Index №. 805373/2016

**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF NEW YORK, PART 10**

----------X

**MICHAEL PADAWER** **Index №. 805373/2016**

**Plaintiff**

**-against-**

**ALFRED OGDEN, M.D., SUSIE SO-HYUN LEE, M.D., and NEW YORK-PRESBYTERIAN HOSPITAL/COLUMBIA UNIVERSITY MEDICAL CENTER**

**Defendants**

----------X

**HON. GEORGE J. SILVER:**

In this medical malpractice action, defendants ALFRED OGDEN, M.D. ("Dr. Ogden") and THE NEW YORK AND PRESBYTERIAN HOSPITAL ("NYPH," collectively "defendants") move, pursuant to CPLR §3212, for summary judgment and an order dismissing the complaint of plaintiff MICAHEL PADAWER ("plaintiff") as against them. Plaintiff opposes defendants' application.

**BACKGROUND**

This lawsuit arises from the allegations of negligent care and treatment received by plaintiff from defendants while plaintiff was a post-operative patient of Dr. Ogden, the surgeon who performed a spinal surgery procedure on him on April 1, 2016 at NYPH. The surgical procedure was performed to address plaintiff's complaints of spinal stenosis. Dr. Ogden recommended and performed surgical intervention to address plaintiff's complaints, specifically performing a laminectomy and partial facetectomy. Plaintiff's allegations of negligence in the instant lawsuit do not relate to the performance of the surgery or the informed consent therefrom. Rather, plaintiff takes issue with defendants' post-operative care and treatment, specifically defendants' failure to appropriately, timely and properly address plaintiff's post-operative complaints of pain, at times severe and unrelenting, as well as plaintiff's post-operative urinary retention and decreasing ability to ambulate. Indeed, plaintiff alleges that it was not until almost forty-eight (48) hours after plaintiff's original surgery that plaintiff was found to be in an emergency neurosurgical condition due to the presence of a hematoma at the operative site causing compression on the spinal cord in that area, also known as a cauda equina syndrome. Because of defendants' delay, plaintiff states that plaintiff had little or no movement in his feet as well as some numbness on top of his feet. Despite emergency neurosurgical intervention thereafter on April 3, 2016, plaintiff continues to experience neurological dysfunction of his lower extremities.

Index №. 805373/2016

**ARGUMENTS**

In support of the instant motion, defendants argue based on the medical records, deposition testimony of the parties and party witnesses, and the sworn expert affirmation of John Houten, M.D., a physician board certified in neurological surgery, that defendants are entitled to summary judgment in this case, because at all times and in all ways, plaintiff was treated in full accord with good and accepted standards of medical care during his admission to NYPH in April 2016.

More specifically, Dr. Houten opines that there is no genuine issue of material fact and no legitimate dispute as to the fact that plaintiff's surgery on April 1, 2016 was medically necessary and comported with accepted standards of care. Dr. Houten further states that plaintiff knew of, and consented to, the known risks and complications of the surgery, including the potential risk of developing a post-operative hematoma. Moreover, based on his review of the relevant medical records and testimony, Dr. Houten opines that defendants properly monitored and treated plaintiff following his surgery. According to Dr. Houten, the fact that plaintiff subsequently developed a post-operative hematoma on his spine was an unfortunate, but commonly known and accepted risk of plaintiff's surgery even where all care is rendered in an appropriate fashion.

In the face of plaintiff's post-operative complaints, including severe pain and urinary retention, Dr. Houten further submits that Dr. Ogden and the various other medical care providers at NYPH, did not and should not have had a reasonable basis to suspect the presence of a hematoma until the morning of April 3, 2016, as plaintiff did not demonstrate any neurological deficits which should have triggered a suspicion of a hematoma compressing upon the nerves. Therefore, Dr. Houten submits that plaintiff does not have a viable claim against defendants premised on their alleged failure to timely diagnose and treat him.

