

<b>Estevez v Wickiewicz</b>
2019 NY Slip Op 32167(U)
July 16, 2019
Supreme Court, New York County
Docket Number: 805481/2016
Judge: George J. Silver
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

-----X  
FELIPE ESTEVEZ and LIMAYRI ESTEVEZ,

Plaintiffs,

Index No. 805481/2016  
Motion Seq. 001

-against-

**DECISION & ORDER**

THOMAS WICKIEWICZ, M.D., HENRY SPINELLI, M.D.,  
THE HOSPITAL FOR SPECIAL SURGERY and  
NEW YORK PRESBYTERIAN/WEILL CORNELL  
MEDICAL CENTER,

Defendants.

-----X  
**GEORGE J. SILVER, J.S.C.:**

In this medical malpractice action, defendant DR. HENRY SPINELLI (“Dr. Spinelli” or “defendant”) moves for summary judgment. Plaintiffs FELIPE ESTEVEZ (“plaintiff”) and LIMAYRI ESTEVEZ (collectively “plaintiffs”) do not oppose the motion. For the reasons discussed below, the court grants the motion.

On December 10, 2014, ten years after injuring his left knee in a car accident, plaintiff underwent a total left knee replacement. Dr. Thomas Wickiewicz (“Dr. Wickiewicz”), plaintiff’s surgeon, was concerned about the quality of the skin over plaintiff’s left knee, and sent plaintiff to Dr. Spinelli, a plastic surgeon, for an evaluation of the skin above the left knee. On December 2, 2014, Dr. Spinelli saw plaintiff, and opined that the skin was sufficient and viable for Dr. Wickiewicz to proceed with the operation.

On December 14, 2014, plaintiff developed a postoperative hematoma, which was incised and drained by Dr. Wickiewicz three days later. Plaintiff alleges that Dr. Spinelli negligently evaluated the skin on his left knee, and cleared him for surgery without a skin graft or skin flap procedure.

### ARGUMENTS

Based on the record before the court, defendant argues that summary judgment must be granted, because plaintiff cannot establish that defendant's medical treatment of plaintiff deviated from accepted standards of care or proximately caused plaintiff's alleged injuries.

In support of his motion, defendant annexes the affirmation of Dr. Nelson Goldberg ("Dr. Goldberg"), a board-certified plastic surgeon. Dr. Goldberg asserts that Dr. Spinelli's decision for plaintiff to proceed with a total left knee replacement was made after a careful physical examination of plaintiff's left knee. According to Dr. Goldberg, Dr. Spinelli found that plaintiff's skin was viable and mobile, and that the skin had sensation, good blood flow, and good capillary refill that would support the incisions. As such, Dr. Goldberg concludes that there were good signs to proceed with the operation without performing a skin graft.

Dr. Goldberg also opines that Dr. Wickiewicz's decisions with respect to plaintiff's care and treatment are not attributable to Dr. Spinelli, and therefore, Dr. Spinelli cannot be held responsible for the results of plaintiff's operations. Dr. Goldberg points out that Dr. Spinelli offered to assist in closing the operative field over plaintiff's left knee on December 10, 2014, but Dr. Wickiewicz did not feel that it was necessary. Similarly, Dr. Goldberg highlights that Dr. Spinelli was not contacted when plaintiff's skin was under tension following the operation, and that Dr. Spinelli was not asked to participate in closing the wound after the incision and drainage procedure on December 17, 2014. According to Dr. Goldberg, had plaintiff's hematoma been treated earlier, and had Dr. Spinelli participated in the operation and incision and drainage procedure, plaintiff's results might have been different, but these decisions were made by Dr. Wickiewicz, not Dr. Spinelli.

Dr. Goldberg further opines that Dr. Spinelli's decision to perform plaintiff's total knee replacement without a skin graft or muscle flap was a reasonable medical decision. According to Dr. Goldberg, performing a skin flap procedure first would have also been acceptable, but the decision to proceed with the total knee replacement without the skin flap is not medical malpractice. In that regard, Dr. Goldberg highlights Dr. Wickiewicz's testimony that if a skin flap is performed first, then the total knee replacement operation would involve an incision off the midline, thereby making the total knee replacement procedure more difficult.

Additionally, Dr. Goldberg avers that plaintiff's operation went well, and that plaintiff had no problem with the integrity of the skin above the operative site until he developed a hematoma in the left knee four days after the operation. Dr. Goldberg contends that a hematoma is a known risk of surgery, and that it was only because of a post-operative infection that plaintiff's knee replacement had to be removed. Dr. Goldberg also notes that plaintiff's post-operative infection was not predictable, and that the cultures taken from the open incision on December 17, 2014 were negative, suggesting that the infection was not present as of December 17, 2014, and was contracted that day or on a subsequent day.

