Jones v Wong
2020 NY Slip Op 31776(U)
June 5, 2020
Supreme Court, New York County
Docket Number: 850260/2014
Judge: Eileen A. Rakower

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER PART 6

Justice

LEONARD JONES,

Plaintiff,

- against-

MICHAEL WONG, M.D., WEN C. YANG, M.D., and LENOX HILL HOSPITAL,

Defendants.

INDEX NO. 850260/2014
MOTION DATE
MOTION SEQ. NO. 1
MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion for/to

	NUMBERED	PAPERS
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...		
Answer — Affidavits — Exhibits _____		
Replying Affidavits		

Cross-Motion: Yes X No

HON. EILEEN A. RAKOWER, J.S.C.

Defendants Wen C. Yang, M.D. ("Dr. Yang"), and Lenox Hill Hospital (collectively, "Defendants") move pursuant to CPLR §3212 granting summary judgment to Defendants and directing the entry of judgment in their favor. In the alternative, Defendants move pursuant to CPLR §3212(e) and (g) granting partial judgment in Defendants' favor.[1] Plaintiff Leonard Jones ("Plaintiff") opposes the motion.

Factual Background

On January 1, 2014, Plaintiff, a 24 year old male, presented to the Emergency Department of Lenox Hill Hospital with complaints of numbness to his

[1] Defendant Michael Wong, M.D., was never served with the Summons and Complaint.

feet and hands and bilateral weakness to his upper and lower extremities (Lenox Hill Records P55-59).

On January 3, 2014, a fluoroscopy-guided lumbar spinal puncture was performed on Plaintiff as part of work-up to diagnose whether Plaintiff had Guillain-Barre Syndrome ("GBS") or Lyme's Disease (P608-609).

Michael Wong, M.D. ("Dr. Wong"), a resident, started the lumbar spinal puncture under the supervision of Dr. Yang. Dr. Yang testified that he took over the procedure after Dr. Wong encountered resistance with the needle and completed the procedure (Dr. Yang's deposition ["Yang Dep."], p. 91-95). As to what Dr. Yang believed caused the resistance that Dr. Wong encountered, Dr. Yang testified that "it's possible the needle was too far advanced and hit ligament of whatever structure in the spinal canal..." (*Id.* at 99). Dr. Yang testified that the resistance may have been caused by "[t]he ligament behind the vertebral body" and "vertebral bone" (*Id.*). In answering whether he removed the needle at that point, Dr. Yang testified, "We just pull back, allow the tip of needle to be in the subarachnoid space" (*Id.* at 96-97).

Dr. Yang testified that Dr. Wong told him "there was resistance" for "about two seconds" (*Id.* at 101). Dr. Yang testified that he took over the procedure from Dr. Wong and "pulled the needle back and the fluid out" (*Id.* at 99). Dr. Yang collected 13 cc of fluid. (*Id.* at 92). The cerebral spinal fluid collected in the procedure had a protein level of 250 and a red blood count of 4 (P591). It was "colorless." (P591). Dr. Yang testified that at that time of the procedure, Dr. Wong would have performed "not too many" lumbar punctures (Yang Dep. 112).

Plaintiff testified that, "At first I felt a couple of pokes, and started a feeling more and more" (Plaintiff's deposition ["Plaintiff's Dep."] at p. 74). Plaintiff testified that he "told the gentleman that it hurt … [a]nd it felt like they kept going, and they were just talking over me" (Plaintiff's Dep. 74). Plaintiff testified that he "just kept feeling the poking and poking" and after he complained about the pain, the "pokes" "slowed down" (*Id.* at 74-75). Plaintiff further testified that he estimated 10 pokes after he started feeling numb (*Id.*).

Dr. Wong authored a medical note timed at 4:00 p.m. on January 3, 2014. Dr. Wong wrote that "patient underwent a lumbar puncture by Dr. Yang at level L3-L4," and "patient tolerated the procedure well" (P72). There is no mention in the medical note of Dr. Wong's involvement in the procedure, the resistance

encountered by Dr. Wong, the number of attempts made to complete the procedure, or the length of time it took to perform the procedure (P72; Dr. Yang Dep. 91-97). There is no mention of these details in any other medical record. In addition, while the procedure was performed under fluoroscopic guidance, the images including the position of the needle were not stored and available to review (Yang Dep. 102-106).

