

Murphy v Drosinos

2019 NY Slip Op 30132(U)

January 15, 2019

Supreme Court, New York County

Docket Number: 805259/2015

Judge: Martin Shulman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

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MOLLY MURPHY and ANDREW MURPHY,

Index No.: 805259/2015

Plaintiffs,

DECISION AND ORDER

-against-

SOPHIA DROSINOS, M.D., EMILIE VANDER
HAAR, M.D., SILVANA RIBAUDO, M.D., and
NEW YORK PRESBYTERIAN HOSPITAL,

Defendants.

-----X
Martin Shulman, J.:

In this action seeking damages for medical malpractice, defendant Sophia Drosinos, M.D. (Dr. Drosinos) moves for summary judgment dismissing the complaint pursuant to CPLR 3212 (motion sequence 001). Defendants Emilie Vander Haar, M.D. (Dr. Vander Haar), Silvana Ribaud, M.D. (Dr. Ribaud) and the New York Presbyterian Hospital (NYPH) move for the same relief (motion sequence 002). Plaintiffs oppose both motions, which are consolidated for disposition.

Plaintiffs Molly Murphy (Mrs. Murphy or plaintiff) and Andrew Murphy (Mr. Murphy) allege medical malpractice in connection with Mrs. Murphy's July 15, 2014 vacuum-assisted vaginal delivery with fourth degree laceration repair. Plaintiffs allege that defendants departed from applicable standards of medical care by *inter alia* failing to: properly manage Mrs. Murphy's labor and delivery; repair her fourth degree perineal tear which allegedly resulted in an anovaginal fistula; appreciate her postpartum complaints of fecal incontinence and stool leaking from her vagina; diagnose and repair

an anal sphincter muscle tear; and refer her to a surgeon to repair the fistula and sphincter tear.

Plaintiff further alleges that defendants failed to obtain her informed consent to the laceration repair in that they failed to advise her that chief resident Dr. Vander Haar would perform the procedure. Mrs. Murphy's alleged injuries include: grade four laceration; rectal-vaginal fistula; fecal incontinence; external anal sphincter tear; the need for additional surgical procedures (to wit, episiotomy and sphincteroplasty); deformed perineal area; foul smelling vaginal discharge/drainage; menstrual cycle irregularity; inability to deliver vaginally in the future; pain upon intercourse; and impaired mobility.

Background

On January 9, 2014, Mrs. Murphy presented to obstetrician-gynecologist (ob/gyn) Silvana Ribaldo, M.D. for confirmation of pregnancy. Dr. Ribaldo noted that the pregnancy was normal and plaintiff continued to see Dr. Ribaldo throughout her pregnancy. Toward the end of Mrs. Murphy's pregnancy, Dr. Drosinos, a private attending physician with admitting privileges at NYPH, was covering Dr. Ribaldo's patients while she was on vacation.

On July 14, 2014 plaintiff presented to Dr. Drosinos for a prenatal visit. At that time her blood pressure was elevated, she had protein in her urine and she had gained eleven pounds over the preceding week. Dr. Drosinos directed Mrs. Murphy to proceed to NYPH for induction of labor and she was admitted that day.

Plaintiffs' daughter was born the next day via vacuum assisted vaginal delivery. Dr. Drosinos delivered the baby with Dr. Vander Haar's assistance.¹ Dr. Drosinos made the decision to use the vacuum device to expedite the delivery due to concerns regarding the fetal heart rate. Dr. Vander Haar placed the vacuum cup on the baby's head pursuant to Dr. Drosinos' instructions and once it was placed Dr. Drosinos examined plaintiff to ensure that it was attached only to the baby's head and not the vagina.

Dr. Drosinos cut a median episiotomy² after the cup was placed and prior to the third pull of the vacuum. Dr. Vander Haar performed the first two pulls with the vacuum and Dr. Drosinos performed the third and final pull, for a total of "three pulls and one pop-off." After the third pull and as the baby's head was delivered, the doctors discovered the episiotomy extended into a fourth-degree laceration. At her deposition, Dr. Drosinos testified that a fourth-degree laceration is one that goes through the rectal mucosa past the internal and external anal sphincter. She further testified that an instrumental delivery, such as by vacuum or forceps, increases the risk of experiencing a fourth-degree laceration.

Dr. Drosinos and Dr. Vander Haar next began repairing the laceration. They began by visually examining the vagina and perineum to make sure there were no sulcus tears. They placed a finger in the rectum: "after we completed the rectal –

¹At the time of the events herein, Dr. Vander Haar was a fourth-year ob/gyn resident at NYPH.

²An episiotomy is an incision on the perineum from the vagina about halfway down toward the anus.

suturing of the rectal mucosa, we put a finger in the rectum to see if there were any sutures that perforated through" (Levin affirmation, exhibit E at 130). Dr. Vander Haar next repaired the vagina and perineum. According to Dr. Drosinos' deposition testimony, she was present next to Dr. Vander Haar throughout this procedure:

Q: Okay. If Dr. Vander Haar is doing this repair, what are you doing?

A: I am standing right here (indicating), at her shoulder, instructing her on every throw she makes.

MR. MAY: When you say "throw," you mean?

A: Every throw of the suture and I'm the retractor.

(*id.* at 87). Dr. Drosinos testified that she was right by Dr. Vander Haar's side, "retracting while [Dr. Vander Haar] is stitching," and this is something she had to do "throughout the entire repair process" (*id.* at 95).

