUBELL:

Motion by third-party defendants, Dariuzs Bulczak, M.D., s/h/a DARIUZS Bulczak,  
M.D. ("Bulczak") and Virtual Radiologic Professionals, LLP s/h/a Virtual Radiologic  
Professionals, LLP, ("VRAD") for an order granting them summary judgment pursuant to  
CPLR § 3212 is decided as follows:

**MEMORANDUM DECISION**  
Index No. 20012/13E

Present:  
**HON. LEWIS J. LUBELL**  
**J.S.C.**

Third-Party  
Index No.: 43259/2015E

This is a medical malpractice action stemming from plaintiff Herman Buschke's ("plaintiff") laminectomy surgery on November 23, 2010 at Montefiore Medical Center, and his subsequent in-patient rehabilitation treatment at Mount Sinai Hospital from December 1 through December 3, 2010. Plaintiff developed a hematoma at the surgical site which is alleged to have caused spinal cord compression resulting in injury. Plaintiff's claims against first-party defendants concern an alleged failure to timely diagnose and treat the hematoma.

First-party defendants, Mount Sinai Hospital and Dr. Anne Felicia Ambrose, subsequently sued Bulczak and VRAD in a third-party action, alleging that they are responsible for a failure to report the finding of a hematoma at Mount Sinai Hospital. Bulczak was an off-site teleradiologist who reviewed one CT study of the patient on the night of December 2, 2010. He prepared and transmitted back to the hospital a preliminary report indicating a finding of hematoma at the surgical site. First-party defendants/third-party plaintiffs allege that the hematoma was compressing the spinal nerves and that the finding should have been emergently reported to Mount Sinai, rather than transmitted in a written report. Bulczak's written report was transmitted at approximately midnight on December 3, 2010, and it was not until 8:00 a.m. on the morning of December 3, 2010 that the patient's treating physicians, including Dr. Ambrose, independently discovered the hematoma. According to their deposition testimony, they never read Bulczak's report. As such, first-party defendants/third-party plaintiffs allege that Bulczak's failure to notify them of his findings by telephone or some other emergent means resulted in an eight-hour delay in discovering and beginning treatment on the hematoma.

The first-party action was commenced on or about January 2, 2013. First party

plaintiff filed a note of issue on or about June 17, 2015 and third-party defendants Bulczak and VRAD, received notice of the third-party summons and complaint in July 2015. They served answers on November 18, 2015. Thereafter, the third-party defendants moved for an extension of time to move for summary judgement which was granted by the court on or about July 29, 2016. On or about December 13, 2016 this court so-ordered a stipulation between the parties in the third-party action establishing a deadline for third-party defendants to file a motion for summary judgment. This motion is timely in accordance with said stipulation.

In November 2010, plaintiff was admitted to Montefiore and underwent an elective microscopic revision lumbar laminectomy for treatment of spinal stenosis. Following the surgery, plaintiff could move all extremities and had no weakness or paralysis of the lower extremities. He was given pain medication for continued complaints of pain and remained admitted until December 1, 2010 when he was discharged to Mt. Sinai for rehabilitation. Plaintiff continued to complain of pain and continued to take pain medication. It was noted that he had an unsteady gait and was in severe pain with deficits in self-care. His daily flow sheets on November 28 and 29 indicated weakness or paralysis of the bilateral lower extremities. On November 30 the occupational therapist noted a decrease in his balance, strength and endurance. On December 1, plaintiff was found on the floor following a fall. On that same day he was admitted to Mt. Sinai for in-patient rehabilitation. The Mt. Sinai charts give no indication that plaintiff ever got out of bed or onto his feet during his admission from December 1 to December 3, 2010.