Lastly, Dr. Spinelli argues that plaintiff's informed consent claim is not applicable since he did not operate on plaintiff, and was under no obligation to obtain plaintiff's consent for the procedure. Rather, Dr. Spinelli asserts that he only opined as to whether to perform a skin flap procedure prior to the total knee replacement, and that it was Dr. Wickiewicz's responsibility as the operating surgeon to obtain plaintiff's informed consent. Nevertheless, Dr. Spinelli contends that his December 2, 2014 chart indicated that he explained the risks and alternatives of the operation to plaintiff, including the risk of infection, asymmetry, revision, and the possible loss of

a limb. Dr. Goldberg also highlights that Dr. Spinelli documented that he discussed the alternatives of not performing the surgery with plaintiff.

### 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 A.D.3d 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 A.D.3d 727, 729 [2d Dept. 2008]). The opinion must be based on facts in the record or personally known to the expert (*Roques*, 73 A.D.3d at 207). 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 A.D.3d 403, 404 [1st Dept. 2010]). Further, it must "explain 'what defendant did and why'" (*id. quoting Wasserman v. Carella*, 307 A.D.2d 225, 226 [1st Dept. 2003]).

Once defendant makes a *prima facie* showing, the burden shifts to 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, 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). "Summary 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 [2nd Dept 2016] [citations and internal quotation marks omitted]). Instead, the conflicts must be resolved by the factfinder (*id.*).

Here, Dr. Spinelli set forth a *prima facie* case in favor of dismissal, as evidenced by the submission of medical records, and an expert affidavit, all of which attest to the fact that his treatment of plaintiff was in accordance with accepted standards of care, and did not proximately cause plaintiff's alleged injuries. To be sure, Dr. Goldberg's expert affirmation is detailed and predicated upon ample evidence within the record. As Dr. Spinelli has made a *prima facie* showing, the burden shifts to plaintiffs.

Because plaintiffs have failed to oppose Dr. Spinelli's motion, they cannot raise triable issues of fact to rebut Dr. Spinelli's *prima facie* showing of an entitlement to summary judgment. For example, plaintiffs failed to address or rebut Dr. Goldberg's opinion that Dr. Spinelli's decision to proceed with the total left knee replacement was made after a careful examination of plaintiff's left knee. By contrast, Dr. Spinelli submitted undisputed evidence that there were good signs to proceed with the operation without first performing a skin graft, including the fact that plaintiff's skin was viable and mobile, and the fact that plaintiff's skin had sensation, good blood flow, and good capillary refill.

Plaintiffs also failed to refute Dr. Spinelli's assertion that Dr. Spinelli's decision to perform the total knee replacement without a skin graft or muscle flap was a reasonable medical decision. In that regard, plaintiffs cannot dispute the fact that Dr. Spinelli did not participate in closing the operative field over plaintiff's left knee or closing the wound after the incision and drainage of the hematoma. Plaintiffs further failed to challenge Dr. Goldberg's opinion that plaintiff's operation went well, and that it was only because of an unpredictable post-operative infection that plaintiff's knee replacement had to be removed.

Moreover, plaintiffs failed to refute Dr. Spinelli's assertion that he was under no obligation to obtain plaintiff's informed consent for the total knee replacement procedure since he was not

the operating surgeon. Rather, Dr. Spinelli set forth ample evidence that he discussed the risks and alternatives of the procedure, as well as the alternatives of not performing the surgery, with plaintiff on December 2, 2014. Based on plaintiffs' failure to address or dispute Dr. Spinelli's assertions, there are no triable issues of fact here sufficient to preclude summary judgment.

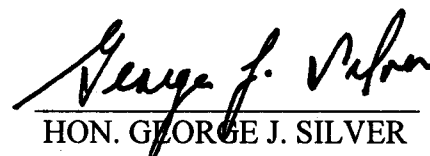
Accordingly, based on the foregoing, it is hereby

ORDERED that DR. HENRY SPINELLI's motion for summary judgment is GRANTED in its entirety;<sup>1</sup> and it is further

ORDERED that the clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Date: July 16, 2019

  
HON. GEORGE J. SILVER  
**GEORGE J. SILVER**  
J.S.C.

Check one:  FINAL DISPOSITION     NON-FINAL DISPOSITION

<sup>1</sup> Plaintiffs have settled their lawsuit against Thomas Wickiewicz, M.D. and the Hospital for Special Surgery, and have discontinued the action against New York Presbyterian/Weill Cornell Medical Center. As summary judgment has been granted in Dr. Spinelli's favor, the case is now disposed of in its entirety.