Finally, on the morning of April 3, 2016, when there were changes in plaintiff's condition, specifically a new onset weakness in both legs, including lack of movement in plaintiff's feet and numbness on the top of both feet, Dr. Houten notes that NYPH staff, immediately acted upon this change in plaintiff's condition, by speaking with Dr. Ogden, by emergently ordering an MRI to confirm the suspected diagnosis of a hematoma, and returning plaintiff to the operating room for surgery to evacuate the hematoma.

As such, defendants submit that there is no genuine dispute that plaintiff was treated in full accord with good and accepted standards of medical care during his admission to NYPH in April 2016, and that there was no delay in diagnosing and/or treating plaintiff's post-operative hematoma. Defendants further submit that plaintiff's entire theory of liability is derived solely from the after-acquired knowledge that plaintiff was diagnosed with a post-operative hematoma on the morning of April 3, 2016. In defendants' estimation, working backward from that result, plaintiff is attempting to reverse engineer a departure, by attempting to argue that there had to have been signs/symptoms of the presence of this hematoma on April 1, 2016, and/or April 2, 2016, simply because it was found to have existed on the morning of April 3, 2016. existed on the morning of April 3, 2016. Contrary to that theory, defendants argue that the law is clear that the conduct of defendants in medical malpractice actions is to be judged on the facts as they exist at the time

of treatment, and not in retrospect due to subsequent events. As such, defendants submit that they are entitled to judgment in their favor.

In opposition, plaintiff states at the outset that it is not the plaintiff's contention that the mere fact that the plaintiff developed a post-operative hematoma means defendants were negligent in his care and treatment. Rather, it is plaintiff's contention that the failure of defendants to consider the presence of a post-operative hematoma in plaintiff, a patient known to have been on a blood thinner medication who asserted post-operative complaints of pain, represented a deviation and departure from the good and accepted practice that proximately caused injury to plaintiff. In response to defendant's expert affirmation's contention that plaintiff was appropriately and properly treated by defendants, plaintiff annexes the affirmation of an expert board certified in the field of neurology, who said opines that defendants deviated and departed from the good and accepted practice of medicine in their treatment of plaintiff, whose post-operative hematoma was present since the time of the initial surgery, and continued thereafter. Indeed, it is plaintiffs expert's opinion, within a reasonable degree of medical certainty, that given plaintiff's signs, symptoms, findings and/or complaints, as well as his apparently having been on low dose aspirin with a post-operative hematoma, it was a deviation and a departure for plaintiff to have not been seen by any physician or physician's assistant from the time of the completion of the morning rounds on April 2, 2016 at around 8:30 a.m. until Sunday morning April 3, 2016 at 8:30 a.m. With reference to the record before the court, plaintiff's expert highlights that there are absolutely no notes or documentation of any kind to prove that any physician or physician's assistant saw, examined, assessed or evaluated plaintiff during that 24-hour time period.

It is plaintiff's expert's opinion, within a reasonable degree of medical certainty, that the failure of defendants to adequately, timely and appropriately assess and evaluate plaintiff during this 24-hour period, and the resultant failure of defendants to order an emergency MRI during this time and prior to the emergency MRI ordered only after examining plaintiff on April 3, 2016, was a deviation from appropriate standards of care. Consequently, plaintiff submits that issues of fact surrounding plaintiff's care and treatment during the relevant timeframe preclude a finding of summary judgment in defendants' favor.

In reply, defendants challenge plaintiff's expert affirmation and the conclusions drawn therefrom. Defendants further reiterate the arguments made in their moving papers, and renew the argument that they are entitled to judgment in their favor. Mainly, defendants state that plaintiff's expert's qualifications as a neurologist do not establish that he has any relevant knowledge within the field of neurosurgery. Moreover, defendants argue that plaintiff's expert failed to challenge defendants contention that plaintiff was adequately monitored throughout his admission. Defendants further submit that plaintiff's expert's opinions are predicated, in part, on new allegations defendants' failure to consider plaintiff's use of low dose aspirin. For these reasons and more, defendants states that plaintiff's expert's opinion is conclusory, of no probative value, and unworthy of consideration by the court. Accordingly, defendants restate their sentiment that they are entitled to judgment in their favor.

