

**Malefakis v Jazrawi**

2019 NY Slip Op 34884(U)

August 7, 2019

Supreme Court, Kings County

Docket Number: Index No. 521688/2016

Judge: Bernard J. Graham

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: Part 36**

JASON MALEFAKIS,

Plaintiff(s),

-against-

LAITH JAZRAWI, M.D., and  
NYU HOSPITALS CENTER,

Defendant(s).

Index No: 521688/2016  
Motion Calendar No.  
Motion Sequence No.

**DECISION / ORDER**

Present:  
**Hon. Judge Bernard J. Graham**  
Supreme Court Justice

**Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motion to: award summary judgment to the defendants, pursuant to CPLR § 3212.**

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	_____ 1-2 _____
Order to Show cause and Affidavits Annexed.....	_____
Answering Affidavits.....	_____ 3 _____
Replying Affidavits.....	_____ 4 _____
Exhibits.....	_____
Other: .....(memo).....	_____ 5 _____

2019 AUG 14 PM 12: 27

KINGS COUNTY CLERK  
FILED



**Upon the foregoing cited papers, the Decision/Order on this motion is as follows:**

Defendants, Laith Jazrawi, M.D. (“Dr. Jazrawi”) and NYU Hospitals Center (“NYU”) have each moved, pursuant to CPLR§ 3212, for summary judgment and a dismissal of plaintiff’s complaint, upon the grounds that they did not depart from accepted medical and hospital practice in the care and treatment rendered to the plaintiff Jason Malefakis (“Mr. Malefakis”), and that any alleged departure was not the proximate cause of the plaintiff’s alleged injuries. In opposition to the defendants’ motions, the plaintiff asserts that summary judgment is not warranted as there are triable issues of fact as to whether the defendants departed from accepted medical and hospital practice in the care and treatment that was rendered to the plaintiff, and that those departures were a substantial factor in causing the injuries sustained by the plaintiff.

Background:

An action was commenced, on or about December 6, 2016, by the filing of a summons and complaint on behalf of the plaintiff. A Certificate of Merit was also filed by counsel for the plaintiff on or about December 6, 2016. Issue was joined on or about December 30, 2016, by service of the answer of NYU, and on or about January 5, 2017, by the service of the answer of Dr. Jazrawi.

At the time that defendants served their answer, discovery demands, which included a demand for a verified bill of particulars, were made of the plaintiff. The plaintiff served a Verified Bill of Particulars on or about February 21, 2017. The plaintiff alleges that Dr. Jazrawi failed to properly revise the plan for the May 22, 2015 right knee arthroscopic surgery, thereby performing an unnecessary surgery. Additionally, the plaintiff alleges that Dr. Jazrawi negligently performed the surgery in that the medial patellofemoral ligament (MPFL) was lacerated.

Depositions were conducted of the plaintiff, on August 30, 2017 and on September 29, 2017. The deposition of Dr. Jazrawi was held on January 31, 2018. The plaintiff waived the deposition of a witness from NYU.

A Note of Issue and Certificate of Readiness was filed by the plaintiff on or about April 12, 2018.

Facts:

The plaintiff (a 26-year-old male), initially felt pain in the medial side of his right knee after falling while playing in a flag football game on April 18, 2015. The plaintiff then presented to Apollo Imaging on May 1, 2015 for a right knee MRI the results of which showed an increased signal consistent with a tear of the right posterior horn medial meniscus. Thereafter, the plaintiff on May 5, 2015 was seen by Dr. Thomas Mick (a non-party orthopedist) for a consultation. Dr. Mick, following an examination, believed that there was a tear of the right medial meniscus. Dr. Mick's recommendation was that the plaintiff obtain a consult for arthroscopic surgery, and he provided a referral to Dr. Jazrawi.

The plaintiff initially saw Dr. Jazrawi on May 6, 2015 for a surgical consultation. Upon examination of the right knee, Dr. Jazrawi found a slight limitation in range of motion, both the medial joint line as well as the medial condyle were found to be tender and there was a positive medial McMurray test. Dr. Jazrawi reviewed the MRI of May 1, 2015 and agreed with the Apollo radiology report that there was a linear medial meniscus tear. Dr. Jazrawi was of the opinion that the abnormal signal intensity of the posterior horn was consistent with a grade III meniscus tear. Dr. Jazrawi suggested that they follow a conservative treatment plan and scheduled a follow-up visit in two to four weeks to ascertain if there was any improvement and if there was still a need for arthroscopic surgery (see Dr. Jazrawi EBT p. 32-37).