Plaintiff testified that "[l]ater that night [he] started getting a little bit of back pain" (Plaintiff's Dep. at 82). Based on the medical records, on January 4, 2013 at 1:45 pm, Plaintiff reported feeling better although he continued to "have numbness in his feet and weakness" (P87). On January 5, 2014, at 12:00 pm, Plaintiff "feels better" with some "facial numbness" (P96). On January 6, 2014 at 9 am, Plaintiff "states he feels better overall" and that "his weakness is improving" (P100). On January 6, 2014, it is noted that "Plaintiff has no new complaints" and his "strength" is "5/5 throughout" (P102). It is also noted that Plaintiff "still has mild L facial droop" and "intermittent numbness in feet" (P102).

On January 7, 2014 at 6:33 am, Plaintiff "complained of back pain" (P104). At 7:45 am, Plaintiff complained of "lower back pain" that was "sharp, non-radiating" (P105). Plaintiff stated that the pain improved when he laid on his side (P105). The medical notes also state that there was no "bowel/bladder incontinence" (P105). At 12 pm, it was noted that Plaintiff complained of "lower sacral pain that in nature" which was "relieved with morphine" (P105). Plaintiff reported that "his symptoms are resolving but still feels weak" (P105).

On January 7, 2014, an MRI was performed on Plaintiff (P609). The "impression" from the MRI was "[p]osterior epidural hematoma in the lumbar and lower thoracic spinal canal up to the level of T10, with compression of the thecal sac" (P609). Dr. Yang signed the findings of the MRI at 9:46 a.m. on January 8, 2014 (P610). The medical notes state that the findings of the MRI were shared with Dr. Selby on January 8, 2014 at 2:01 am (P610).

The medical records state that Dr. Fira Chamas "was consulted to evaluate the patient on around 1 o'clock" and "[t]he patient was seen five minutes after the consultation" (P221). Dr. Chamas's "[r]eview of his diagnostic imaging revealed a massive epidural hematoma extending all the way from T11 to the sacrum severely compressing his thecal sac and his conus, so he was indicated for an emergent evacuation of the epidural hematoma for cauda equina syndrome which was subsequent to the epidural hematoma" (P221).

On January 8, 2014, Dr. Chamas performed the following operation: "[t]horacic laminectomy, T11-T12," "[l]umbar laminectomy, L1-L5," "[s]acral laminectomy, S1," "[e]vacuation of epidural hematoma," and "[h]emostasis of epidural vessel bleeding" (P220). The medical records state during "the evacuation process, there was large dilated epidural vessels which were visible" and "[t]hey were under pressure and copious amount of bleeding was coming from these epidural vessels" (P221). The medical records state that "[t]here several attempts at coagulating them with bipolar electrocautery … in addition to using Surgiflo with thrombin to help control the bleeding" (P221).

On January 17, 2014, Plaintiff was discharged from Lenox Hill Hospital and was transferred to a rehabilitation facility (P250). Following his surgery, Plaintiff underwent inpatient rehabilitation and physical and occupational therapy.

Summary Judgment Standard

CPLR §3212 provides in relevant part, that a motion for summary judgment,

> shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party… [t]he motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.

A defendant moving for summary judgment in a medical malpractice case has the burden of making a prima facie showing of entitlement to judgment as a matter of law by showing that "there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged" by introducing expert testimony that is supported by the facts in the record. *Rogues v. Nobel*, 73 AD3d 204, 206 [1st Dept. 2010].

Once the defendant has made this showing, the burden shifts to the party opposing the motion "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 Hospital*, 68 NY2d 320, 324 [1986]. Specifically, a plaintiff "must submit evidentiary facts or materials to rebut the prima facie showing by the

defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact." *Alvarez*, 68 NY2d at 324.

A plaintiff "must submit an affidavit from a physician attesting that the defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged." *Rogues*, 73 AD3d at 207. "General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat defendant physician's summary judgment motion." *Id.* at 325. An affidavit from an expert which sets "forth general conclusions, misstatements of evidence and unsupported assertions, is insufficient to demonstrate a defendant's failure to comport with accepted medical practice, or that any such failure was the proximate cause of plaintiff's injuries." *Coronel v. New York City Health & Hosps. Corp.*, 47 AD3d 456, 457 [1st Dept 2008].

A hospital is vicariously liable for the acts of negligence of its physicians and medical staff pursuant to *Hill v. St. Clare's Hospital*, 67 NY2d 72 (1986) and *Mduba v. Benedictine Hospital*, 52 AD2d 450 (3d Dep't 1976) and under a theory of respondeat superior.