Bulczak received a study of plaintiff remotely for review as he worked off-site. He completed and signed a preliminary report on December 3, less than an hour after the study was performed, and electronically transmitted the form back to Mt. Sinai. A copy of

the report appears in the medical chart. Bulczak reported decompression of the central canal with bilateral laminectomies, large hyper dense soft tissue density consistent with hematoma and additional relatively lower density fluid collection in the subcutaneous soft tissues posteriorly. Although this report is in the Mt. Sinai records, there is no evidence that it was viewed by anyone at Mt. Sinai overnight on December 3, 2010 plaintiff continued to complain of back pain at a level of 9 out of 10. At 8:00am Dr. Stacy reviewed the CT images on the Mt. Sinai computer and diagnosed a fluid collection. He notified Dr. Ambrose and Dr. Ambrose coordinated with neurosurgeons to transfer plaintiff back to Montefiore for surgery. Plaintiff was noted to be lethargic and getting weaker through the day with more pain. Dr. Stacy noted the deficit had significantly increased neurologically but did not provide a time frame over which the deficit occurred. The notes contain no indication that the fluid collection was an emergent condition requiring emergent treatment. He did, however, testify that after he discovered the fluid collection at 8:00am on December 3 he believed the condition should be treated within the next three to six hours. Plaintiff was discharged from Mt. Sinai at 1:30pm and taken into surgery where the lumbar hematoma was evacuated at approximately 3:47pm.

Bulczak and VRAD argue that they are entitled to summary judgment because they provided treatment in accordance with the applicable standard of care and that no act or omission on their part proximately caused the injuries.

#### **DISCUSSION**

To prevail on 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 the patient's injury (*Roques v. Noble*, 73 AD3d 204, 206

[1st Dept. 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 (see e.g., *Joyner-Pack v. Sykes*, 54 AD3d 727, 729 [2d Dept. 2008]). The opinion must be based on facts in the record or personally known to the expert (*Roques*, 73 AD3d at 207, *supra*). The expert cannot make conclusions by assuming material facts which lack evidentiary support (*id.*). The defense expert's opinion should state "in what way" a patient's treatment was proper and explain the standard of care (*Ocasio-Gary v. Lawrence Hosp.*, 69 AD3d 403, 404 [1st Dept. 2010]). Further, it must "explain 'what defendant did and why'" (*id. quoting Wasserman v. Carella*, 307 AD2d 225, 226 [1st Dept. 2003]).

Once defendant makes a prima facie showing, the burden shifts to the plaintiff "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]). To meet that burden, a plaintiff must submit an expert affidavit attesting that defendant departed from accepted medical practice and that the departure proximately caused the injuries (see *Roques*, 73 AD3d at 207, *supra*). "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions" (*Elmes v. Yelon*, 140 AD3d 1009 [2nd Dept 2016] [citations and internal quotation marks omitted]). Instead, the conflicts must be resolved by the factfinder (*id.*).

Here, movants argue that the records and testimony, together with the expert affirmations they have provided from Lewis Rothman, M.D. ("Dr. Rothman"), and John Robbins, M.D. ("Dr. Robbins"), establish that they rendered treatment to plaintiff in accordance with the applicable standard of care and that said treatment was not a proximate cause of his injuries. Expert radiologist, Dr. Rothman, opines that while the CT images show evidence of fluid collection in the area of the lumbar spine surgery, they do

not show evidence of any emergent findings such as spinal nerve compression so that the standard of care did not require Bulczak to alert plaintiff's treating physicians of the findings. Dr. Rothman further opines that the standard of care required Bulczak to issue a thorough report of his findings, which he did. The affirmation of neurosurgeon Dr. Robbins indicates that Bulczak had no reason to think that the CT findings were emergent and he agrees that there was no reason to make a special effort to contact plaintiff's treating physicians beyond issuing an accurate preliminary report. The experts further opine that there was no causal connection between the treatment and the injuries. Dr. Robbins opines that the eight hour delay in diagnosis and treatment claimed herein did not cause the harm alleged and that there is no evidence to demonstrate that the condition or outcome grew worse as a result of the delay. Dr. Robbins opines that the neurological damage alleged was already complete and irreversible by the time Dr. Bulczak rendered care to the patient. Dr. Robbins explains that plaintiff's symptoms worsened after the surgery and that his lower extremity impairment increased. The fall was likely caused by the worsening hematoma, and in turn, the fall worsened the hematoma. The blood thinning medication given to him on November 29 exacerbated the bleeding that was already present at the surgical site and effected the lower extremities which likely led to the fall. Although Dr. Robbins opines that there was already spinal nerve compression when the CT study was performed there was no evidence of this compression visible on the images reviewed by Bulczak. Furthermore, the actions of Dr. Ambrose and Dr. Stacy demonstrate that they did not treat the hematoma as an emergency finding after they discovered it at 8:00am on December 3. Dr. Stacy testified he believed it should have been treated within the next 3 to 6 hours or by between 11:00am and 2:00pm. However, the transfer back to Montefiore was lengthy which demonstrates that even after they

became aware of the hematoma they were willing to wait several hours for plaintiff to undergo decompression surgery so that their claim that Bulczak's failure to contact them caused a critical delay in treatment is a misrepresentation.