Mr. Malefakis returned for a follow-up visit with Dr. Jazrawi on May 19, 2019. Prior to that visit, it appears that the plaintiff requested by e-mail that his surgery be scheduled as soon as possible because he thought it would increase his chances for a successful repair. At the follow-up visit, the plaintiff advised Dr. Jazrawi that he had not felt right knee pain for approximately a week and a half and questioned as to whether another MRI was necessary to ascertain if the tear had healed. In response to this inquiry, Dr. Jazrawi stated that another MRI would not show any significant change in healing and that it was possible that Mr. Malefakis' lack of pain could be attributed to his lack of activity. Nonetheless, the plan of Dr. Jazrawi was to proceed with a diagnostic right knee arthroscopy in order to rule a medial meniscus tear.

On May 22, 2015, Dr. Jazrawi performed the procedure at NYU. During the procedure, Dr. Jazrawi found the anterior and posterior cruciate ligaments to be intact and no evidence of any meniscal tearing. The plaintiff was initially moved from the operating room (OR), and then approximately one and one-half hours later was discharged from NYU with instructions to follow-up with Dr. Jazrawi.

At the initial follow-up visit on May 26, 2015, the plaintiff reported he had minimal pain and was recovering, the surgical wounds had stopped draining and he was instructed to return in one week for suture removal. Physical therapy was recommended, and plaintiff commenced it in June 2015.

Mr. Malefakis had three additional post-operative visits with Dr. Jazrawi, and at the last visit on July 28, 2015, the plaintiff reported having pain at the medial portal incision site.

On August 17, 2015, the plaintiff presented to East River Medical Imaging (ERMI) for an MRI of the right knee due to complaints of medial right knee pain.

On August 28, 2015, the plaintiff was evaluated by Dr. Elliot Hershman, an orthopedic surgeon. Dr. Hershman examined plaintiff's knee, reviewed the postoperative MRI and made the assessment that the medial meniscus and scar tissue in the region of the MPFL were consistent with one who had undergone an arthroscopic procedure.

On September 16, 2015, the plaintiff had an appointment with Dr. James Kinderknecht, another orthopedic surgeon, who examined the plaintiff's right knee and reviewed the August 17<sup>th</sup> MRI. Dr. Kinderknecht assessed the plaintiff as having an inflammatory type response in the anterior medial right knee related to the medial portal site.

With respect to plaintiff's claim of an eye injury, Mr. Malefakis claims that on May 22, 2015, defendants failed to take appropriate measures prior to, during and after the meniscus surgery to prevent damage to plaintiff's eyes. Plaintiff claims he suffered an injury to the cornea of his left eye while he was a patient at NYU.

On May 26, 2015, the plaintiff was evaluated by Samuel Guillory, an ophthalmologist, for the sensation of a foreign body in the left eye. Dr. Guillory was of the opinion that there was a left corneal keratitis punctate and he prescribed eye drops and ointment.

Discussion:

On a motion for summary judgment seeking a dismissal of a medical malpractice cause of action, a defendant must make a prima facie showing either that there was no departure from good and accepted medical practice, or, if there was a departure, that the departure was not the proximate cause of plaintiff's alleged injuries (Williams v. Bayley Seton Hosp., 112 AD3d 917, 918, 977 NYS2d 395 [2<sup>nd</sup> Dept. 2013]; Giacinto v. Shapiro,

151 AD3d 1029,1030, 59 NYS3d 42 [2<sup>nd</sup> Dept. 2017]; Brinkley v. Nassau Health Care Corp., 120 AD3d 1287, 993 NYS2d 73 [2<sup>nd</sup> Dept. 2014]). Thus, on a motion for summary judgment, the defendant has the initial burden of establishing the absence of any departure from good and accepted practice or that the plaintiff was not injured by any departure (see Terranova v. Finklea, 45 AD3d 572, 845 NYS2d 389 [2<sup>nd</sup> Dept. 2007]). “In order to sustain this burden, the defendant is only required to address and rebut the specific allegations of malpractice set forth in the plaintiff’s complaint and bill of particulars” (Bhim v. Dourmashkin, 123 AD3d 862, 864, 999 NYS2d 471 [2<sup>nd</sup> Dept. 2014]).

Once the defendant has made such a showing, the burden shifts to the plaintiff to submit evidentiary facts or materials to rebut the prima facie showing made by the defendant, so as to demonstrate the existence of a triable issue of fact (see Fritz v. Burman, 107 AD3d 936, 94, 968 NYS2d 167 [2<sup>nd</sup> Dept. 2013]; Brinkley v. Nassau Health Care Corp., 120 AD3d at 1287). The plaintiff must “lay bare her proof and produce evidence, in admissible form, sufficient to raise a triable issue of fact as to the essential elements of a medical malpractice claim, to wit, (1) a deviation or departure from accepted medical practice, [and/or] (2) evidence that such departure was a proximate cause of injury” (Sheridan v. Bieniewicz, 7 AD3d 508, 5089 [2<sup>nd</sup> Dept. 2004]; Gargiulo v. Geiss, 40 AD3d 811, 911-812 [2<sup>nd</sup> Dept. 2007]). In order to prevail on a claim for medical malpractice, “expert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause” (Nicholas v. Stammer, 49 AD3d 832, 833 [2008]).

In addressing the issue of proximate cause, the Court notes that “in a medical malpractice action, where causation is often a difficult issue, a plaintiff need do no more than offer sufficient evidence from which a reasonable person might conclude that it was more probable than not that the injury was caused by the defendant” (Johnson v. Jamaica Hosp. Med. Ctr., 21 AD3d 881, 883 [2<sup>nd</sup> Dept. 2005], quoting Holton v. Sprain Brook Manor Nursing Home, 253 AD2d 852 [2<sup>nd</sup> Dept. 1998]). “A plaintiff’s evidence of proximate cause may be found legally sufficient even if his or her expert is unable to

quantify the extent to which the defendant's act or omission decreased the plaintiff's chance of a better outcome or increased the injury, as long as evidence is presented from which the jury may infer that the defendant's conduct diminished the plaintiff's chance of a better outcome or increased the injury" (Semel v. Guzman, 84 AD3d 1054, 1055-1056 [2<sup>nd</sup> Dept. 2011], quoting Goldberg v. Horowitz, 73 AD3d 691, 694 [2<sup>nd</sup> Dept. 2010], quoting Alicea v. Liguori, 54 AD3d 784, 786 [2<sup>nd</sup> Dept. 2008]).

Here, this Court is presented with the issue as to whether defendants, Dr. Jazrawi and NYU, deviated or departed from accepted medical and hospital practice in their care and treatment rendered to Mr. Malefakis, and whether there was a lack of informed consent, and if so, whether their departure from accepted medical and hospital practice was the proximate cause of the alleged injuries to plaintiff's right knee and left eye.

#### Defendant's (Dr. Jazrawi)- Motion for Summary Judgment

In support of the motion for summary judgment by Dr. Jazrawi and NYU and a dismissal of plaintiff's cause of action as against said parties, counsel offers the affirmation of a medical expert, Dr. Fred Cushner, the Chief of Orthopedic Surgery at Southside Hospital and an attending Orthopedic Surgeon, as well as Dr. Adam Levine, a professor of Anesthesiology at the Icahn School of Medicine at Mount Sinai and an attending physician Board Certified in Gastroenterology and Internal Medicine. These two doctors opined that these defendants did not depart from accepted medical practice in the care, treatment and services rendered to Mr. Malefakis, and that any alleged acts or omissions on the part of these defendants were not the proximate cause of the plaintiff's injuries.