Pursuant to Public Health Law § 2805-d[2], "[t]he right of action to recover for medical, dental or podiatric malpractice based on a lack of informed consent is limited to those cases involving either (a) non-emergency treatment, procedure or surgery, or (b) a diagnostic procedure which involved invasion or disruption of the integrity of the body."

"To prevail on such claim, a plaintiff must establish, via expert medical evidence, that defendant failed to disclose material risks, benefits and alternatives to the medical procedure, that a reasonably prudent person in plaintiff's circumstances, having been so informed, would not have undergone such procedure, and that lack of informed consent was the proximate cause of her injuries." *Balzola v Giese*, 107 AD3d 587, 588 [1st Dept 2013]. A defendant moving for summary judgment on a lack of informed consent claim must show *inter alia* that there is no factual dispute as to whether the plaintiff was informed "of any foreseeable risks, benefits or alternatives" of the treatment rendered. *Balzola*, 107 AD3d at 588.

Summary Judgment Motion

In Plaintiff's Bill of Particulars as to Dr. Yang, Plaintiff alleges *inter alia* that Dr. Yang negligently performed a lumbar spinal puncture; failed to supervise the resident during the procedure; failed to recognize that the spinal puncture was traumatic; caused Plaintiff to suffer an epidural hematoma and failed to properly diagnose and treat the condition; and caused cauda equina syndrome. Plaintiff alleges *inter alia* that Dr. Yang failed to monitor Plaintiff during the lumbar puncture; failed to properly perform neurologic monitoring during the procedure, caused an excessive number of lumbar punctures; failed to recognize the lumbar puncture was drawing blood in the cerebrospinal fluid; and failed to recognize the significance of what had occurred.

In Plaintiff's Bill of Particulars as to Lenox Hill Hospital, Plaintiff alleges that Lenox Hill Hospital *inter alia* "negligently and carelessly failing to provide an experienced, qualified and competent staff of attending nurses, technicians; physicians and employees."

Expert Affidavits

Defendants submit the expert affidavit of Howard J. Silberstein, M.D. Dr. Silberstein is a physician licensed to practice medicine in the State of New York and is board certified in neurosurgery. Dr. Silberstein states that he has reviewed Plaintiff's Bills of Particulars, the parties' deposition testimony, and the medical records and diagnostic reports.

Plaintiff submits the expert affirmation of an unnamed expert. Plaintiff's expert is a physician licensed to practice in New York and currently board certified in neurology.

Dr. Silberstein opines "with a reasonable degree of medical certainty that Dr. Yang and Lenox Hill Hospital conformed to the standard of care at all times in the care and treatment that they rendered to the plaintiff, and that their alleged departures from the standard of accepted medical practice were not the proximate cause of the alleged injuries or damages claimed herein." Dr. Silberstein opines that Dr. Yang and Lenox Hill Hospital "properly treated, cared for, observed, administered to, diagnosed, tested, and otherwise treated the plaintiff for the condition and complaints with which he presented, and that they properly,

adequately, safely and in accordance with the good and accepted standards of medical care and treatment."

Dr. Silberstein opines "with a reasonable degree of medical certainty that the Defendants rendered appropriate care and treatment during the admission prior to the January 3, 2014 lumbar puncture." Dr. Silberstein opines that the manner in which Drs. Yang and Wong performed the lumbar puncture met the standard of care. Dr. Silberstein notes that "[t]here was no frank blood found on the needle and the CSF that was extracted was clear and colorless" and opines "with a reasonable degree of medical certainty that the protein level of 250 and the red blood cell count of 4 does not raise suspicion for a traumatic lumbar puncture." Dr. Silberstein states that "elevated protein level reflecting inflammation of nerve roots is consistent with" GBS, the condition that Plaintiff was suspected of having by the doctors.

Dr. Silberstein opines "with a reasonable degree of medical certainty the defendants did not negligently or improperly perform a lumbar spinal puncture and did not fail to timely and properly recognize that the spinal puncture performed had contributed to a post-procedure epidural hematoma." Dr. Silberstein opines that Defendants properly monitored Plaintiff throughout the procedure and states there is no evidence that Plaintiff sustained a neurological injury during the lumbar puncture.