Movants have established their prima facie entitlement to summary judgment, thus requiring first-party defendants/third-party plaintiffs to proffer sufficient evidence raising triable issues of fact. In opposition, the first-party defendants/third-party plaintiffs have provided the court with the expert affirmations of neurosurgeon Deborah Benzil, M.D. ("Dr. Denzil"), and radiologist neuroradiologist Caren Jahre ("Dr. Jahre"). These doctors argue that the CT images depict a clear and moderate to severe compression of the thecal sac and neuro elements at or around the site of the laminectomy that required immediate evaluation and treatment. As such, first-party defendants/third-party plaintiffs argue that as a result of Bulczak's failure, the Mt. Sinai staff was deprived of an opportunity to timely effectuate an earlier evaluation and transfer of plaintiff to Montefiore. Dr. Jahre opines that it is the duty of an interpreting radiologist to interpret and report on all the images in the films which should be comprehensive and accurate regardless of the designation of the diagnostic test as emergent or routine. Furthermore, the standard of care dictates that an interpreting radiologist must document the full relevance of their findings in context and note where such findings could possibly have a significant impact on the course of treatment for the patient. Dr. Jahre opines that the failure of Bulczak to highlight or refer to the hematoma in his report constituted a clear departure from thoroughly and accurately documenting the CT findings. Dr. Benzil also opines that the condition shown in the CT images were emergent so it was incumbent upon Bulczak to comply with the standard of care and detail the nerve compression and threat of impingement injuries in his preliminary report and notify the staff of Mt. Sinai immediately. Both doctors also agree that Bulczak

should have handled this information in a manner most likely to reach the attention of the treating ordering physician to provide the best benefit to the patient. In doing so they note that the American radiology parameters for the communication of diagnostic imaging findings require this. They further opine that the injuries sustained by Dr. Buscke were proximately caused by this failure to give full and proper notice of the findings. They also opine that third-party defendants reliance on the fact that it took approximately seven hours to transfer the plaintiff and effectuate surgery is disingenuous as it does not account for the necessary preoperative diagnostic testing and other preparatory measures. Essentially, the transfer time from Mt. Sinai to Montefiore does not minimize the effect of the eight hour delay caused as the result of Bulczak's failure.

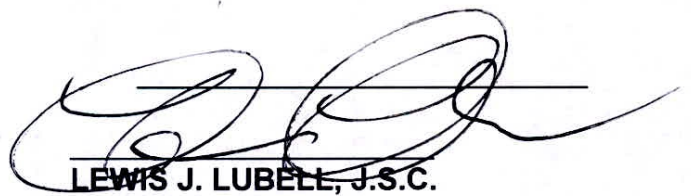
The instant motion for summary judgment is denied. It is well-established that the summary judgment stage of litigation is dedicated to issue finding rather than issue determination (*Sillman v. Twentieth Century-Fox Film Corp.* 3 N. V. 2d 395.404 [1957]). Here, Bulczak and VRAD have made a prima facie showing through the evidence annexed to their moving papers, including the relevant medical records and expert affirmations. In opposition, first-party defendants/third-party plaintiffs have raised triable issues of fact by highlighting the conclusions of their own experts, who opine that Bulczak's delay deviated from the appropriate standard of care for radiological practice and proximately caused plaintiff's injuries. The challenges raised as to the findings of first-party defendants/third-party plaintiffs experts have no merit, as Bulczak and VRAD are essentially asking this court to weigh the findings of their experts above those of any other experts. This court cannot decide such a "battle of the experts" as a matter of law (*see Elmes*, 140 AD3d at 1011, *supra*). Indeed, the dueling opinions of the medical experts herein has created questions of fact sufficient to defeat the instant motion.

Accordingly, it is hereby

ORDERED that by third-party defendants Bulczak and VRAD's motion for summary judgment is denied in its entirety.

This constitutes the decision and order of the court.

Dated: 5/7/2018



LEWIS J. LUBELL, J.S.C.