According to the deposition testimony of both Mr. and Mrs. Murphy, plaintiff was not advised that she needed an episiotomy, nor was she told that she had torn until "[l]ater. . . I felt the pull. I heard them saying sutures too" (*id.*, exhibit D-1 at 115). She additionally testified that:

[m]y husband was with Grace. I was with the nurse. Dr. Drosinos was on the sofa. I wanted to hold Grace. Dr. Drosinos got up and down several times. She was saying suture to the other doctor who was sewing or doing whatever she was doing . . . Sitting, looking out the window, talking about the Yankees to my husband . . . And I was talking to the doctor who was stitching me saying, why is it taking so long? . . . I then asking again why it was taking so long. Dr. Drosinos got up, talking to me here, and said, You had a fourth degree tear. And I said, What is a fourth degree tear? And she said Well, it is a fourth degree tear. I said, Okay . . . I had no idea what a fourth degree tear was.

(*id.* at 115-117).

Plaintiff additionally testified that Dr. Drosinos was standing next to Dr. Vander Haar during the suture process, but that she got up and down two or three times from sitting on the couch to the area where Mrs. Murphy was being sutured. She could hear Dr. Drosinos and Dr. Vander Haar talking about sutures:

Q: Did you hear what Dr. Drosinos and Dr. Vander Haar were talking about?

A: Sutures. Something about stitching.

Q: Did Dr. Drosinos, as far as you know, participate in the suturing?

A: She was – there were times when she was there next to her while they were stitching when she was there. I don't know if it was Drosinos or Vander Haar doing the stitching. The majority of time it was Dr. Vander Haar, with Dr. Drosinos either standing there or sitting on the sofa.

(*id.* at 118).

Plaintiff believes that Dr. Drosinos was instructing Dr. Vander Haar: "It sounded like instructions. I don't know what they were saying. But I'm sure that is what it was"

(*id.*, exhibit D-2 at 358).

Likewise, Mr. Murphy testified that Dr. Drosinos was, at times, next to Dr. Vander Haar during the suturing, and was also sitting on the couch next to him:

I was going back and forth between Grace and Molly. And Dr. Drosinos was talking to me. There was a couch right next to the window . . . And Vander Haar was still in front of Molly I believe beginning the stitching process . . . I saw Dr. Vander Haar bending down into my wife's vagina area, yes . . . [Dr. Drosinos] walked over. But I never saw her take part in what was going on. But it was very, very limited. She was off to the side of Molly most of the time. Because I can just recall having either of them on the side of me.

(*id.*, exhibit F at 68-71).

When asked how much longer Dr. Drosinos was in the labor and delivery room after the birth, he testified: "She was there for I believe most of the stitching of Molly. But at one point I remember Vander Haar the only one in the room between the two of them. There may have been other doctors." (*id.* at 73-74).

Dr. Drosinos testified that Dr. Vander Haar followed all of her instructions:

Q: Did Dr. Vander Haar follow your instructions –

A: Yes.

Q: At every – just—at every point of doing whatever it is she did during the delivery and the repair of this fourth-degree episiotomy extension –

A: Yes.

(*id.*, exhibit E at 144).

After the laceration was repaired, the doctors "did a rectal exam again and then we looked – we looked at the vagina again to make sure there weren't sulcus tears. Then that was it" (*id.*). In total, the doctors did four rectal examinations.

Mrs. Murphy was discharged from the hospital on July 17, 2014 and then had postpartum office visits with Dr. Ribauda on July 20, 2014, August 19, 2014 and October 14, 2014.

At the July 20, 2014 postpartum visit, Dr. Ribauda examined Mrs. Murphy's rectum and vagina. Plaintiff complained that she experienced stool leaking from her

vagina at the time of her first post-delivery bowel movement.³ At the August 19th visit, Dr. Ribaldo examined the vagina and rectum again and did not find a fistula or any defect. At the October 14th visit, Dr. Ribaldo did another vaginal examination and found no fistula or any defect. Approximately one week later, Mrs. Murphy called Dr. Ribaldo and reported that she again had stool leaking through her vagina. At that point, Dr. Ribaldo referred plaintiff to Toyooki Sonoda, M.D., a colon-rectal surgeon.

Mrs. Murphy saw Dr. Sonoda on November 7, 2014, approximately four months after giving birth. Dr. Sonoda did a digital anorectal examination and did not find a fistula or any sphincter defect. He noted that he felt an anterior anorectal scar, that at the lower aspect of the scar he felt a small pucker, and that the overall rectal tone was good. In his records, he additionally noted that: it was "difficult to tell if tiny fistula is present" (Shapiro affirmation, exhibit K at 002). On November 25, 2014, Dr. Sonoda did an examination under anesthesia (EUA) and found a small anovaginal fistula, which is a connection between the anus and vagina. Dr. Sonoda noted that "the fistula tract was 1/4 to 1/3 up the anal canal, and seemed to involve less than 5 mm of anal sphincter" (*id.* at 004). He also found an anal sphincter tear during the EUA.

On December 11, 2014, Dr. Sonoda recommended surgery to repair the fistula and sphincter tear. Plaintiff opted to undergo surgery after the holidays and Dr. Sonoda performed the repair on January 6, 2015.

³ Although Mrs. Murphy testified that this occurred one week after giving birth, it appears to have occurred the fourth day after the delivery.

Plaintiffs allege that Drs. Drosinos and Vander Haar departed from accepted medical practice in that they failed to properly suture and repair the laceration, resulting in the development of a rectovaginal fistula and the anal sphincter muscle tear. As to Dr. Ribaldo, plaintiffs allege that she failed to timely diagnose and treat the rectovaginal fistula and anal sphincter tear, which they allege were caused by the negligent repair of the fourth-degree laceration, and also failed to timely and properly refer Mrs. Murphy to a colorectal surgeon.⁴

All defendants now move for summary judgment. Based upon a review of the facts and the applicable law, this court grants summary judgment in favor of all defendants.

Discussion

An award of summary judgment is appropriate when no issues of fact exist (CPLR 3212 [b]; *Sun Yau Ko v Lincoln Sav. Bank*, 99 AD2d 943 [1st Dept 1984], *affd* 62 NY2d 938 [1984]; *Andre v Pomeroy*, 35 NY2d 361 [1974]). In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law by providing sufficient evidence to eliminate any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Indeed, the moving party has the burden to present evidentiary facts to establish his or her cause sufficiently to entitle the movant to judgment as a matter of law (*Friends of Animals v Associated Fur*

⁴ Mrs. Murphy testified that she has not experienced stool leaking from the vagina since Dr. Sonoda repaired the fistula. She gave birth to her second child in 2017.

Mfrs., 46 NY2d 1065 [1979]). “Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposition papers (*Masucci v Feder*, 196 AD2d 416, 419 [1st Dept 1993]).

In deciding the motion, the court views the evidence in the light most favorable to the nonmoving party and gives the party the benefit of all reasonable inferences that can be drawn from the evidence (see *Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]). Moreover, the court should not pass on issues of credibility (*Assaf v Ropog Cab Corp.*, 153 AD2d 520, 521 [1st Dept 1989]). While the moving party has the initial burden of proving entitlement to summary judgment (*Winegrad*, 64 NY2d at 853), once such proof has been offered, in order to defend the summary judgment motion, the opposing party must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]); *Freedman v Chemical Constr. Corp.*, 43 NY2d 260 [1977]; see also *Friends of Animals, Inc.*, 46 NY2d at 1067).

“To sustain a cause of action for medical malpractice, a plaintiff must prove two essential elements: (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of plaintiff’s injury” (*Frye v Montefiore Med. Ctr.*, 70 AD3d 15, 24 [1st Dept 2009]). Speculative and unsubstantiated assertions of plaintiff’s expert are patently inadequate to raise a triable issue of fact (*Petty v Pilgrim*, 22 AD3d 478, 481 [2d Dept 2005]).

Dr. Drosinos

Dr. Drosinos argues that the treatment she rendered to plaintiff was entirely consistent with good and accepted medical practice. In support of her motion, she relies upon the expert affirmation of Victor Grazi, M.D. (Dr. Grazi). Dr. Grazi, a board-certified ob/gyn, opines to a reasonable degree of medical certainty that Dr. Drosinos “correctly made the determination that [Dr. Vander Haar] was well qualified to perform a surgical repair of a fourth degree tear under [her] expert direction and supervision . . .” (Grazi affirmation, ¶10).

Dr. Grazi bases this opinion upon Dr. Vander Haar’s status as a chief resident who, prior to the delivery in question, had already repaired approximately five other fourth degree vaginal tears during her third and fourth years of residency. According to Dr. Grazi, “[t]here was no deviation from the standard of care by Dr. Drosinos in permitting the experienced and trained Chief Resident to repair Ms. Murphy’s perineal tear. It would make no sense for a teaching hospital, such as NYPH, to graduate a Chief Resident if that same physician had never been supervised performing a fourth-degree repair” (*id.*).⁵

With respect to the repair of the fourth degree tear, Dr. Grazi opines that Dr. Drosinos met the standard of care. Dr. Grazi concludes that “[t]he evidence in this case is overwhelming that the fourth-degree tear was correctly repaired, and that any

⁵ Dr. Grazi additionally opines that Dr. Drosinos’ management of plaintiff’s labor and delivery met the standard of care. However, plaintiffs’ opposition does not address this alleged departure and the claim is deemed abandoned.

breakdown of the episiotomy extension had nothing whatsoever to do with the care and treatment that was provided by Dr. Drosinos and the resident” (*id.*, ¶ 14). Dr. Grazi bases this opinion on his observations that Dr. Drosinos took care in performing the suturing and in inspecting the area carefully before, during and after the repair. Dr. Grazi notes that: “Prior to the repair of the perineal tear or episiotomy extension, Dr. Drosinos and the Chief Resident correctly examined the patient’s perineum and rectum, ensuring there was only the perineal tear and not a sulcus tear” (*id.*, ¶ 13). Dr. Grazi goes on to state:

The record indicates appropriate suturing materials were used throughout the fourth-degree repair . . . The patient was also appropriately administered IV Ancef in advance of the surgical repair. The repair of the rectal mucosa was correctly started slightly above the apex of the rectum. Dr. Drosinos correctly instructed the Chief Resident to avoid placing a stitch through the mucosa and [she] appropriately supervised to ensure that did not happen . . . both Dr. Drosinos and the Chief Resident thoroughly examined the suturing to ensure there was no disruption and that no suture material had perforated through the rectum. [They] inspected with their finger inside the rectum to make sure there was no disruption or buttonhole above the full thickness rectal tear.

(*id.*, ¶ 14).