Dr. Silberstein further opines that Defendants "did not negligently fail to recognize that the lumbar puncture was drawing blood in the CSF and/or that they failed to act upon the presence of red blood cells in the CSF being drawn during the lumbar puncture." Dr. Silberstein opines "that the 13cc of CSF extracted was an appropriate amount." Dr. Silberstein states that there was no evidence of an improper number of CSF vials used for collection or a failure to order appropriate and proper pathology studies with the CSF that was obtained.

Dr. Silberstein opines "with a reasonable degree of medical certainty that there was no departure in failing to respond to plaintiff's alleged intra-procedure complaints of lower extremity numbness and back pain because lower back pain is a common complaint made by patients by virtue of the nature of the procedure and the plaintiff already had lower extremity numbness for which he was being worked up." Dr. Silberstein opines that "it was a routine lumbar puncture and that there was no indication for further workup such as diagnostic studies, blood tests and/or additional consults."

Dr. Silberstein opines "with a reasonable degree of medical certainty that postoperative bleeding and the development of an epidural hematoma is a rare but known complication to a lumbar puncture that can occur in the absence of negligence, and that in this case, such development occurred in the absence of negligence on the part of the defendants." Dr. Silberstein opines that "it is likely that the needle punctured a small blood vessel while being properly advanced into the spinal canal during the single attempt and "there was nothing required by the standard of accepted medical practice that could have been done by Dr. Wong or Dr. Yang prior to or during the lumbar puncture to change the small risk of puncturing a blood vessel during the procedure." Dr. Silberstein further opines "that while the procedure was performed with fluoroscopic guidance, vasculature is not visible and thus does not minimize the risk of puncturing a blood vessel during the procedure." Dr. Silberstein further opines "that Dr. Wong advancing the needle through the subarachnoid space and encountering the ligament did not cause or contribute to the development of the epidural hematoma."

Dr. Silberstein states that "[t]he records and testimony are consistent with Dr. Wong and Dr. Yang having been able to successfully extract CSF from the subarachnoid space during one attempt, and thus there was no departure from the standard of accepted medical practice by negligently and improperly making excessive attempts at performing a lumbar spinal puncture." Dr. Silberstein opines "with a reasonable degree of medical certainty that an inability to extract CSF during a single attempt is not indicative of negligence on the part of the practitioner performing the procedure, and that it is common for practitioners to require multiple attempts during a lumbar puncture in order to extract CSF." Dr. Silberstein opines "that a failed attempt at extracting CSF does not require abandonment of the procedure" and "that even assuming arguendo that Dr. Wong and Dr. Yang made multiple attempts in order to successfully extract CSF, there would be no evidence of negligence on their part, particularly in light of the importance in successfully extracting CSF as part of the workup to diagnose the serious conditions of GBS and Lyme disease."

Dr. Silberstein opines "with a reasonable degree or medical certainty that there was no failure with respect to the diagnosis and treatment of the plaintiff's epidural hematoma" because Plaintiff's symptoms from January 4 through 6, 2014 did not indicate postoperative bleeding or the need for further related diagnostic studies.

Dr. Silberstein opines "with a reasonable degree of medical certainty that an MRI of the lumbar spine was not indicated before January 7, 2014, and that

performing the emergency procedure any earlier on January 8, 2014, would not have had any impact on the plaintiff's condition, hospital course, treatment, prognosis or outcome." Dr. Silberstein further opines "that there was no negligence in causing and/or allowing the plaintiff's epidural bleed to continue unabated, no failure to properly monitor the plaintiff postoperatively, and no negligence in causing and/or allowing the epidural hematoma to progress to result in cauda equine syndrome." Dr. Silberstein further opines that there is no evidence to support Plaintiff's claim that Lenox Hill Hospital failed to train its residents in performing a lumbar puncture and post operative care.

Dr. Silberstein further opines that Plaintiff was informed of all the known risks and complications of the lumbar puncture procedure, including postoperative bleeding. Dr. Silberstein states that Plaintiff signed an Informed Consent form. Dr. Silberstein further opines that no reasonable patient that was experiencing the same symptoms of Plaintiff and facing the same diagnoses would have withheld his or her consent for the procedure if he or she had been informed of the risks.

Plaintiff's expert states that he has reviewed the medical records and deposition testimony. Plaintiff's expert opines "within a reasonable degree of medical certainty that the defendants departed from good and accepted practice by negligently and improperly performing a lumbar puncture (or spinal tap) on January 3, 2014 and in failing to timely and properly obtain a neurosurgical consultation when the hematoma was diagnosed on MRI." Plaintiff's expert further opines "within a reasonable degree of medical certainty that the negligent performance of the lumbar puncture was a substantial contributing factor to Mr. Jones' injuries, including, *inter alia*, his lumbar epidural hemorrhage and cauda equina compression that required surgical evacuation along with multiple levels of laminectomy."