## DISCUSSION

In an action premised upon medical malpractice, a defendant doctor or hospital establishes prima facie entitlement to summary judgment when he or she establishes that in treating the plaintiff there was no

departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged (*Roques v. Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Thurston v Interfaith Med. Ctr.*, 66 AD3d 999, 1001 [2d Dept. 2009]; *Myers v Ferrara*, 56 AD3d 78, 83 [2d Dept. 2008]; *Germaine v Yu*, 49 AD3d 685 [2d Dept 2008]; *Rebozo v Wilen*, 41 AD3d 457, 458 [2d Dept 2007]; *Williams v Sahay*, 12 AD3d 366, 368 [2d Dept 2004]). In claiming that 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 Dept2008]). The opinion must be based on facts within the record or personally known to the expert (*Roques*, 73 AD3d at 207, *supra*). Indeed, it is well settled that expert testimony must be based on facts in the record or personally known to the witness, and that an expert cannot reach a conclusion by assuming material facts not supported by record evidence (*Cassano v Hagstrom*, 5 NY2d 643, 646 [1959]; *Gomez v New York City Hous. Auth.*, 217 AD2d 110, 117 [1st Dept 1995]; *Matter of Aetna Cas. & Sur. Co. v Barile*, 86 AD2d 362, 364-365 [1st Dept 1982]). Thus, a defendant in a medical malpractice action who, in support of a motion for summary judgment, submits conclusory medical affidavits or affirmations, fails to establish prima facie entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Cregan v Sachs*, 65 AD3d 101, 108 [1st Dept 2009]; *Wasserman v Carella*, 307 AD2d 225, 226 [1st Dept 2003]). Further, medical expert affidavits or affirmations, submitted by a defendant, which fail to address the essential factual allegations in the plaintiff's complaint or bill of particulars do not establish prima facie entitlement to summary judgment as a matter of law (*Cregan*, 65 AD3d at 108, *supra*; *Wasserman*, 307 AD2d at 226, *supra*). To be sure, 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 the defendant meets its burden of establishing prima facie entitlement to summary judgment, it is incumbent on the plaintiff, if summary judgment is to be averted, to rebut the defendant's prima facie showing (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The plaintiff must rebut defendant's prima facie showing without "[g]eneral allegations of medical malpractice, merely conclusory and unsupported by competent evidence" (*id.* at 325). Specifically, to avert summary judgment, the plaintiff must demonstrate that the defendant did in fact commit malpractice and that the malpractice was the proximate cause of the plaintiff's injuries (*Coronel v New York City Health and Hosp. Corp.*, 47 AD3d 456 [1st Dept. 2008]; *Koeppel v Park*, 228 AD2d 288, 289 [1st Dept. 1996]). To meet the required burden, the plaintiff must submit an affidavit from a medical doctor attesting that the defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged (*Thurston*, 66 AD3d at 1001, *supra*; *Myers,* 56 AD3d at 84, *supra*; *Rebozo*, 41 AD3d at 458, *supra*).

Here, defendants' submission of deposition transcripts, medical records and an expert affirmation based upon the same established a prima facie defense entitling them to summary judgment (*Balzola v Giese*, 107 AD3d 587 [1st Dept 2013]). To be sure, Dr. Houten opines that defendants role in plaintiff's care was at all times appropriate as plaintiff's surgery on April 1, 2016 was medically necessary and comported with accepted standards of care. Dr. Houten further states that plaintiff knew of, and consented to, the known risks and complications of the surgery, including the potential risk of developing a post-operative hematoma.

Moreover, based on his review of the relevant medical records and testimony, Dr. Houten opines that defendants properly monitored and treated plaintiff following his surgery. In Dr. Houten's estimation, the fact that plaintiff subsequently developed a post-operative hematoma on his spine does not mean that defendants' care was inappropriate, especially since post-operative hematomas are commonly associated with the type of surgery plaintiff underwent. As Dr. Houten's opinions are predicated upon ample support within the record, defendants have shown that plaintiff was treated in full accord with good and accepted standards of medical care during his admission to NYPH in April 2016, and that there was no delay in diagnosing and/or treating plaintiff's post-operative hematoma.

In opposition to defendant's prima facie showing, plaintiff raises triable issues of fact to preclude summary judgment. Indeed, plaintiff's expert opines that defendant departed from accepted standards of care in several material ways. To be sure, plaintiff's expert opines that defendant's actions ran athwart of standards of care insofar as defendants failed to consider the presence of a post-operative hematoma in plaintiff even though plaintiff had been administered a blood thinner medication and asserted post-operative complaints of pain. Such conduct, in plaintiff's expert's estimation, represented a deviation and departure from the good and accepted practice that proximately caused injury to plaintiff. Indeed, it is plaintiff's expert's opinion, within a reasonable degree of medical certainty, that given plaintiff's signs, symptoms, findings and/or complaints, as well as his apparently having been on low dose aspirin with a post-operative hematoma, it was a deviation and a departure for plaintiff to have not been seen by any physician or physician's assistant from the time of the completion of the morning rounds on April 2, 2016 at around 8:30 a.m. until Sunday morning April 3, 2016 at 8:30 a.m. This view is supported by the record before the court, as defendants have failed to provide any notes or documentation of any kind to prove that any physician or physician's assistant saw, examined, assessed or evaluated plaintiff during that 24-hour time period. The affidavits that defendants' physician's assistants have submitted are insufficient to provide that plaintiff was evaluated during the aforementioned 24-hour time period. To be sure, defendants' physician's assistants have no independent recollection of examining plaintiff, and merely submit that it would have been their custom and practice to check up on a patient in plaintiff's position. Such observations are, as a matter of law, insufficient to prove that plaintiff was in-fact appropriately evaluated during the referenced timeframe. Indeed, the weight to afford defendants' physician's assistants testimony is for a jury, not this court, to decide. Regardless, plaintiff's expert's opinion is also that Dr. Ogden, not defendants' physician's assistants, should have personally evaluated plaintiff. To be sure, it is plaintiff's expert's opinion, within a reasonable degree of medical certainty, that the failure of defendants to adequately, timely and appropriately assess and evaluate plaintiff during this 24-hour period was a deviation from appropriate standards of care. Consequently, plaintiff has sufficiently shown that issues of fact surrounding plaintiff's care and treatment during the relevant timeframe preclude a finding of summary judgment in defendants' favor.

Defendants challenges to plaintiff's expert's credentials are without merit. Plaintiff's expert is a board-certified neurologist, who has been practicing within the field for the past 30 years. In preparing his affirmation, plaintiff's expert affirms that he was supplied with the relevant medical records of plaintiff, deposition transcripts, bills of particulars, and defendants' moving papers. Working as a neurologist, plaintiff's expert has observed numerous admissions such as plaintiff's admission at NYPH in the instant

lawsuit, and therefore can opine within a reasonable degree of medical certainty whether defendants' medical intervention was at all times appropriate, and in accordance with accepted standards of care. Relevantly, plaintiff's expert's observations within the instant lawsuit do not relate to the manner in which plaintiff's surgery was performed. Rather, as a neurologist, plaintiff's expert submits that defendants should have properly observed plaintiff to detect potential neurological compromise *after* plaintiff's surgery. This is an important issue to highlight, because the breadth of case law that defendants cite for the proposition that plaintiff's expert cannot opine outside his area of expertise has optimal applicability if this case related squarely to the manner in which plaintiff's surgery was performed. In such a circumstance, plaintiff's expert would necessarily be required to either be a specialist in neurosurgery, or an individual with an articulated foundational knowledge in the appropriate standards of care one must follow within a neurosurgical discipline. As that is not the case, and as this case more accurately relates to whether defendants, within the broad spectrum of neurology, should have detected whether plaintiff was neurologically compromised after his surgery, plaintiff's expert has set forth the requisite foundational knowledge to proffer his opinions. To be sure, plaintiff's expert's credentials do not place him within the ambit of medical professionals devoid of the requisite knowledge or experience to render an opinion outside of their discipline (*see Atkins v Beth Israel Health Servs.*, 133 AD3d 491 [1st Dept 2015]; *Mustello v Berg*, 44 AD3d 1018 [2d Dept 2007]).

Moreover, it is important to note that while there are considerable differences between neurologists and neurosurgeons, when it comes to medical management, there is a significant overlap between the two disciplines. Indeed, neurosurgery is closely associated with neurology in that both require specialized knowledge of the nervous system and its functions. Both neurosurgeons and neurologists may perform complex neurological testing like EEG, MRI, and CT scans to monitor the brain, and both may use minimally invasive procedures to repair blood vessels within the brain. While both neurologists and neurosurgeons diagnose and treat conditions that involve the nervous system, neurologists do not perform surgery. Rather, neurologists are focused on discovering diagnosis-specific neurological conditions that can be corrected — via medications or other therapies — or require close management. As such, Dr. Ogden, even as a neurosurgeon, arguably could have detected whether plaintiff was neurologically compromised. Importantly, this is not a case where plaintiff's expert is practicing in an entirely different discipline. Even if he was, as previously articulated, a medical expert need not be a specialist in a particular field in order to testify regarding accepted practice in that field (*Lopez v Gramuglia*, 133 AD3d 424 [1st Dept 2015]) so long as that medical expert provides a foundation that he or she possesses the requisite knowledge necessary to make a determination on the issues presented (*Limmer v Rosenfeld*, 92 AD3d 609 [1st Dept 2012]). Once such a foundation is laid, the issue of the expert's qualifications to render such an opinion is a question of weight for a jury resolve. Here, in addition to the noted similarities between neurological and neurosurgical procedures with respect to detecting whether or not a patient is neurologically compromised, the court finds that plaintiff's expert's noted credentials and extensive experience within the field of neurology provide the requisite foundation to opine on whether defendants' actions comported with appropriate standards of post-surgery neurological care. As such, it is axiomatic that plaintiff's expert has provided a requisite foundation for his opinions.

The very fact that plaintiff's experts opinions differ from those proffered by Dr. Houten illustrates the existence of issues of triable fact. To be sure, "[s]ummary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions" (*Elmes v. Yelon*, 140 A.D.3d 1009 [2d Dept 2016] [citations and internal quotation marks omitted]). Instead, the conflicts must be resolved by the fact finder (*id.*).

Finally, defendants argument that plaintiff failed to address defendants' claims that plaintiff was timely monitored throughout his admission are contravened by the content of plaintiff's expert affirmation, which repeatedly takes aim at the fact that defendants' monitoring and intervention, even when it was done, was inadequate and did not comport with applicable standards of care. Additionally, contrary to defendants' assertions, plaintiff contests Dr. Houten's contention that defendants acted emergently when requisitioning an MRI and returning plaintiff to the operating room. To be sure, plaintiff's expert opines that defendants did not act with haste, and that their delays resulted in neurological compromise to plaintiff. Lastly, the testimony of defendants' neurological physician's assistants that they did not find signs of neurological injury to plaintiff do not defeat plaintiff's expert's assessment that their intervention was insufficient. As previously observed, it is also important to note that defendants' neurological physician's assistants had no independent recollection of evaluating plaintiff, but merely submitted affidavits premised on their general custom and practice. Therefore, defendants' neurological physician's assistants' contentions do not prove that they appropriated examined plaintiff, if at all, in this particular case. Because plaintiff's expert's opinion cannot be discounted as a matter of law, this and other issues presented in defendants' motion, will have to be reconciled by a finder of fact at trial.

Finally, to the extent that plaintiff's pre-surgical use of low dose aspirin could have contributed to his post-surgical neurological compromise, plaintiff has shown that such an allegation is not inherently devoid of merit Moreover, defendants cannot reasonably claim surprise from this contention, as it naturally flows from the purported deviations noted throughout plaintiff's pleadings during this litigation (*see Denicola v. Mary Immaculate Hosp.* 272 AD2d 505, 506 [2d Dept 2000]).

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is denied in its entirety; and it is further

ORDERED that the parties are directed to appear for a conference before the court on May 28, 2019 at 9:30 AM at the courthouse located at 111 Centre Street, Room 1227 (Part 10).

This constitutes the decision and order of the court.

Dated: April 12, 2019

GEORGE J. SILVER