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| Forth-Wood v Goldstein |
| 2020 NY Slip Op 30801(U) |
| March 12, 2020 |
| Supreme Court, New York County |
| Docket Number: 805103/15 |
| Judge: Joan A. Madden |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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JANE FORTH-WOOD,

Plaintiff,

INDEX NO. 805103/15

-against-

JEFFREY A . GOLDSTEIN, M.D., JASON M. GALLINA, M.D.,
VLADIMIR STEINBERG, M.D., HOSPITAL FOR JOINT
DISEASES AT NYU LANGONE MEDICAL CENTER, NEW
YORK UNIVERSITY LANGONE MEDICAL CENTER,
SEAPORT ORTHOPAEDIC ASSOCIATES, PC and NEW
YORK UNIVERSITY ANESTHESIA ASSOCIATES,

Defendants.
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JOAN A. MADDEN, J.:

In this action for medical malpractice and lack of informed consent involving back surgery, defendant Hospital for Joint Diseases at NYU Langone Medical Center¹ (“HJD”) and New York University Langone Medical Center (“NYU Hospital”) move for summary judgment. Co-defendants Jeffrey A. Goldstein, M.D. and Seaport Orthopaedic Associates, P.C. (collectively “Dr. Goldstein”) cross-move for summary judgment, relying on the expert affirmation of NYU’s expert. Plaintiff opposes the motion and cross-motion, but her expert affidavit is silent as to any departures by defendant NYU Hospital. The claims against NYU Hospital, therefore, are deemed abandoned and NYU Hospital is entitled to summary judgment dismissing the complaint as against it.²

¹This defendant moves as NYU Hospitals Center s/h/a Hospital for Joint Diseases at NYU Langone Medical Center.

²Plaintiff does not dispute that she was a private patient of Dr. Goldstein and he was not employed by HJD or NYU Hospital. Thus, no basis exists for imposing vicarious liability on

On September 11, 2012, plaintiff underwent a posterior cervical laminectomy at C3 - C7, and a posterior cervical segmental instrumented fusion at C3 - C6. Dr. Goldstein performed the surgery at HJD. After the surgery, plaintiff initially presented with normal neurologic function, but approximately 40 minutes later, she was unable to move her arms and legs (quadriplegia) (4:20 p.m.). When the results of a CT scan were inconclusive, Dr. Goldstein ordered an MRI (7:00 p.m.). The MRI could not be performed at HJD at that time, since an MRI scanner was not available on a 24-hour basis. Plaintiff was transported by ambulance to NYU Hospital for the MRI (8:30 p.m.) and after the MRI, she was transported back to HJD (10:28 p.m.). Based on the results of the MRI, Dr. Goldstein determined that exploratory surgery was necessary for a post-surgical hematoma. The surgery could not be performed at HJD at that time, since surgical facilities were not available on a 24-hour basis. Plaintiff was transported back to NYU Hospital (left HJD at 12:38 a.m and arrived at NYU Hospital at 1:15 a.m.), where Dr. Goldstein performed the surgery (beginning at 2:26 a.m.).

Based on the opinions of her expert neurologist, plaintiff alleges that HJD departed from the standard of care by offering its facilities to doctors for surgical procedures even though it was not equipped and prepared to staff or address the complications of such surgeries; by failing to provide surgeons with the ability to perform an MRI or have an operating room available when complications of a complex surgery arise; and by failing to have surgical intensive care unit capabilities.³ As to Dr. Goldstein, plaintiff alleges that he departed from the standard of care by

HJD or NYU Hospital for the actions or inactions of Dr. Goldstein.

³As noted above, plaintiff's expert affidavit is silent as to any departures by defendant NYU Hospital.

failing to ensure that the surgical facility he selected could provide the necessary and proper level of care to diagnose, address and treat known complications in a timely manner; by failing to timely transfer plaintiff to a facility that could provide diagnosis and treatment; by failing to presume the cause was the formation of a hematoma, the moment he became aware plaintiff presented with quadriplegia; by failing to timely order a CT scan and an MRI; by failing to direct that plaintiff remain at NYU Hospital until the MRI results were available and a treatment decision made; and by returning plaintiff to HJD and then transporting her back to NYU Hospital for surgery.

Plaintiff alleges that due to the alleged departures, the diagnosis and treatment of the post-surgical hematoma were delayed for 10 hours, and as a result, she suffered severe, debilitating and permanent neurological injuries. Plaintiff also alleges that Dr. Goldstein failed to obtain an informed consent with respect to the inability to address known complications at HJD and the necessity to transport patients to NYU Hospital for diagnostic testing and treatment.