Plaintiff's expert opines that Drs. Wong and Yang and Lenox Hill Hospital departed from accepted standards of medical care by utilizing improper technique in their performance of the lumbar puncture on January 8, 2014. Plaintiff's expert opines that "[h]emorrhagic complications are known to be increased when technical difficulty is encountered at lumbar puncture and technical difficulty is a commonly noted factor in reported spinal hematoma complications." Plaintiff's expert opines "within a reasonable degree of medical certainty that a hematoma will only develop with a profoundly ineptly performed lumbar puncture unless the patient is markedly anticoagulated" and Plaintiff "did not have coagulation issues."

Plaintiff's expert opines:

> It is clear that poor technique was utilized based on a variety of factors. First, the needle was passed beyond the subarachnoid space and was not immediately retracted upon encountering resistance when it was clear to Dr. Yang (sic) that the needle had breached the spinal canal. It was a departure from the standard of care to not stop advancing the needle when the needle was beyond the subarachnoid space. Instead, Dr. Yang (sic) continued to try to advance the needle for two seconds through resistance, greatly increasing the risk of injury to the ligaments, vessels and bone in or near the canal that could lead to hemorrhage.

Plaintiff's expert further opines:

> It is also clear that poor technique was utilized because multiple attempts were made to perform the puncture and that an inexperienced resident had made approximately 10 attempts to properly place the needle. That multiple vessels were bleeding copiously supports Mr. Jones' recollection of multiple attempts. The standard of care required the procedure to be abandoned after three attempts and it was a departure from the standard of care to perform excessive traumatic taps such that they resulted in an epidural hemorrhage, an extremely rare occurrence during lumbar puncture that more than likely not occurred as a result of improper technique and the careless manner in which this procedure was performed.
>
> It is also evident that poor technique was utilized based on the fact that Mr. Jones complained of pain and the procedure continued on without changing positions or adjusting the needle angle.

Plaintiff's expert opines "within a reasonable degree of medical certainty" that Defendants "departed from accepted practice" (1) "by failing to, at least, restart the procedure at a different level after repositioning the patient to ensure safe access and with a more experienced practitioner performing the procedure"

because "[a]llowing repeated traumatic attempts greatly increased the patient's risk for injury" and (2) "by failing to abort the lumbar puncture procedure in light of the patient's complaints of pain" because "[t]his should have been a sign to Drs. Wong and Yang that the needle was malpositioned during the procedure."

Plaintiff's expert further opines that Lenox Hill Hospital failed to timely and properly obtain a neurological surgery consultation immediately upon the MRI's finding of the massive hematoma with thecal sac compression on July 7, 2014. The expert states that, "The MRI was performed at approximately 8 p.m. on the July 7, a report was made to the resident at around 2 am on July 8 and a consultation was not ordered until 1 p.m. on July 8." Plaintiff's expert opines that [t]his delay of approximately 17 hours was a departure from the standard of care because it permitted the nerve compression to persist unabated until a surgeon finally was called the following day."

Plaintiff's expert further opines that these departures were substantial factors in causing Plaintiff's injuries. Plaintiff's expert states that the departures resulted in the causing of Plaintiff massive epidural hematoma resulting in the compression of the thecal sac and the need for extensive surgery to evacuate the hematoma. Plaintiff's expert states "[t]he hemorrhage was caused by damage to epidural vessels, and there is no other reasonable explanation for how that injury would occur in this case other than as a of the traumatic tap." Plaintiff's expert states, "Given the amount of blood produced by this tap and the carelessness in which it was performed, it is my opinion within a reasonable degree of medical certainty that the hemorrhage was caused by this poorly performed traumatic lumbar puncture." Plaintiff's expert states, "As a result of the traumatic lumbar puncture, Mr. Jones suffered cauda equina syndrome with weakness in his legs that required a multi-level laminectomy and evacuation of the hematoma and also caused him to undergo an extensive course of rehabilitation."