Dr. Cushner opined that the decision of Dr. Jazrawi to perform the knee surgery on May 22, 2015 was appropriate based on the plaintiff's symptoms, medical history, an examination and test results. When the plaintiff initially saw Dr. Jazrawi on May 6, 2015, he already had undergone a right knee MRI on May 1, 2015, which showed an increased signal intensity consistent with a grade III linear tear of the posterior horn of the medial

meniscus. During the exam when performing the McMurray test<sup>1</sup>, the plaintiff exhibited pain which could be indicative of a meniscal tear. In addition, Dr. Jazrawi reviewed the May 1, 2015 right knee study and appropriately agreed with the radiologist that it was consistent with a linear meniscal tear of the posterior horn medial meniscus. The expert opined that while grade I and II meniscus tears are generally not serious, surgical intervention is generally appropriate for grade III tears. Dr. Jazrawi did offer conservative and surgical treatment options to the plaintiff, but based upon the MRI reading and the history, complaints and examination, proceeding with surgery was consistent with the normal standard of care.

The expert further opined that plaintiff's claim that another MRI should have been performed prior to the May 22, 2015 surgery has no merit. Dr. Jazrawi properly advised the plaintiff that another MRI would not have been helpful as it was too early for a follow-up MRI to detect a change in meniscal healing and given the positive symptoms and examination, a repeat MRI would not change the clinical picture. Despite being told by the patient that his right knee has not hurt for a period of a little more than a week, Dr. Jazrawi properly advised the plaintiff that the lack of knee pain was likely the result of a decrease in general activity and it was completely normal for a patient with a meniscal tear to have a decrease in knee pain due to lack of physical activity. Despite the contention that his knee had not hurt, at the May 19 visit, plaintiff did exhibit pain when doing deep knee bends.

Dr. Cushner found no merit to plaintiff's claim that he should have waited longer before performing surgery. In fact, the plaintiff had asked Dr. Jazrawi to advance the date of surgery, so it could be performed within a six-week window from the time of the actual injury, to increase the chance of a successful repair. The expert stated that the longer the wait to suture the tear, the higher the risk that the tear enlarges and/or becomes unrepairable. The most reliable way to determine if there was a meniscus tear and/or if it had healed or required surgical intervention was a diagnostic arthroscopy of the knee

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<sup>1</sup> The McMurray test consists of palpating the medial joint line while flexing and rotating the knee to see if it elicits pain.

which is a safe and minimally invasive procedure and provides the only way to definitely assess the status and stability of the meniscus.

Dr. Cushner opined that with respect to the surgery, Dr. Jazrawi properly performed the right knee arthroscopy. The placement of a lateral arthroscopic portal and then a medial portal is standard for such a procedure. The intraoperative arthroscopic camera images that were part of the chart show that the medial meniscus was not torn or injured and given that there was no tear in the meniscus, it was standard for the surgeon to probe the meniscus to determine its stability. Dr. Jazrawi properly determined that there was no need to do any suturing/repair of the meniscus since the meniscus was found to be stable. It was within the standard of care for Dr. Jazrawi to use a shaver to remove the inflamed plica and synovitis<sup>2</sup> as it can cause pain.

Dr. Cushner opined that even though the meniscus, when seen intraoperatively appeared to be healed, that does not signify that the surgery was unnecessary, given plaintiff's symptoms and the grade III signal on the May 1 MRI. Further, the fact that no meniscus tear was found intra-operatively demonstrates the limitations of the MRI and that an arthroscopy is the only definitive way to determine the extent of a meniscal injury within the knee.

Dr. Cushner opined that Dr. Jazrawi rendered the proper care and treatment during the four postoperative visits from May 26 to July 28, 2015. He suggested that the plaintiff should rely upon time and patience and despite the plaintiff having complaints of residual pain, there was no indication that any further surgical procedures should be performed.

Dr. Cushner further opined that the post-operative MRI taken at East River Medical Imaging on August 17, 2015, demonstrates that the arthroscopy was appropriately performed and does not support the claim of the plaintiff that he suffered a lacerated MPFL. The radiology report shows "scarring in the medial and lateral portions of the infrapatellar fat pad<sup>3</sup>, likely from prior arthroscopic knee surgery." There was no

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<sup>2</sup> Synovitis and inflammation can develop due to chronic irritation or as a response to trauma to the knee.

<sup>3</sup> The infrapatellar fat pad is the soft tissue that lies beneath the kneecap.

finding of scarring or any injury to the MPFL. The experts review of the MRI of August 17, 2015 shows no evidence of any lacerations, gaps, scarring or injury to the MPFL. Additionally, Dr. Hershman, the subsequent treating orthopedist, made an assessment that there was scar tissue in the region of the MPFL, and not scarring of the MPFL itself.

Finally, Dr. Cushner opined that there were no negligent acts or omissions that caused plaintiff's extended postoperative pain at his medial port site. During port placements, nerves can be irritated, and nerve irritation is a known complication of an arthroscopic knee procedure.

Dr. Levine opined that the claim of the plaintiff having sustained an eye injury has no merit based upon the records or testimony in this case. The expert finds no evidence that general anesthesia was rendered improperly or that inappropriate measures were taken to prevent damage to the plaintiff's eyes. The expert noted that following arthroscopic surgery, Katie Anderson, a registered nurse in the post-anesthesia care unit (PACU) included in her report that there was redness in the plaintiff's left eye, and that the plaintiff had indicated that his left eye had been red since the day before the surgery. Additionally, Dr. Cynthia Feng, the anesthesiologist, who had performed a post anesthesia evaluation in the PACU, noted no post anesthesia complications.

The expert further opined that even if the Court were to accept the plaintiff's testimony that he did not have left eye redness before the surgery, there is no evidence that any negligent acts or omissions by defendants caused the plaintiff's left corneal keratitis punctate. The expert stated that corneal keratitis punctate, an inflammation of the cornea, is a complication that is recognized in the field of anesthesiology, and such injury, while rare, is commonly recognized to occur in the absence of negligence.

In addressing the issue of lack of informed consent, the expert opined that the records of plaintiff's May 6 and May 19, 2015 visits, as well as the e-mail's that were exchanged between Dr. Jazrawi and Mr. Malefakis, indicate that the doctor appropriately reviewed the risks, benefits and alternatives of the arthroscopic surgery. The e-mail of May 21, 2015 provides an explanation to Mr. Malefakis as to why a second MRI would

not show healing. Additionally, the plaintiff signed the consent form for surgery in the morning of May 22, which was prior to the procedure.

Defendant's (NYU Hospital) - Motion for Summary Judgment:

In support of the motion by NYU to dismiss the action, the defendant also offers the expert affirmation of Dr. Cushner. Dr. Cushner opined that all surgical decisions were made by Dr. Jazrawi and there is no evidence of any directions given or action taken by Dr. Jazrawi to the hospital that was so clearly contraindicated that required staff to intervene. In addition, there were no negligent acts or omissions by NYU that caused plaintiff's post-operative pain at the medial port site.

This Court finds upon review of the defendants' submissions that the defendants have set forth their prima facie burden of establishing that they neither departed from good and accepted medical practice nor that the plaintiff had been injured as a result of any alleged departure, and the burden shifted to the plaintiff to establish the existence of a triable issue of fact.

Plaintiff's opposition to defendants' motion to dismiss:

The plaintiff, in opposing the defendants' motion for summary judgment, offers the expert affirmation of Dr. Hervey S. Sicherman, M.D., as well as deposition testimony, medical records and a memorandum of law. Dr. Sicherman, who specializes in orthopedic surgery, opined that Dr. Jazrawi committed one or more significant departures from the standard of care, and were it not for the departures, the plaintiff would not have sustained the pain and suffering he endured as a result of complications from the meniscal repair surgery.

Dr. Sicherman opined that Dr. Jazrawi failed to give the patient the information needed for a full informed consent. When the patient advised Dr. Jazrawi that he had no pain for a week and a half prior to surgery, the doctor should have informed Mr. Malefakis that he could wait a longer period to see if he continued to improve and remain pain free or that he would likely not require surgery at all. Dr. Sicherman opined that the

specific type of meniscal tear that plaintiff sustained (peripheral tear) is known to have the ability to self-heal. Thus, when the plaintiff reported that he had been pain free for over a week, the meniscal tear may have been self-healing. Had the patient or a reasonably prudent person been informed of the option to delay surgery, they would have elected not to proceed at the time.

The expert stated that the notes of Dr. Jazrawi indicated that the plaintiff had been experiencing increased pain is contradicted by plaintiff's email of May 21, 2015, in which he states that he had been pain free for a week and one-half.

The expert further opined that as a result of the knee pain that plaintiff experienced, he had a number of follow up visits to Park Lenox Orthopedics on August 17, August 25, September 18, October 30, 2015, as well as February 5 and May 3, 2016. In addition, the plaintiff had an appointment at the Hospital for Special Surgery on September 16, 2015, to address the right medial knee pain, as well as he had additional physical therapy and pain management appointments.

Finally, Dr. Sicherman opined that he conducted a physical examination of the plaintiff and observed that his right quadricep was smaller in circumference than the left and no quadricep atrophy had existed prior to surgery.

The plaintiff contends that at the initial appointment that Mr. Malefakis had with Dr. Jazrawi, the patient was clear that he wished to avoid surgery if possible. If surgery was required, the plaintiff wanted it done within the six week window period following the injury to limit the possibility of having arthritis in his knee at a later time. The plaintiff maintains that damage to his knee has caused pain and severe restrictions on his daily and long-term activities as he considered himself to be an elite amateur athlete. The plaintiff alleges that following surgery he has experienced intermittent sharp pain down to his ankle and frequent spasms in his foot.

This Court finds that the plaintiff has raised triable issues of fact with the submission of an expert affirmation which offered an opinion as to the treatment rendered to Mr. Malefakis which conflicts with defendants' expert opinions, sufficient to warrant denial of summary judgment and a dismissal of the causes of action pertaining to claims

of malpractice (pertaining to the right knee) as against to Dr. Jazrawi (see Contreras v. Adeyemi, 102 AD3d 720, 721, 958 NYS2d 430 [2<sup>nd</sup> Dept. 2013]); Shahid v. NYC Health & Hosps. Corp., 47 AD3d 798, 850 NYS2d 521 [2<sup>nd</sup> Dept. 2008]), as well was the claim of lack of informed consent.

In reaching this determination, the Court has considered the defendant's argument that the report from Apollo Imaging following the May 1, 2015 MRI showed an increased signal which is consistent with a tear of the right posterior horn. The Court also considered the exam of the plaintiff by Dr. Jazrawi in which there was a positive medial McMurray test and both the medial joint line and medial condyle were found to be tender. The Court further considered the argument that surgical intervention is generally appropriate for grade III tears and the longer one waits to suture a tear, the greater the risk that the tear enlarges and/or becomes unrepairable. Additionally, the Court considered the argument that a diagnostic arthroscopy of the knee is a safe and minimally invasive procedure and the most reliable way to determine if there was a meniscus tear, and the plaintiff had allegedly requested to advance the date for surgery. Finally, the Court considered the assertion by defendant's expert, Dr. Cushner, that Dr. Jazrawi properly performed the arthroscopic procedure which included the placement of portals and the use of a shaver. These arguments were addressed by the plaintiff who rejects some of these contentions and offers his own arguments and conflicting opinions as to the departure on the part of the defendants.

This Court considered the argument of the plaintiff that it was his desire to avoid any surgical intervention which might adversely affect his abilities as an amateur athlete who had achieved a status of being highly competitive. The plaintiff maintained that when Mr. Malefakis advised Dr. Jazrawi that he had been pain free for a period of almost ten days prior to surgery, that the surgery should have been postponed. Mr. Malefakis contended that the only reason that he sought to advance the date for surgery was that it be performed within the six week period following the injury in order to reduce his risk of early arthritis. This Court also considered the argument of plaintiff's expert that this type of meniscal tear had the ability to self-heal and that under the circumstances it would

have been prudent for Dr. Jazrawi to delay the procedure or at least offer that option. The Court further considered the argument that the expert had examined the plaintiff and found evidence of atrophy and that the pain that plaintiff experienced following surgery has continued and has resulted in the plaintiff undergoing numerous medical appointments and physical therapy.

It is well settled that where parties to a medical malpractice action offer conflicting expert opinions on the issue of malpractice and causation, issues of credibility require resolution by the factfinder (see Loaiza v. Lam, 107 AD3d 951, 953 [2013]; Omane v. Sambaziotis, 150 AD3d 1126, 1129 [2<sup>nd</sup> Dept. 2017]); Dandrea v. Hertz, 23 AD3d 332, 333 [2005]). Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical opinions (see Elmes v. Yelon, 140 AD3d 1009, 1011 [2<sup>nd</sup> Dept. 2016], (Feinberg v. Feit, 23 AD3d 517, 519 [2<sup>nd</sup> Dept. 2005]; Shields v. Baktidy, 11 AD3d 671, 672 [2<sup>nd</sup> Dept. 2014]). With regard to proximate cause, where causation is often a difficult issue, a plaintiff need do no more than offer sufficient evidence from which a reasonable person might conclude that it was more probable than not the injury was caused by the defendant (see Johnson v. Jamaica Hosp. Med. Ctr, 21 AD3d 881, 883[2005]) quoting Holton v. Sprain Brook Manor Nursing Home, 253 AD2d 852 [1998], lv. denied 92 NY2d 818 [1999]). The plaintiff opposing a defendant physicians' motion for summary judgment must only submit evidentiary facts or materials to rebut the defendant's prima facie showing (see Stukas v. Streiter, 83 AD3d 18, 24-26 [2<sup>nd</sup> Dept. 2011]).

As to the issue of the plaintiff's claim of having sustained an injury to his right eye, the defendants have offered the medical notes of Katie Anderson, an RN in the PACU unit, which indicate that she was informed by Mr. Malefakis' that his eye was red the day prior to surgery. In addition, the anesthesiologist, Dr. Feng, noted that there were no post anesthesia complications. In opposition, the plaintiff offered arguments from counsel, as well as deposition testimony but the expert failed to address the injury to the plaintiff's eye. In opposing a defendant's motion for summary judgment, "a plaintiff must submit a physician's affidavit of merit attesting to a departure from accepted

practice and containing the attesting doctor's opinion that the defendant's omissions or departures were a competent producing cause of the injury to the eye (Thompson v. Orner, 36 AD3d 791, 792, 828 NYS2d 509 [2<sup>nd</sup> Dept. 2007]). "General allegations that are conclusory and unsupported are insufficient to defeat summary judgment" (Keevan v. Rifkin, 41 AD3d 661, 662, 839 NYS2d 151 [2<sup>nd</sup> Dept 2007]), citing Alvarez v. Prospect Hospital, 68 NY2d 320, 324 [1986]; also see Romano v. Stanley, 90 NY2d 444, 661 NYS2d 589 [1997]). Here, the plaintiff has failed to rebut the defendant's primary showing of its entitlement to summary judgment in its favor.

Defendant (NYU Hospitals Center)- (Motion to Dismiss):

In moving to dismiss the action as against NYU, the defendant maintains that NYU was not vicariously liable for the actions of Dr. Jazrawi and there are no independent claims of negligence.

The defendant maintains that Dr. Jazrawi was the plaintiff's privately retained physician and entirely in charge of his care. The testimony and medical records support the contention that Mr. Malefakis personally selected Dr. Jazrawi to perform his surgery. Defendant NYU has offered the affidavit of Michael Browdy, the Director of Insurance, whose duties include reviewing requests for the employment status of physicians at the hospital. Based upon Mr. Browdy's search, Dr. Jazrawi was not employed by NYU from May 2015 through July 2015.

A patient admitted to the hospital by his/her personal attending physician "is a private" and is not considered the patient of the hospital and its employee doctors (Rodrigo v. Brookdale Hospital, 194 AD2d 774, 599 NYS2d 626 [2<sup>nd</sup> Dept. 1993]). Under those circumstances, the hospital does not control the private patient's course of treatment and, in the absence of an employment relationship between the physician and the hospital, the hospital cannot be legally responsible for the actions of the private physician (see Rodrigo v. Brookdale Hospital, 194 AD2d at 774; Hicks v. Fraser Clinic, 169 AD2d 558, 565 NYS2d 484 [1<sup>st</sup> Dept. 1991]). When treatment is rendered by a private attending physician, not an employee of the hospital, the general rule is that the

hospital is not liable for the acts of malpractice which are committed in carrying out the independent physician's orders (see Sarivola v. Brookdale Hospital & Med. Center, 204 AD2d 245, 612 NYS2d 151 [1<sup>st</sup> Dept. 1994]). No liability can attach to a hospital as a matter of law in the absence of proof that the hospital or its employees contributed to the occurrence of the patient's medical condition where the patient's personal physician was in control of the patients' care (see Hodge v. Franklin General Hospital, 610 NYS2d 837, 202 AD2d 635 [2<sup>nd</sup> Dept. 1994]).

As to the alleged liability of NYU during the hospital stay of Mr. Malefakis, since Dr. Jazrawi was a private attending physician, and there was no employment relationship between Dr. Jazrawi and NYU, the Court finds that NYU is not vicariously liable for any alleged departures by Dr. Jazrawi.

In addition, the defendant maintains that the plaintiff failed to articulate any specific theory of negligence as to how the hospital caused Mr. Malefakis' injury. There is no indication in the record that any residents or other NYU staff has any decision-making ability with respect to the management of Mr. Malefakis' care at the time of the operation and in the post-operative period. There is also no evidence in the record to suggest that any NYU staff failed to carry out any of the orders of Dr. Jazrawi. The hospital support staff members merely acted under the supervision of Dr. Jazrawi at all times.

#### Lack of informed consent:

In addressing the portion of the defendants' motions to dismiss the plaintiff's cause of action for malpractice based upon lack of informed consent, a plaintiff must prove (1) the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances; (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed; and (3) that the lack of informed consent is a proximate cause of the injury (see Zapata v.

Buitriago, 107 AD3d 977, 979, 969 NYS2d 79 [2<sup>nd</sup> Dept. 2013]); Spano v. Bertocci, 299 AD2d 335, 749 NYS2d 275 [2<sup>nd</sup> Dept. 2002]).

Here, the Court has considered the assertions of defendant Dr. Jazrawi that he explained the procedures to Mr. Malefakis and that he answered all of his questions and concerns, that he acceded to his request to advance the date of surgery, and that a consent form was signed on the date of surgery. In opposing this argument, the Court has considered the assertion of plaintiff's expert that this type of tear had the ability to self-heal and thus considering the fact that the plaintiff had been pain free for a period of ten days, that the procedure should have been delayed or at least the option should have been presented so that Mr. Malefakis could have made an informed and knowledgeable decision. In addition, Mr. Malefakis had stated that he wanted to do some other testing (additional MRI) to see if they could avoid surgery (see Mr. Malefakis EBT p. 56, 76). Mr. Malefakis testified that he made the request because Dr. Jazrawi had stated that the MRI of May 1, 2015 was not of the highest definition. Mr. Malefakis further testified that he considered cancelling the procedure, but the date had already been advanced and Dr. Jazrawi described the procedure as being very minimal (see Mr. Malefakis EBT p. 79, 90). A defendant moving for summary judgment on a lack of informed consent claim must demonstrate that the plaintiff was indisputably informed of the foreseeable risks, benefits, and alternatives of the treatment rendered, and that a reasonably prudent person would have declined to undergo the procedure if informed of the potential complications (see Kol Hou Chan v. Yeung, 66 AD3d 642, 887 NYS2d 164 [2<sup>nd</sup> Dept. 2009]). Notwithstanding the plaintiff's signature on the consent form, the arguments of the plaintiff, including the plaintiff's deposition testimony, raises a factual dispute between the doctor and the patient on the issue of informed consent, precluding summary judgment, (see Barnett v. Fashakin, 85 AD3d 832, 925 NYS2d 168 [2<sup>nd</sup> Dept. 2011]), and a dismissal of this cause of action.

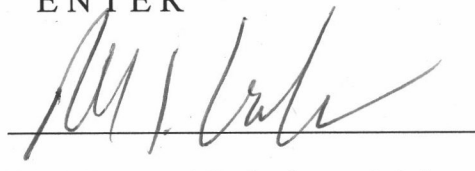
Conclusion:

The motion by defendant Dr. Jazrawi for summary judgment is granted only to the extent of dismissing the cause of action pertaining to any injury to plaintiff's eye. In all other respects, defendant Dr. Jazrawi's motion is denied. The motion by NYU to dismiss the action is granted.

This shall constitute the decision and order of this Court.

Dated: August 7, 2019  
Brooklyn, New York

ENTER



Hon. Bernard J. Graham, Justice  
Supreme Court, Kings County

2019 AUG 14 PM 12:27  
KINGS COUNTY CLERK  
FILED