A defendant moving for summary judgment in a medical malpractice action must make a prima facie showing of entitlement to judgment as a matter of law by showing 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. Nobel, 73 AD3d 204, 206 (1st Dept 2010). To satisfy the burden, defendant must present expert opinion testimony that is supported by the facts in the record, addresses the essential allegations in the complaint or the bill of particulars, and is detailed, specific and factual in nature. Id.; see Joyner-Pack v. Sykes, 54 AD3d 727, 729 (2nd Dept 2008). Expert opinion must be based on facts in the record or those personally known to the expert, and the opinion of defendant’s expert should specify “in what

way” the patient’s treatment was proper and “elucidate the standard of care.” Ocasio-Gary v. Lawrence Hospital, 69 AD3d 403, 404 (1st Dept 2010). Defendant’s expert opinion must “explain ‘what defendant did and why.’” Id (quoting Wasserman v. Carella, 307 AD2d 225, 226 [1st Dept 2003]).

“[T]o avert summary judgment, plaintiff must demonstrate that the defendant did in fact commit malpractice and that the malpractice was the proximate cause of the plaintiff’s injuries.” Roques v. Nobel, supra at 207. To meet this burden, “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.” Id. Where the parties’ conflicting expert opinions are adequately supported by the record, summary judgment must be denied. See Frye v. Montefiore Medical Center, 70 AD3d 15 (1st Dept 2009); Cruz v. St Barnabas Hospital, 50 AD3d 382 (1st Dept 2008).

In support of the motion, defendants HJD and NYU Hospital submit the expert affirmation of Dr. Thomas M. Mauri, M.D., a board certified orthopedic surgeon, who reviewed the bill of particulars, party and non-party depositions, medical records and imaging studies. As noted above, Dr. Goldstein also relies on Dr. Mauri’s affirmation, and does not submit his own expert affirmation in support of his cross-motion for summary judgment.

With respect to HJD, Dr. Mauri opines that not all hospitals have the same availability and access to treatment modalities and services, and here, plaintiff and her surgeon chose to go to HJD, which in 2012 was a hospital specializing in orthopedic surgery which did not maintain a 24-hour operative suite. Dr. Mauri opines that there is no medical requirement for a hospital to

maintain an operating room with 24 hour access; it is not common for speciality hospitals, such as HJD, to do so; and based on Dr. Goldstein's testimony, he was aware of this fact. Dr. Mauri states that HJD had a professional relationship with NYU Hospital and if a HJD patient required surgery at a time when its operating room was not available, the patient would be transferred to NYU Hospital for the surgery, which is what occurred in this instance. He opines that plaintiff's transfer was accomplished in a reasonable time from the point when Dr. Goldstein determined exploratory surgery was necessary to evaluate the post-operative hematoma as a potential cause of plaintiff's post-surgical neurological changes.

Dr. Mauri likewise opines that not all hospitals have 24-hour access to an MRI scanner, and based on the testimony of non-party Dr. Rybak, it "appears" there was a time in 2012 when HJD used a mobile MRI scanner that was not available 24 hours a day. Dr. Mauri opines that when an MRI was needed and not available for a patient at HJD, the patient would be transported to NYU Hospital in an ambulance. He opines that here, plaintiff was transferred to NYU Hospital for the MRI within a reasonable time, and it was appropriate for Dr. Goldstein to wait for the results of the MRI before performing any further surgery. He opines that the timing of the various interventions was reasonable and appropriate, and the staff, including nurses, residents and support staff from both HJD and NYU Hospital, properly followed and executed Dr. Goldstein's orders.

Dr. Mauri opines that to the extent plaintiff alleges HJD should have maintained a 24-hour MRI scanner and a 24-hour operating room, that is not a standard of care issue, and "amounts to an allocation of resources issue for Hospital administration." He opines that as long

as private attending physicians, like Dr. Goldstein, who operate at HJD, are aware of the potentially limited access to an MRI scanner and operating rooms after normal business hours, these issues do not amount to standard of care issues, and as such HJD should not be found to have departed from a standard of care which “simply does not exist.” Dr. Mauri further opines that the timing of the MRI and the exploratory surgery at NYU Hospital is of “little import,” as the “operative findings of Dr. Goldstein on re-exploration of the wound found evidence of only a minimally clotted non-compressive hematoma – i.e. it would appear that the post-operative hematoma was not the apparent cause for the post-operative changes noted at PACU at HJD.” He opines that based on plaintiff’s presentation, the “far more likely cause for the post-operative changes would have been post-operative edema following the cervical decompression and fusion of a long-standing myelopathic cervical spine.” He opines this conclusion is further supported by the fact that when post-operative prednisone/steroids were administered to plaintiff, she began to regain some sensation and function in her extremities even before the exploratory surgery.

Addressing Dr. Goldstein’s surgery and the hospital admissions to HJD and NYU, Dr. Mauri opines that based on his review of the hospital records and the parties’ testimony, the hospital care rendered to plaintiff was at all times appropriate; the assistance and care rendered by all healthcare providers at HJD and NYU Hospital “appears to have been completely appropriate and well within the standards of care required, and I see no departures from the standard of care as to any of the Hospital staff, nor do I see that plaintiff alleges any such direct negligence against said individuals.” He opines that plaintiff, a private patient of Dr. Goldstein,

was appropriately monitored in the recovery room, and any complains she made as to her physical condition were timely and accurately relayed to Dr. Goldstein, who was actively involved in the management of her care throughout her admission to HJD and NYU Hospital, and “I see no basis for any allegations of negligence, either direct or vicarious.”

Based on the foregoing, HJD has made a prima facie showing of entitlement to judgment as a matter of law. Dr. Mauri’s affirmation is likewise sufficient to make a prima facie showing as to Dr. Goldstein, in view of his opinion as to the issue of causation, i.e. that the post-operative hematoma was not the “apparent cause” of plaintiff’s post-operative changes and the “far more likely cause” was post-operative edema.

Turning to the opposition, plaintiff submits the name-redacted affidavit of a board certified neurosurgeon, who reviewed the bills of particulars, medical records, diagnostic reports and films, depositions and the report of defendants’ expert, Dr. Mauri.⁴ Plaintiff’s expert opines that post-surgical hematoma is a known risk of complex cervical spine surgery which can cause severe and permanent neurologic deficits; early detection and evacuation of a hematoma is critical; and vigilance in promptly addressing post-surgical changes in neurologic status is key in achieving a favorable outcome. Citing specific articles, plaintiff’s expert opines the medical literature provides the sooner the hematoma is removed, the better the outcome, and if not remedied in a timely manner, neurologic deficits may be severe and permanent.

Specifically, as to Dr. Goldstein, plaintiff’s expert opines that he departed from the standard of care by failing to ensure that the facility where he chose to perform complex cervical spine surgery was capable of providing the necessary and proper level of care to diagnose,

⁴Plaintiff has provided the Court with un-redacted copy of her expert affidavit.

address and treat known complications in a timely manner; by failing to transfer plaintiff to NYU Hospital as soon as he was aware she presented with quadriplegia; and by failing to presume that the quadriplegia was caused by the formation of a hematoma and not taking immediate action to remove the hematoma.

Plaintiff's expert opines that Dr. Goldstein should have considered that 800cc of blood lost during surgery, which is about 5 to 6 times more than would be expected, in formulating his differential diagnosis. The expert opines that the amount of blood loss is an indication of substantial bleeding during surgery, and combined with the onset of quadriplegia, Dr. Goldstein departed from the standard of care in concluding that the cause of quadriplegia was anything other than a hematoma. The expert opines that when a hematoma causes quadriplegia, the hematoma must be evacuated as soon as possible to prevent permanent neurologic damage, and if diagnostic testing cannot be done emergently, exploratory surgery for evacuation of the hematoma must be done emergently. Plaintiff's expert opines that Dr. Goldstein improperly concluded that quadriplegia was due to edema and very mild myelopathy, as a comparison of the pre- and post-operative MRIs shows that the myelopathy was unchanged after Dr. Goldstein's September 11, 2012 surgery.

Plaintiff's expert opines Dr. Goldstein departed from the standard of care when he ordered a CT scan more than an hour after plaintiff presented with quadriplegia; and since the CT scan could not be performed within 15-20 minutes of the order, plaintiff should have been taken back to operating room immediately. The expert opines that when the CT scan was finally performed, the results were inconclusive as the view was obscured by the hardware implanted by

Dr. Goldstein. Plaintiff's expert opines that Dr. Goldstein departed from the standard of care by waiting one hour after the completion of the CT scan to order an MRI, which required plaintiff to be transported to NYU Hospital. The expert opines that 2 hours and 50 minutes elapsed from when Dr. Goldstein ordered the MRI and the MRI was completed, and that 5 ½ hours elapsed from when plaintiff first presented with quadriplegia and the MRI was completed.