Discussion

Defendants Dr. Yang and Lenox Hill Hospital make a prima facie showing of entitlement to summary judgment on Plaintiff's medical malpractice and informed consent claims. *Alvarez*, 68 NY2d at 324. Dr. Silberstein, on behalf of Dr. Yang and Lenox Hill Hospital, opines that Defendants met the standard of care in the treatment that they provided to Plaintiff. Dr. Silberstein also opines that Plaintiff was informed of all the known risks and complications of the lumbar

puncture procedure, and signed an Informed Consent. Dr. Silberstein further opines no reasonable patient who was presenting with the same symptoms as Plaintiff would have withheld his or her consent to undergo a lumbar puncture even if he or she had been fully informed of all the risks.

The burden now shifts to Plaintiff to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action. *Lindsay-Thompson*, 147 AD3d at 639.

Plaintiff's expert affirmation shows "material issues of fact which require a trial of the action" regarding Plaintiff's medical malpractice claim against Defendants. *Alvarez,* 68 NY2d at 324. While Dr. Silberstein opines that Defendants properly performed the lumbar puncture on Plaintiff and the follow-up care was appropriate and met the standard of care, Plaintiff's expert opines Drs. Wong and Yang departed from good and accepted practice because they utilized improper technique in performing the lumbar puncture.

Plaintiff's expert explains that the standard of care required the needle to be immediately retracted upon feeling resistance. Plaintiff's expert states that here, Dr. Wong departed from the standard of care when he advanced the needle for two seconds after feeling the initial resistance and before stopping the procedure. Plaintiff's expert further explains that the standard of care required that the procedure be abandoned after three attempts and relying on Plaintiff's recollection, Plaintiff felt approximately ten pokes. Plaintiff's expert further explains that Defendants departed from good and accepted practice in failing to reposition Plaintiff and/or adjust needle angle after Plaintiff complained of pain. Plaintiff's expert further explains that Defendants departed from good and accepted practice in delaying a neurologic consultation for approximately 17 hours after detecting the hematoma.

Further, Plaintiff's expert refutes Dr. Silberstein's opinions that the departures were not the proximate causes of the injuries that Plaintiff subsequently sustained. Plaintiff's expert explains that the negligently performed lumbar puncture caused the hematoma and that the hematoma caused the compression on his spinal nerves. Plaintiff's expert states, "The hemorrhage was caused by damage to epidural vessels, and there is no other reasonable explanation for how that injury would occur in this case other than as a consequence of the traumatic tap." Plaintiff's expert further explains that Dr. Wong's failure to stop the procedure and continue the attempts increased the risk of a traumatic result. Plaintiff's expert further explains that the 17 hour delay in obtaining the consult

caused continued pressure on Plaintiff's spinal nerves and contributed to severity of the injury and the need to perform multiple levels of laminectomy to evacuate the hematoma.

Additionally, as stated above, the only record of the procedure is a brief note authored by Dr. Wong that does not include details concerning Dr. Wong's involvement in the procedure, the resistance encountered by Dr. Wong, the number of attempts made to complete the procedure, or the length of time it took to perform the procedure (P72; Dr. Yang Dep. 91-97). Further, while the procedure was performed under fluoroscopic guidance, the images including the position of the needle were not stored and available to review (Yang Dep. 102-106).

Plaintiff's opposing expert affirmation establishes sufficient factual disputes regarding Plaintiff's medical malpractice claim to defeat summary judgment that should be decided by a jury. "The weight to be accorded to the conflicting testimony of experts is "a matter 'peculiarly within the province of the jury.'" *Torricelli v Pisacano*, 9 AD3d 291, 293 [1st Dept 2004].

However, Defendants have established their prima facie entitlement to judgment as a matter of law dismissing the cause of action based upon an alleged lack of informed consent through Dr. Silberstein's opinion and the record. Plaintiff's expert does not address Dr. Silberstein's opinion that Plaintiff understood the risks associated with the surgery and consented to go forward with the surgery or "that a reasonably prudent person in plaintiff's circumstances, having been so informed, would not have undergone such procedure, and that lack of informed consent was the proximate cause of her injuries." *Balzola*, 107 AD3d at 588. Plaintiff's informed consent claim is therefore dismissed.

Wherefore it is hereby

ORDERED that Defendants Wen C. Yang, M.D., and Lenox Hill Hospital's motion for summary judgment is granted only to the extent that Plaintiff's informed consent claim is dismissed. Defendants' motion as it pertains to Plaintiff's medical malpractice claim is denied; and it is further

ORDERED that the parties shall appear for pretrial conference in Part 6 on September 8, 2020 at 10:00 AM.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: JUNE 5, 2020

ENTER: _____ J.S.C.

HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION