

**Costoso-Miller v Westchester County Healthcare Corp.**

2018 NY Slip Op 34414(U)

July 3, 2018

Supreme Court, Westchester County

Docket Number: Index No. 69729/2015

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT : STATE OF NEW YORK  
IAS PART WESTCHESTER COUNTY  
PRESENT: HON. JOAN B. LEFKOWITZ, J.S.C.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

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CHRISTINE COSTOSO-MILLER, as Administratrix of the Estate of ROBERT MILLER, Deceased, and CHRISTINE COSTOSO-MILLER, Individually,

Plaintiffs,

DECISION & ORDER

-against-

Index No: 69729/2015

WESTCHESTER COUNTY HEALTHCARE CORPORATION (MIDHUDSON REGIONAL HOSPITAL OF WESTCHESTER COUNTY MEDICAL CENTER), WILLIAM BARRACK, M.D., ORTHOPEDIC ASSOCIATES OF DUTCHESS COUNTY, P.C., FAIZAN ARSHAD, M.D., and LORETTA OBI, M.D.,

Motion Return Date:  
December 22, 2017  
Motion Seq. #3

Defendants.

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The following papers (e-filed documents 65-87; 111-128; 138) were read on the motion by the defendant, Westchester County Healthcare Corporation, for an order granting summary judgment dismissing the complaint insofar as it asserts a cause of action against it.

- Notice of Motion, Affirmation (Exhibits A-U)
- Affirmation in Opposition (Exhibits A-Q)
- Reply Affirmation

Upon reading the foregoing papers it is

ORDERED the motion is denied; and it is further

ORDERED the parties are directed to appear on July 31, 2018, at 9:15 a.m. in the Settlement Conference Part, Courtroom 1600, Westchester County Supreme Court, 111 Martin Luther King Boulevard, White Plains, New York, prepared to conduct a settlement conference.

On October 23, 2014, Robert Miller consulted with Dr. William Barrack concerning his neck, back and shoulder pain. Eventually Dr. Barrick recommended surgery to remove a disc in Mr. Miller's neck and fuse the spine there. Mr. Miller consulted with his primary care physician, Dr. Fontanez, who cleared him for the surgery. Dr. Fontanez instructed Miller to discontinue all anti-inflammatory products such aspirin or Aleve for one week prior to surgery.

On December 1, 2014, Miller met with Dr. Barrack. At that time it was agreed to go

ahead with the elective surgery. The surgery was then scheduled for December 17, 2014, at Mid-Hudson Regional Hospital. Miller received written instructions from Mid-Hudson Regional Hospital to stop anti-inflammatory medicines, including Aleve, one week before surgery.

On the day of surgery, December 17, 2014, Mr. Miller advised the anesthesiologist that he had taken Aleve within the past 48 hours. Dr. Barrack's notes state, "Had Aleve. Increased risks of surgical bleeding discussed with patient and daughter. Patient declines cancellation of surgery despite increased risks." Mr. Miller's daughter has a different recollection. At deposition, the daughter testified Dr. Barrack was hesitant to go forward with the surgery and her father stated I am already on disability and am already here, do you think we should go forward with it, and that Dr. Barrack responded yes, it was a quick surgery and everything would be fine.

Dr. Barrack performed the surgery. His post-operative report indicates a loss of 50 ccs of blood and states the inferior thyroidal artery was not in the operative field. At deposition and in an affidavit he denied the artery could have been injured since he did not see it in the operative field and that if it were injured there would have been the loss of more blood.

Mr. Miller was admitted to the Post Anesthesia Care Unit (PACU) at approximately 6:57 p.m. He had a slight temperature, elevated blood pressure and a pain score of 0/10. Dr. Barrack's post operative orders included orders that Mr. Miller's head be elevated to reduce airway swelling and prevent aspiration and that a Miami J collar be worn out of bed, but not in bed. No orders were issued regarding the increased risk of bleeding due Miller's ingestion of Aleve within 48 hours of the surgery. Prior to leaving Miller in the recovery room at 7:44 p.m. Dr. Barrack noted that Mr. Miller's voice was normal and that he observed no swelling of the neck.

Mr. Miller's family then visited him in the PACU. His daughter recalled that Mr. Miller was wearing a big collar, did not speak and appeared to be in pain. At 7:25 p.m. morphine was administered when Mr. Miller reported his pain level at 5/10. Additional medications were administered for elevated blood pressure and for nausea.

Miller was transferred from PACU to the total joint center at 9:35 p.m. His pain score was 3/10 and his blood pressure was lower.

At 10:45 p.m. Dr. Obi examined Miller at Dr. Barrack's request for management of his diabetes. Dr. Obi testified that Miller complained of neck pain and tightness of the collar. Dr. Obi made no inquiry as to the reason for the tightness and asked a nurse to remove it. Dr. Obi testified that she thought the collar might be tight because she thought Miller's neck was bigger than normal. After dictating her notes Dr. Obi again observed Miller. She observed the neck was swollen but attributed this to normal swelling after surgery. She only observed the neck and did not palpate the neck or press on the swelling. She testified that she was consulted only for medical issues and not surgical issues. During Dr. Obi's consultation Miller's pain level increased from 4/10 to 8/10 and he was given oxycodone.

Mr. Miller was noted to be sleeping at midnight, one a.m. and two a.m. He was given medication for nausea, vomiting, anxiety and itching. At 2:03 a.m. a note was entered that indicated swelling around Miller's eye, and "tenderness, redness and swelling" were noted in Miller's neck, but that no drainage, redness or swelling were noted around the incision. The note indicates Miller was wearing the collar. The 2:03 a.m. note does not indicate when these observations were made.

More Ativan, an anti-anxiety drug, and oxycodone were administered at 3:26 a.m. when Mr. Miller reported a pain level of 9/10. A 3:47 a.m. note documents Mr. Miller had reported "discomfort" in his throat. The nurse at deposition stated that Miller told her his throat "still hurt" but she attributed this to Miller having been intubated during surgery.

There are no nursing notes which document any interaction between the nursing staff and Mr. Miller between 3:47 a.m. and 5:15 a.m., a span of one hour and a half hours.

A nursing note relates the following occurring at 5:15 a.m.:

"Pt received in asleep [sic] in bed, easily aroused to name. Speech clear. Pt states surgical pain level has improved. However, throat still uncomfortable, Pt stated 'I feel like I am having a hard time breathing.' RR easy and unlabored at 22. Pulse OX 94%Ra. 2LNC applied. Asked to open mouth to assess airway. Mild swelling to tongue. Mild swelling noted to lateral neck bilaterally. DRSG remains CDI. Charge nurse called to room to assess patient. Charge nurse left room to call Dr. Barrack to report findings of assessment. Pt quickly sat up and stated 'I can't breathe.' Rapid response called. In less than one minute pt color went to blue. Code blue activated. ICU RN x2 and RRT arrived. Refer to code blue flowsheet for code events."

Dr. Arshad, who is trained in emergency medicine, responded to the code blue. According to Dr. Arshad, when he arrived Miller was in full cardiac arrest. According to the code blue flowsheet, the code blue was activated at 5:33 a.m., the monitor was applied at 5:34 and the initial rhythm was noted as "sinus bradycardia with weak pulse." CPR was immediately administered. Dr. Arshad attempted to intubate Mr. Miller with a Glidescope, but could not since he could not adequately see the vocal chords. Next Dr. Arshad unsuccessfully attempted intubation with a conventional laryngoscope equipped with a "Miller" blade. Dr. Arshad claims he was then able to successfully place a laryngeal mask airway (LMA) device. Dr. Arshad claims normal CO<sub>2</sub> and SaO<sub>2</sub> levels were maintained after placement of the LMA, although Mr. Miller remained pulseless. Dr. Arshad testified three minutes passed between his arrival and the successful placement of the LMA. Twenty minutes into the code Dr. Arshad and staff discussed possibility of a hematoma in the neck causing the cardiac arrest and considered performing surgery to create an airway but would only do so if Mr. Miller regained spontaneous circulation of his blood. However, Mr. Miller never regained spontaneous circulation. He was pronounced dead at 6:10 a.m.

The autopsy report indicates a cause of Mr. Miller's death as "cardio pulmonary arrest associated with hematoma formation in the neck." The report noted a 9 x 3 x 1.5 inch purple hematoma overlying the right side of the larynx, thyroid gland and upper trachea with hemorrhage noted throughout the neck. The report also states, "[u]pon postmortem perfusion of the vessels of the neck there appears to be leakage from a branch of the inferior thyroidal artery."

This action was commenced in August 2015. Following completion of discovery, Westchester County Healthcare Corporation (WCHCC), moves for an order granting summary judgment dismissing the complaint insofar as it asserts a cause of action against it.

In support of the motion WCHCC submits the affirmations of its experts who opine that WCHCC and its staff, including the nursing staff, Dr. Arshad and Dr. Obi, did not deviate from good and accepted medical practice in its care and treatment of Mr. Miller.