Plaintiff's expert opines that Dr. Goldstein departed from the standard of care by failing to include in the order for the MRI, a specific directive that plaintiff remain at NYU Hospital until the MRI was read and treatment decision rendered; as a result plaintiff was shuttled back to HJD after the MRI, which created further delays, since the operating room at HJD was closed when Dr. Goldstein determined that exploratory surgery was necessary, and plaintiff had to be brought back to NYU Hospital. Plaintiff's expert opines that from the time plaintiff first presented with quadriplegia until the exploratory surgery commenced, plaintiff was unable to move and suffered from quadriplegia for 10 hours. The expert opines that during this 10-hour delay, a post-surgical hematoma flattened, compressed and displaced plaintiff's spinal cord resulting in on-going pain, limitations, and medical and neurologic problems.

Plaintiff's expert opines that Dr. Goldstein further departed from the standard of care by failing to obtain an informed consent from plaintiff with respect to the inability to address known complications at HJD and the necessity to transport patients to another hospital for diagnostic testing and treatment.

Turning to defendant HJD, plaintiff's expert opines that HJD departed from the standard of care by offering its facility to doctors to perform complex cervical spine surgery without being equipped, prepared to staff and address known complications in a timely manner; by failing to

provide surgeons with the ability to perform a timely MRI when a patient presents with quadriplegia; by failing to staff its operating rooms 24 hours a day, so a patient can be timely and properly brought back to the operating room when she presents with quadriplegia; and by allowing complex cervical spine surgery at its facility without surgical intensive care unit capabilities, as once plaintiff presented with quadriplegia, her level of care should have been elevated to ensure close monitoring of her neurologic status, vitals and the Hemovac drain output, in light of concerns that a post-surgical hematoma was responsible for the quadriplegia. The expert opines that HJD departed from the standard of care by failing to draft and enact protocols, practices and procedures requiring immediate transfer of patients like plaintiff who present with the onset of quadriplegia, to a facility that offers a high level of critical care, diagnostic treatment and observation.

Plaintiff's expert opines that a direct result of the departures by Dr. Goldstein and HJD, there was a marked delay in diagnosis and treatment of plaintiff's post-surgical hematoma, and the cumulative effect of the ten-hour delay from the presentation of quadriplegia to the commencement of the exploratory surgery, resulted in complications relating to the hematoma, including quadriplegia, quadriparesis, C6 incomplete tetraplegia, neurogenic bladder, chronic urinary tract infections, neurogenic bowel, bladder spasms, incontinence, bowel regime, administration of steroids and Lovenox, partial foot drop of right leg, inability to bear weight and ambulate without assistance (use of wheelchair, walker and crutches), muscle weakness in upper and lower extremities, loss of motor function, impaired motor strength, aggravation and exacerbation of numbness of both arms, numbness of lower extremities, severely reduced ranges

of motion of upper extremities, inability to perform all acts of daily living and hygiene without assistance, and extraordinary pain, discomfort and tenderness.

Addressing the opinions of defendants' expert, plaintiff's expert disagrees with Dr. Mauri's opinion that Dr. Goldstein's finding of a minimally clotted non-compressive hematoma indicates that the timing of the MRI and exploratory surgery did not cause plaintiff's quadriplegia. Plaintiff's expert points to the post-operative MRI which showed a displaced, flattened and compressed spinal cord, and Dr. Goldstein's testimony that when he read the MRI film, he observed a hematoma compressing the spinal cord, and when he performed the exploratory surgery, the dimensions of the hematoma coincided with the dimensions in the MRI report. Plaintiff's expert states that he/she personally read the MRI films and found a large compressive hematoma flattening the spinal cord that comports with the MRI report. The expert opines that given the objective MRI findings, coupled with plaintiff's clinical presentation preceded by a substantial blood loss during the first surgery, Dr. Goldstein's description during the exploratory surgery as a minimally clotted non-compressive hematoma is "preposterous."

Plaintiff's expert opines that contrary to Dr. Mauri's opinion, the formation of a hematoma is not the issue here, as the formation of a hematoma is a known risk of cervical spine surgery; but where as here a post-operative patient has a normal neurologic exam and then develops quadriplegia, timely diagnosis and treatment is determinative of the outcome. The expert opines that the compressive hematoma seen on the MRI scan was the cause of plaintiff's neurologic deficits.

Plaintiff's expert also disagrees with Dr. Mauri's opinion that the post-operative neurologic changes are attributable to post-operative edema of the spinal cord, related to

plaintiff's pre-existing cervical myelopathy. Plaintiff's expert objects that Dr. Mauri presents no medical evidence to support his opinion and fails to explain how the post-operative hematoma shown on the September 11, 2012 MRI caused physical compression of the spinal cord but was not responsible for plaintiff's quadriplegia. The expert opines that if plaintiff's pre-existing myelopathy was the cause of her neurologic deficits, the MRI would show some change of signal within the spinal cord reflecting this, and since the only significant changes on the MRI relate to the hematoma compressing the spinal cord, it cannot be that plaintiff's decline is due circumstances outside the obvious injury to her spinal cord by the hematoma.

Plaintiff's expert disagrees with Dr. Mauri's opinion as to significance of plaintiff's reaction when treated with steroids before the exploratory surgery. The expert opines that such slight fluctuations of neurologic findings are clinically insignificant, and do not indicate the absence of a compressive hematoma flattening the spinal cord. Plaintiff's expert also disagrees with Dr. Mauri's opinion that plaintiff has returned to her pre-operative baseline condition. Plaintiff's expert opines that before the surgery, plaintiff was a high-functioning woman actively engaged in many physically demanding activities, including construction work on rental properties, cleaning gutters, snow shoveling, and landscaping; she also enjoyed hiking, walking and traveling. The expert opines that as a result of the departures by Dr. Goldstein and HJD, plaintiff is unable to engage in those activities and continues to suffer from multiple neurologic deficits, as documented in her recent physical therapy records, showing that she suffers from quadriparesis, swollen extremities, body spasms, unsteady gait, frequent falls, loss of sensation in arms, reduced sensation in trunk, loss of coordination, severe neuropathy and persistent

weakness; and her current limitations include urinary and bowel incontinence, self-extraction of bowel movement, and problems walking necessitating the use of a walker, cane and wheelchair.

The foregoing opinions of plaintiff's expert neurologist, raise material issues of fact that preclude summary judgment. The parties' experts offer sharply conflicting opinions as to whether HJD departed from the standard of care by offering its facilities to doctors for surgical procedures even though it was not equipped and prepared to staff or address the complications of such surgeries; by failing to provide surgeons with the ability to perform an MRI or have an operating room available when complications of a complex surgery arise; and by failing to have surgical intensive care unit capabilities. The experts also sharply disagree as to whether the 10-hour delay in diagnosing and treating plaintiff's post-operative quadriplegia resulted in permanent neurologic injuries that could have been avoided if she had been diagnosed and treated sooner. The experts further disagree as to the results of the post-operative MRI and the post-operative exploratory surgery, and whether plaintiff's injuries were caused by a hematoma compressing on her spinal cord, or edema related to her pre-existing myelopathy. Where as here the parties' conflicting expert opinions are adequately supported by the record, summary judgment must be denied. See Frye v. Montefiore Medical Center, supra; Cruz v. St Barnabas Hospital, supra.⁵

Accordingly, it is

ORDERED that the branch of the motion for summary judgment by defendant New York University Langone Medical Center, is granted and the Clerk is directed to enter judgment dismissing the complaint as against said defendant; and it is further

⁵Given the denial of Dr. Goldstein's cross-motion, the Court need not consider plaintiff's argument that the cross-motion is untimely.

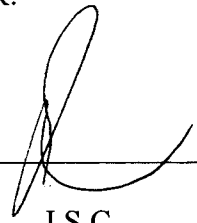
ORDERED that the branch of the motion for summary judgment by defendant Hospital for Joint Diseases at NYU Langone Medical Center (moving as NYU Hospitals Center s/h/a Hospital for Joint Diseases at NYU Langone Medical Center), is denied; and it is further

ORDERED that the cross-motion for summary judgment by defendants Jeffrey A. Goldstein, M.D. and Seaport Orthopaedic Associates, P.C., is denied; and it is further

ORDERED the remaining parties are directed to appear for the pre-trial conference previously scheduled for March 26, 2020 at 10:00 a.m., in Part 11, Room 351, 60 Centre Street.

DATED: March 12, 2020

ENTER:



J.S.C.

HON. JOAN A. MADDEN
J.S.C.