As to the thoroughness of Dr. Drosinos’ examination of the repair, Dr. Grazi states: “Throughout the surgical repair, the rectum was examined four times – after repair of the rectal mucosa, after the sphincter repair, and after the first and second-degree lacerations were repaired” (*id.*). Dr. Drosinos argues that plaintiffs cannot establish that her care and treatment caused or contributed to Mrs. Murphy developing a rectovaginal fistula. In support of this argument, Dr. Drosinos cites the fact that

plaintiff did not complain of stool leaking through her vagina until several days after the delivery.

Dr. Drosinos' submissions in support of her motion for summary judgment meet her burden of establishing the prima facie showing required to warrant judgment in her favor as a matter of law. Dr. Drosinos relies on the hospital records, Dr. Grazi's expert opinion, and the deposition testimony to establish that no questions of fact exist concerning her status as a private attending physician, her judgments and actions, and her failure to deviate from accepted medical practice.

These submissions offer detailed descriptions of the care she provided to plaintiff, including her presence in the birthing room and her supervision of Dr. Vander Haar, as well as her position next to, and instructions to, Dr. Vander Haar during the procedure. This court finds that based upon these submissions, Dr. Drosinos has met her legal burden on her motion.

In opposition, plaintiffs argue that Dr. Drosinos' motion ignores the factual discrepancies regarding her role in supervising the repair of Mrs. Murphy's fourth-degree laceration. Plaintiffs' expert affirms that Dr. Drosinos departed from accepted medical practice in that she failed to properly repair the laceration and failed to properly supervise Dr. Vander Haar. Plaintiffs' expert challenges Dr. Grazi's affirmation on the grounds that Dr. Grazi merely devotes two paragraphs (13 and 14) to the repair of the fourth degree tear, and makes no reference to the plaintiffs' deposition testimony to the effect that Dr. Drosinos moved from the couch to the patient two to three times, and

therefore was neither doing the suturing nor properly supervising Dr. Vander Haar's work.

Concerning Dr. Drosinos' presence in the room throughout the suturing, plaintiffs' expert opines: "The divergent deposition testimony clearly establishes a sharp question of fact in this regard, and calls into question whether Dr. Drosinos even remained present in the delivery room throughout the laceration repair" (Futterman affirmation, exhibit A, ¶ 30). Thus, the expert concludes that this conduct was a deviation since "[g]ood and accepted obstetrical practice required Dr. Drosinos to remain present throughout and to complete the evaluation of the episiotomy repair before the mother could be taken from the delivery room" (*id.*, ¶ 34).

Plaintiffs' expert bases this conclusion on Mr. Murphy's testimony that at one point Dr. Drosinos was not in the room while Dr. Vander Haar was suturing his wife. In his affirmation, plaintiffs' expert challenges only that Dr. Drosinos was not present, next to Dr. Vander Haar, during the entire time that Dr. Vander Haar was working on plaintiff, and based upon this alone he/she speculates that Dr. Drosinos deviated from accepted medical practice insofar as supervising and participating in the procedure.

Plaintiffs' expert offers no facts supporting any deviation, other than a failure of supervision based only upon plaintiffs' testimony that Dr. Drosinos moved to sit on a couch two to three times during the procedure and, according to Mr. Murphy, she might have left the room for a period of time at some point. Plaintiffs' expert does not challenge Dr. Drosinos' decisions during the suturing, such as the materials she used, the examinations she performed, or the specific instructions she gave to Dr. Vander

Haar. Plaintiffs similarly do not challenge the technique Dr. Drosinos used or the guidance she provided to Dr. Vander Haar. Instead, plaintiffs' expert challenges Dr. Drosinos' presence at Dr. Vander Haar's shoulder during the entire procedure, opining that there could be no other cause for the fistula than improper suturing.

Although there are factual discrepancies between Dr. Drosinos' testimony that she was by Dr. Vander Haar's shoulder during the entire repair, and the plaintiffs' testimony that she was up and down from the couch two to three times, this factual dispute does not create a material issue of fact. Plaintiffs essentially ask the court to speculate that, because Dr. Drosinos was up and down from the couch, that she was not adequately present during the repair to properly supervise Dr. Vander Haar and to do her part of the suturing, resulting in less than acceptable treatment. However, plaintiffs offer no specific details of deviation, including whether Dr. Drosinos' presence on the couch meant that she was not following every stitch or offering detailed instructions. Ultimately, plaintiffs offer no evidence whatsoever that would permit the court to find that Dr. Drosinos deviated from an accepted level of care.

Additionally, plaintiffs' expert affirms that the fistula must have resulted from a failure to properly close and suture the rectal and vaginal layers of the laceration, and not from any other potential cause such as breakdown of the surgical closure or infection:

As Mrs. Murphy experienced stool leaking from the vagina on July 19, 2014, only four days post-delivery and on the occasion of her first post-delivery bowel movement, the fistula resulted from a failure to properly close and suture the rectal and vaginal layers of the laceration. There was simply not enough time for the closure to break down and there was no

sign of any infection at the time of Mrs. Murphy's first postpartum visit to Dr. Ribaud.

(*id.*, ¶33).

Plaintiffs' expert further opines on this point:

The records and testimony reflect that Mrs. Murphy was appropriately following her discharge instructions to utilize stool softeners and her testimony establishes that she felt her first bowel movement come on; that she immediately ran to the bathroom; that she had no control and that the minute she sat down, she felt it come from her vagina. This testimony is sufficient to establish that Mrs. Murphy was not straining to move her bowels and did not put undue pressure on her body to force a bowel movement. It is my opinion with a reasonable degree of medical certainty that this is further evidence that there was not a breakdown of a properly sutured laceration, but evidence of an improperly sutured repair.

(*id.*).

Based upon this testimony, plaintiffs' expert additionally finds that the fecal incontinence was not the result of copious stool softeners but "was the result of weakening of anal control due to an undiagnosed tear of her anal sphincter muscle which had also not been properly sutured following the July 15, 2014 laceration repair"

(*id.*). Based upon these post-surgery findings, plaintiffs' expert opines that "the fourth degree laceration was not properly closed" (*id.*, ¶34).

Although these opinions may appear to present questions about the fistula's cause, they do not create a material issue of fact as to whether Dr. Drosinos deviated from accepted medical practice. Once again, plaintiffs' expert does not point to any failure on Dr. Drosinos' part to render adequate care.

Additionally, plaintiffs' expert concludes that both Drs. Drosinos and Vander Haar failed to obtain a proper informed consent to the laceration repair in that they failed to disclose to Mrs. Murphy "that the repair of the fourth degree laceration, which is a complicated procedure requiring considerable obstetrical experience, would be performed by the resident, rather than the attending ob/gyn" (*id.*, ¶ 31).

In reply, Dr. Drosinos argues that plaintiffs' expert's affirmation is facially invalid because it was prepared out-of-state without a certification or notarization. Further, Dr. Drosinos argues that plaintiffs' expert's conclusions are speculative and are based upon "hindsight reasoning" that cannot defeat summary judgment. Dr. Drosinos claims that plaintiffs' expert does not rely on specific facts in the record to undermine her own detailed factually-based testimony that she did a proper examination and a proper surgical repair. Dr. Drosinos argues that her testimony from first-hand experience that she checked plaintiff's rectum to ensure the repair was properly performed is not in any way undermined by plaintiffs' expert's speculation that the surgery must logically be the fistula's only cause.

Specifically, Dr. Drosinos argues that plaintiffs' expert fails to raise a triable issue of fact regarding the technique used to accomplish Mrs. Murphy's laceration repair, as there is absolutely no evidence to indicate any disruption in its suturing. This court finds that plaintiffs' expert's affirmation fails to raise a triable issue of fact as to whether Dr. Drosinos departed from good and accepted practice in failing to properly suture/repair the fourth-degree laceration, and whether this was the substantial contributing factor in causing plaintiff's injuries.

On the issue of informed consent, as to Dr. Drosinos, there similarly is no question of fact. Under the Public Health Law:

[!]lack of informed consent means the failure of the person providing the professional treatment or diagnosis to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable medical, dental or podiatric practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation

(Public Health Law, § 2805-d [1]).

As stated in *Bernard v Block*, 176 AD2d 843, 848 (2d Dept 1991):

Pursuant to Public Health Law § 2805-d (2), in order for a doctor to be found liable for failure to obtain a patient's informed consent to a procedure, the plaintiff must sustain the burden of proof on three issues. First, the doctor must have failed to apprise her of a reasonably foreseeable risk of the procedure. Secondly, having been informed of the risks and alternatives, the plaintiff must prove that a reasonable person in the plaintiff's condition would have opted against it, and thirdly, the plaintiff must prove that the procedure was the proximate cause of her injury.

Plaintiffs must establish that Mrs. Murphy was not informed of the reasonably foreseeable risks associated with having a chief resident perform the repair of her fourth degree laceration and that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been so informed (*Dickstein v Dogali*, 303 AD2d 443, 444 [2d Dept 2003]). In *Ogden v Bhatti*, (92 AD2d 658 [3d Dept 1983]), the plaintiff underwent a colonoscopy which resulted in a bowel perforation. The plaintiff brought an action for malpractice and alleged lack of informed consent. On this cause of action, "[p]laintiffs contend[ed] that the specific risks, such as perforation, must be mentioned, while the defendant maintained that it was necessary only to mention the general risks unless specifically asked" (*id.* at 658). As a result of this conflict, as well as the conflicting testimony as to what the defendant actually told the plaintiff of the

procedure's risks, the court held that there were questions of fact for a jury to resolve and would not disturb the jury's verdict.

On this issue, Dr. Drosinos first argues that plaintiff signed a form consenting to her medical treatment at NYPH. During her deposition, Mrs. Murphy confirmed that it is her signature on the form. Next, Dr. Drosinos notes that:

[t]here is no indication, whatsoever, that a reasonable person would have declined repair of the fourth degree laceration in the manner described in the medical record and deposition testimony. There is no alternative to such repair, and any reasonably prudent patient would have seen the necessity for suturing and repair.

(Levin affirmation, ¶34).

In opposition, plaintiffs merely argue that: "submissions on behalf of Dr. Drosinos wholly fail to refute plaintiffs' allegations as contained in the Verified Bill of Particulars and Supplemental Verified Bill of Particulars that Dr. Drosinos failed to obtain a proper informed consent" (Futterman affirmation, ¶ 48). On this claim, plaintiff testified that before her daughter was born, no one said that she needed an episiotomy and she does not know if she had one. Further, she testified that she was not told that she had torn until "later". On this point, plaintiffs' expert opines that a discussion should have taken place before any suturing began, which would have included how the laceration repair would be accomplished, who would perform the repair, and the extent to which Dr. Drosinos would supervise, because such a discussion would have precluded "the circumstances testified to by both Murphys, with Dr. Drosinos only being physically present at times, sitting on the couch discussing a casual non-medical issue with Mr. Murph [sic], and even being absent from the room" (*id.*, exhibit A, ¶37).

This court finds that any failure on Dr. Drosinos' part to apprise Mrs. Murphy that a resident would be assisting with the laceration repair does not support a claim for lack of informed consent (see *Abram v Children's Hosp. of Buffalo*, 151 AD2d 972 [4th Dept 1989]). In *Abram*, the court held that the "above definition [Public Health Law § 2805-d] covers disclosure of alternatives to treatment, and risks and benefits involved in the treatment; it cannot reasonably be read to require disclosure of qualifications of personnel providing that treatment" (*id.* at 972). Accordingly, Dr. Drosinos' motion is granted on all claims and the action is dismissed as to her.

Dr. Vander Haar

In support of her motion, Dr. Vander Haar argues that as a resident she cannot be held liable for any alleged negligent acts while being supervised by an attending physician and not acting independently. She argues that she is entitled to summary judgment since she followed supervising attending physician Dr. Drosinos' instructions.

During her deposition, Dr. Vander Haar testified that she placed all of the stitches under Dr. Drosinos' direction: "I mean that Dr. Drosinos was with me and she would, say, point with her pointer forceps usually put a stitch here and I would place a stitch where she directed me" (Levin affirmation, exhibit G at 11-12). She testified that during the delivery, the pull of the vacuum and the repair, she followed Dr. Drosinos' directions "[a]t all points in time" (*id.* at 42). Further, Dr. Vander Haar testified that she did a rectal exam according to a specific protocol, and that it was a process she did "independently under the supervision of Dr. Drosinos" and then Dr. Drosinos repeats "the entire process on her own" (*id.* at 35). Dr. Vander Haar further testified that Dr. Drosinos was

at her side "throughout the entire process of repairing the laceration" and that there was never a time when Dr. Drosinos stepped away to leave the room or to go elsewhere in the room (*id.* at 37).

In support of her motion, Dr. Vander Haar relies upon the expert opinion of Dr. Anthony Quartell (Dr. Quartell), a physician who is board certified in obstetrics and gynecology, and who states that he is "very familiar with the indications for and consequences of a vacuum assisted vaginal delivery" (Quartell affidavit, p 2). Dr. Quartell avers that, based on his review of the records, Dr. Drosinos directly supervised Dr. Vander Haar and formulated the plan for plaintiff's delivery and the repair of the fourth degree laceration. Dr. Quartell opines that the plan was reasonable, that Dr. Drosinos showed Dr. Vander Haar where to put the stitches, and Dr. Vander Haar followed Dr. Drosinos' instructions, including "what to do and how to do it" (*id.*, p 3). According to Dr. Quartell, there is no evidence that Dr. Vander Haar made any independent medical decisions.

As held in *Walter v Betancourt*, 283 AD2d 223, 224 (1st Dept 2001) (internal citations omitted):

It is well established that a hospital is not vicariously liable for the acts of a private attending physician. Further, a hospital is sheltered from liability in those instances where its employees follow the directions of the attending physician, unless that doctor's orders "are so clearly contraindicated by normal practice that ordinary prudence requires inquiry into the correctness of the orders."

With respect to a resident's liability for medical malpractice, New York courts have held:

It is well settled that a "resident who assists a doctor during a medical procedure, and who does not exercise any independent medical judgment, cannot be held liable for malpractice so long as the doctor's

directions did not so greatly deviate from normal practice that the resident should be held liable for failing to intervene.”

(*Green v Hall*, 119 AD3d 1366, 1367 [4th Dept 2014][citations omitted]; see also *Bellafiore v Ricotta*, 83 AD3d 632, 633 [2d Dept 2011]). Chart entries indicating the resident’s intent to discuss matters therein with the attendings establish the resident’s work as being supervised by the hospital attendings (*Crawford v Sorkin*, 41 AD3d 278, 280 [1st Dept 2007]). In *Crawford*, the court held that:

the motion court properly dismissed claims against Dr. Holsey, the resident, in the absence of evidence that she had exercised independent medical judgment. There is no record evidence that Dr. Holsey was acting other than under the supervision and at the direction of the hospital attendings, a fact that was not altered by her status as “night chief resident” on the labor and delivery ward. Indeed, Dr. Holsey’s entries in the chart reflect her intent to discuss repeat labs and other such matters with the attendings.

(*id.* [internal citation omitted]). This standard applies even where the resident plays an active role in the plaintiff’s procedure (see *Muniz v Katlowitz*, 49 AD3d 511, 514 [2d Dept 2008]).

This court finds that Dr. Vander Haar has met her burden of establishing that as a matter of law she was properly supervised by Dr. Drosinos and that her orders were not contraindicated. She also establishes that she did not exercise independent judgment.

In opposition, plaintiffs’ expert opines that Drs. Drosinos and Vander Haar departed from good and accepted medical practice with respect to the repair of Mrs. Murphy’s fourth degree laceration resulting in a rectovaginal fistula. Plaintiffs contend that defendants’ experts rely in part upon the divergent deposition testimony of both

plaintiffs, who offer different versions of the facts testified to by Dr. Drosinos and Dr. Vander Haar regarding the nature and extent of Dr. Drosinos' participation in, and supervision of, Dr. Vander Haar's suturing.

Plaintiffs argue that there is a discrepancy between Dr. Grazi's affirmation on Dr. Drosinos' behalf, and Dr. Quartell's affidavit for Dr. Vander Haar. Further, plaintiffs' expert opines that Dr. Vander Haar committed independent acts of negligence, rendering her liable, based on her testimony that she "independently performed a rectal examination to confirm that the rectum and the vagina had not been sewn together and did not see any defect or disruption in the repair of the rectum" (Futterman affirmation, exhibit A, ¶29).

Plaintiffs argue that Dr. Quartell's affirmation is deficient and that the version of the facts as submitted by defendants, based upon deposition testimony, raises numerous questions of fact regarding: Dr. Drosinos' physical presence; her degree of hands-on participation in retraction, suturing and inspection; and Dr. Vander Haar's concessions as to her role. Plaintiffs argue that there is at least a question of fact as to whether Dr. Vander Haar closed the laceration in the apparent absence of her attending.

Plaintiffs have not met their burden of establishing any question of fact as to whether Dr. Vander Haar deviated from accepted medical practice. Plaintiffs' arguments that Dr. Drosinos deviated by stepping away from Dr. Vander Haar two or three times to speak with Mr. Murphy and/or failed to properly supervise the resident are unavailing. Again, it is speculative that Dr. Drosinos did not adequately supervise Dr. Vander Haar and that Dr. Vander Haar acted independently of Dr. Drosinos'

instructions. There is ample evidence, based upon the testimony of Mrs. Murphy, Dr. Drosinos and Dr. Vander Haar, that Dr. Drosinos supervised Dr. Vander Haar's work and showed her how and where to do the suturing. Dr. Vander Haar testified that her independent examination of the sutures was done at Dr. Drosinos' instruction.

Further, plaintiffs' argument that Dr. Drosinos could not have been supervising each "throw," because she stepped away is speculative and does not create a question of fact. This testimony does not challenge the techniques the doctors used, the words they spoke or their actions in connection with the treatment. It is pure speculation on plaintiffs' part that Dr. Drosinos' conversations with Mr. Murphy undermined her supervision of Dr. Vander Haar. There is simply no evidence that Dr. Vander Haar exercised independent medical judgment, or that she was acting other than under the supervision and at the direction of Dr. Drosinos.

As a final matter, plaintiff's lack of informed consent cause of action must be dismissed as to Dr. Vander Haar because she had no duty to obtain Mrs. Murphy's consent. See *Salandy v Bryk*, 55 AD3d 147 (2d Dept 2008). For all of the foregoing reasons, summary judgment is granted in Dr. Vander Haar's favor and the action is dismissed as to her.

Dr. Ribaldo

Dr. Ribaldo referred plaintiff to a colorectal surgeon in October 2014, approximately three months after the delivery. Dr. Ribaldo made this referral after Mrs. Murphy's third visit on October 14, when plaintiff called her complaining that stool was again leaking through her vagina.

In support of her motion, Dr. Ribaldo submits an affirmation from Douglas Held M.D. (Dr. Held), a physician specializing in general and colon-rectal surgery who affirms that he has extensive experience in treating rectovaginal and anovaginal fistulas. He states that there is “no way to determine when the fistula and/or the sphincter tear developed” (Held affirmation at 4). Thus, “plaintiff’s claim that Dr. Ribaldo should have detected the fistula and sphincter tear when she examined plaintiff during the postpartum visits is disproven” (*id.*). To bolster this opinion, Dr. Held stresses that Dr. Sonoda also was unable to detect the fistula and sphincter tear upon physically examining Mrs. Murphy, only identifying it during the EUA with an anoscope.

Dr. Held further opines that “even if plaintiff is right that Dr. Ribaldo should have referred her to a Colon-Rectal surgeon sooner, a position Dr. Ribaldo disagrees with, it would have made no difference because the surgical repair of the fistula and sphincter tear was timely” (*id.* at 6). He explains that:

[s]mall fistulas, such as the one Dr. Sonoda described in his Operative Report, are usually managed non-operatively. If the fistula persists, surgical repair is indicated. . . . The usual time frame to wait before attempting a surgical repair of an anovaginal fistula is from 3 to 6 months. Dr. Sonoda recommended surgical repair on December 11, 2014, well within the usual time frame of 3 to 6 months. Plaintiff chose to wait until January to have the repair done and still had the repair done within the 3 to 6 month time frame . . .

(*id.* at 5). Quoting The American Society of Colon & Rectal Surgeons published Guidelines for *inter alia* “the timing of a surgical repair of a rectovaginal fistula,” Dr. Held explains that waiting for three to six months “allows ‘resolution of acute inflammation and infection, which may set the stage for spontaneous healing of the fistula.’ If the fistula is not healed in 3 to 6 months, then surgery may be indicated” (*id.*).

Based upon the foregoing, Dr. Ribaudo argues that plaintiff fails to establish causation because fistula repairs are customarily done in the same time frame in which Mrs. Murphy's fistula was repaired. As such, the outcome would be the same regardless of whether an earlier referral to a colorectal surgeon had been made.

In opposition, plaintiffs contend that Dr. Ribaudo departed from accepted medical practice in that she failed to timely and properly diagnose both the rectovaginal fistula and the anal sphincter tear during the postpartum period of July through October 2014. Plaintiffs specifically posit that:

a stark question of fact is apparent, with Mrs. Murphy unequivocally testifying that she felt stool coming from the vagina, both on the occasion of her first bowel movement at home prior to the July 20, 2014 office visit, and thereafter through October, while Dr. Ribaudo only makes a single entry as to where the patient reported the stool was coming from, on July 20, where she records that the patient was "unsure" whether it came out of her vagina.

(Futterman affirmation, ¶37).

According to plaintiffs, Dr. Ribaudo did not record Mrs. Murphy's ongoing complaints in her office records. On this point, plaintiffs' expert states: "I do not fault Dr. Ribaudo for not being able to find a very small fistula on rectal examination, but the standard of care required her to immediately refer her patient to a colorectal surgeon" (Futterman affirmation, exhibit A, ¶ 38).

Of the three to six month time frame Dr. Held sets forth, plaintiffs' expert states: "I am aware of Dr. Held's opinion, offered in support of Dr. Ribaudo, that the customary time factor for fistula repair is three to six months following delivery" (*id.*). Plaintiffs' expert continues:

[i]t is my opinion with a reasonable degree of medical certainty that that time period is only applicable where time progresses and the physician has to wait for fibrous tissue to form and heal before surgery can be attempted in order to guard against a failed surgical closure. I therefore disagree with Dr. Held's statement that even if Dr. Ribaud should have referred her patient to a surgeon earlier, it would have made no difference and that there was no delay in treatment. Here, in the immediate post-delivery period, a surgical option could have been presented to the patient as well as the option of waiting to see if healing would occur on its own without surgical intervention. Dr. Held's statement discounts the considerable pain and suffering . . . testified to by Mrs. Murphy.

(*id.*).

In reply, defense counsel contends that plaintiffs' expert, an ob/gyn rather than a colon-rectal expert, is unqualified to offer an opinion as to the three to six month time period for rectovaginal fistula repair. This court disagrees.

"To establish the reliability of an expert's opinion, the party offering that opinion must demonstrate that the expert possesses the requisite skill, training, education, knowledge, or experience to render the opinion [citations omitted]" (*Hofmann v Toys "R" Us-NY Ltd. Partnership*, 272 AD2d 296, 296 [2d Dept 2000]). An expert "need not be a specialist in a particular field" in order to render an expert opinion "if he [or she] nevertheless possesses the requisite knowledge necessary to make a determination on the issues presented" (see *Joswick v Lenox Hill Hosp.*, 161 AD2d 352, 355 [1st Dept 1990]).

In this case, plaintiffs' expert bases his/her opinions on a review of Mrs. Murphy's medical records, the pleadings and deposition transcripts. Plaintiff's expert states that he/she has practiced medicine for over 35 years and describes his/her familiarity with postpartum care. Therefore, it appears that he/she is qualified to provide an expert

opinion. See *Frye v Montefiore Med. Ctr.*, 70 AD3d at 24-25; *Guzman v 4030 Bronx Blvd. Assoc. L.L.C.*, 54 AD3d 42, 49 (1st Dept 2008) (“whether a witness is qualified to give expert testimony is entrusted to the sound discretion of the trial court”).

Based upon the expert affirmations, this court finds that Dr. Ribaudó did not deviate from acceptable standards of medical care. Dr. Held opines that there was no delay by Dr. Ribaudó because Dr. Sonoda’s repair surgery was done within the medically recommended three to six month time frame. He explains that such a time frame exists because the standard of care is to try to avoid the surgery to allow the fistula to spontaneously heal. Plaintiffs’ expert does not contradict this medical recommendation, nor does he/she indicate that waiting this period of time jeopardized Mrs. Murphy’s repair surgery.

Nor do plaintiff’s undocumented postpartum complaints to Dr. Ribaudó raise any material issues of fact. Again, the outcome was the same and plaintiff received the same treatment at each postpartum visit (to wit, rectal and vaginal examinations) regardless of what she may have conveyed to Dr. Ribaudó. Accordingly, Dr. Ribaudó’s motion for summary judgment dismissing the complaint as against her is granted.

NYPH

Plaintiffs’ complaint alleges that defendant NYPH is liable for the negligence of its employees who deviated from the standard of care. During the relevant time period Dr. Vander Haar was a fourth-year resident in obstetrics and gynecology at NYPH. Plaintiffs therefore seek to hold NYPH vicariously liable for Dr. Vander Haar’s treatment of Mrs. Murphy.

In its motion for summary judgment, NYPH argues only that there was no deviation from accepted medical practice by its employee, and therefore it cannot be held vicariously liable. Because this court found that Dr. Vander Haar was not liable to plaintiffs because she did not act independently, the question of vicarious liability on NYPH's part is resolved and its motion for summary judgment is granted (see *Soto v Andaz*, 8 AD3d 470 [2d Dept 2004]).

Mr. Murphy's Derivative Claim

Finally, the third cause of action alleging loss of services on Mr. Murphy's behalf must be dismissed as it is derivative in nature and dismissal of the primary causes of action necessitates its dismissal. *Holmes v City of New Rochelle*, 190 AD2d 713, 714 (2d Dept 1993), citing *Maddox v City of New York*, 108 AD2d 42 (2d Dept 1985), *affd* 66 NY2d 270 (1985). In accordance with the foregoing, it is

ORDERED that defendant Sophia Drosinos, M.D.'s motion for summary judgment (motion sequence 001) is granted and the complaint is dismissed against her with costs and disbursements to said defendant as taxed by the clerk upon the submission of an appropriate bill of costs, and the clerk is directed to enter judgment accordingly; and it is further

ORDERED that defendants Emilie Vander Haar, M.D., Silvana Ribaud, M.D. and New York Presbyterian Hospital's motion for summary judgment (motion sequence 002) is granted, and the complaint is dismissed as against said defendants with costs and disbursements to them as taxed by the clerk upon the submission of an appropriate

bill of costs, and the clerk is directed to enter judgment accordingly.

Dated: New York, New York
January 15, 2019

ENTER:



Hon. Martin Shulman, J.S.C.