The first expert affirmation, from an anesthesiologist, addresses Dr. Arshad's liability. Dr. Arshad also moved for an order dismissing the complaint against him and the court issued an order this date on that motion which found triable issues of fact as to whether Dr. Arshad deviated from good and accepted medical practice and whether the deviation was a substantial factor in Mr. Miller's death.

The second expert affirmation, from a neurosurgeon, opines that the treatment provided by WCHCC at all times conformed with good and accepted standards of care. The expert states that the nursing staff appropriately dealt with the nausea and hypertension issues which were unrelated to the surgery, that the peri-orbital edema was not related to the hematoma, but rather the product of the tape that covered Mr. Miller's eyes during surgery and its removal after surgery, that there is no evidence that Mr. Miller suffered any of the symptoms, such as change of voice, difficulty swallowing, headache, tenseness of the neck, increased swelling, decreased oxygen saturations, associated with periorbital edema, that the staff did not fail to appreciate or recognize warning signs of the development of a neck hematoma, since often patients do not develop warning signs "until its too late," that the other symptoms exhibited by Mr. Miller are all common symptoms suffered by post-operative patients, and that the staff acted appropriately when Mr. Millers' condition rapidly deteriorated beginning at 5:15 a.m.

In opposition, plaintiff submitted the affirmation of its expert orthopedic surgeon, who opined that Dr. Obi, an employee of WCHCC, deviated from good and accepted medical practice, by failing to appropriately respond to symptoms she observed during her 70 minute examination of Mr. Miller, including failing to recognize the possibility of a neck hematoma when Mr. Miller complained of neck pain, which increased from 4/10 to 8/10 during her examination, including observing swelling in the neck but discounting the swelling as the result of the neck brace, or merely a manifestation of Mr. Miller's large neck, without palpating the neck. In the opinion of plaintiff's expert, had Dr. Obi palpated the neck she would have discovered abnormal swelling, and steps would have been taken to address the possibility, not uncommon in this type of surgery, of swelling due to a hematoma forming in the neck and the

resultant compression of the airway.

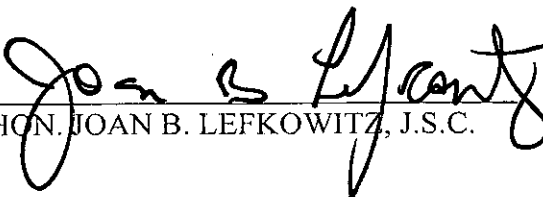
In addition, plaintiff's expert opined the nursing staff at WCHCC deviated from good and accepted standards in its care of Mr. Miller by failing to contact Dr. Barrack or other doctor when Mr. Miller exhibited the symptoms of neck pain, neck swelling, redness, tenderness, facial swelling, throat discomfort, itchiness and anxiety, so an evaluation could be performed to determine the reason for the symptoms, especially when a hematoma forming and compressing the airway is a known risk after the surgery performed on Mr. Miller. The 2:03 a.m. nursing note indicates that at sometime before 2:03 a.m. Mr. Miller exhibited periorbital edema, and his neck was positive for tenderness, redness and swelling. At 3:26 a.m. his neck pain is recorded as 9/10. At 3:47 a.m. throat discomfort is noted in which Mr. Miller complained his throat "hurt." Then, from 3:47 a.m. to 5:15 a.m. there are no nursing notes indicating that Mr. Miller was being monitored. It was at 5:15 that the events began which ended when Mr. Miller airway was compressed by the hematoma, causing asphyxiation, cardiac arrest and eventually death. The expert states, based upon these symptoms and based upon the known risks of a hematoma forming and restricting the airway, good and accepted practice demanded that the nursing staff contact a physician to evaluate Mr. Miller in order to rule out bleeding in the neck, and that if a physician were contacted then the developing hematoma could have been detected and treated, and that the failure to do so is a substantial factor in Mr. Miller's developing the hematoma which closed his airway leading to cardiac arrest and death.

"Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. Such conflicting expert opinions . . . raise credibility issues which can only be resolved by a jury" (*Barrocales v. New York Methodist Hosp.*, 122 AD3d 648, 649 [2d Dept 2014] [internal quotations and citations omitted]).

Here, the affirmation of plaintiff's expert raises triable issues of fact whether the staff of WCHCC deviated from good and accepted practice in its care of Mr. Miller, and whether the deviation was a substantial factor in Mr. Miller's asphyxiation, cardiac arrest and death.

ENTER,

Dated: White Plains, New York  
July 3, 2018

  
HON. JOAN B. LEFKOWITZ, J.S.C.