

**Pasternak v Yongjung Kim**

2020 NY Slip Op 33691(U)

April 23, 2020

Supreme Court, Rockland County

Docket Number: 32952/2016

Judge: Robert M. Berliner

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ROCKLAND

-----X  
FAWNIA PASTERNAK,

Plaintiff,

**DECISION & ORDER**

-against-

Index No. 32952/2016  
Order Date Apr 23, 2020  
Motion Seq. 1

YONGJUNG KIM, JONATHAN DANOFF, JULIA  
PAVELIC, COLUMBIA ORTHOPAEDICS and  
NEW YORK-PRESBYTERIAN HOSPITAL /  
COLUMBIA UNIVERSITY MEDICAL CENTER,

Defendants.

-----X  
BERLINER, J.

The following papers were read on this Notice of Motion by defendants pursuant to CPLR 3212 dismissing plaintiff's complaint:

- Notice of Motion, Aff in Support, Exhs. A-O
- Aff in Opposition, Expert Aff, Exhs. 1-3
- Aff in Reply
- Affirmations of Service
- Stipulations of Adjournment

Upon the foregoing papers, and all prior papers and proceedings in this action, the motion is determined as follows:

Plaintiff Fawnia Pasternack commenced this medical malpractice action by summons and complaint in July 2016. As relevant here, plaintiff alleges that in connection with a nearly four-hour spinal disc fusion surgery in April 2015, she sustained a facial abrasion due to the handling of her head in connection with the administration of general anesthesia and/or her prone posture during the surgery. Plaintiff concedes that her alleged facial scar is "subtle" but that plaintiff "can still appreciate its existence" (Pl Mem in Opp [NYSCEF Doc. 74, at ¶ 22]). The complaint

seeks compensation for emotional distress, pain and suffering, and damages and costs associated with plaintiff's alleged multiple corrective procedures. Defendants are Dr. Yongjung Kim (orthopedic surgeon), Dr. Jonathan Danoff (surgical resident), Dr. Julia Pavelic (anesthesia resident), and Columbia Orthopaedics and New York Presbyterian Hospital / Columbia University Medical Center (collectively NYPH) – where the personal defendants performed or otherwise assisted with the surgery.

Defendants collectively joined issue, the parties proceeded through discovery, and plaintiff filed a Note of Issue and Certificate of Readiness (NYSCEF Doc. 34). In November 2018, all defendants timely moved pursuant to CPLR 3212 to dismiss plaintiff's complaint; thereafter, all parties repeatedly stipulated to adjourn this motion. During the pendency hereof, the covid-19 pandemic required the issuance of emergency orders that delayed the determination of this motion. The motion now comes forward for determination.

### **Party Contentions**

In support hereof, defendants submit, among other things, the pleadings in this action, plaintiff's August 2017 Bill of Particulars (NYSCEF Doc. 57); the deposition transcripts of plaintiff (NYSCEF Doc. 59) and defendants Kim (NYSCEF Doc. 60), Pavelic (NYSCEF Doc. 61) and Danoff (NYSCEF Doc. 62); certain of plaintiff's medical records from NYPH (NYSCEF Doc. 64) and nonparty dermatologist Dr. Elizabeth Knobler (NYSCEF Doc. 65); photographs that plaintiff allegedly took of her face in September 2018 (NYSCEF Doc. 67); and expert affidavits from anesthesiologist Dr. James Eisenkraft (NYSCEF Doc. 68) and dermatologist Dr. Dina Anderson (NYSCEF Doc. 69).

Plaintiff does not dispute that to whatever extent plaintiff's Bill of Particulars asserted damages other than relating to the facial abrasion, plaintiff denied them in her deposition (Pl Tr., 156:6-12). Plaintiff also does not dispute defendants' notice that in plaintiff testified during her deposition that surgical risks were discussed with her but that she did not recall any specific discussion (*id.*, 77:19-23). Plaintiff further testified that she consulted nonparty dermatologist Dr. Elizabeth Knobler in October 2015 in relation to a mole on her chin, and that they discussed a scar on her face (*id.*, 122:10-124:8). Plaintiff adduced no testimony from Dr. Knobler, and

plaintiff's medical chart from Dr. Knobler does not reference any facial scar under plaintiff's eye. While plaintiff's complaint refers to multiple corrective procedures relating to her facial scar, plaintiff points to no record evidence of any such corrective procedures.

Defendants argue that there was no violation of medically acceptable standards of care or duty to elicit informed consent. Kim testified that the proper procedure for plaintiff's spine fusion surgery included physically placing the patient in a prone position face-down into a headrest lined with foam, and that this positioning is the responsibility of the anesthesiologist (Kim Tr., at 17:20-25, 25:13-21, 78:23-79:8). Dr. Danoff testified that he played no role in placement of the head and neck for surgery, but that a patient under anesthesia could sustain a pressure injury under the eye in connection with placement in the head cradle (Danoff Tr., at 22:21-24, 28:5-16). He confirmed that in preparation for anesthesia, a patient's head is rested into a ProneView Headrest, which he described as a device with a foam headrest and head cradle (*id.*, 44:18-24). He also testified that Dr. Pavelic was an anesthesia resident for plaintiff's surgery, that it would be Dr. Pavelic's custom and practice to discuss anesthesia risks including edema and swelling (*id.*, 10:5-8, 46:9-24) but not risks of facial abrasion or scarring (*id.*, 48:8-15).

Dr. Pavelic testified extensively to the anesthesiology team's practices in relation to placing patients in prone positions into the ProneView, maintaining continuous visualization of the patient's eyes, the medical reasons for such continuous visualization, and how the rest of the face remain within the ProneView device's padding (Pavelic Tr., 15:16-17:24, 19:8-22, 31:10-19). She also testified to using clear Tegaderm tape to cover the patient's eyes to prevent corneal abrasion (*id.*, 56:11-57:2). She further testified that when following the standard of care to protect an anesthetized patient in a prone position, prolonged surgeries can cause minor skin abrasion (*e.g.* due to prolonged pressure and/or use of Tegaderm), and that if the patient had a significant abrasion, she would have documented it (*id.*, 77:5-9, 79:4-17).

Dr. Pavelic testified that she discussed the risks of anesthesia with the plaintiff, including potential for edema and swelling (Pavelic Tr., at 46:9-24), but not risks of abrasion or scarring to the face (*id.*, 48:8-15). She testified at length to the positioning of the patient in the ProneView Headrest, its soft cushioning with cutouts, its placement over a mirror so that the anesthesiologist

can visualize the patient's face throughout the procedure, and the medical reasons to maintain such visualization at all times during the procedure (*id.*, 15:16-17:24, 19:5-22, 31:10-19). She further testified that she covered plaintiff's eyes with a thin clear tape called Tegaderm to avoid possible corneal abrasion (*id.*, 56:11-57:2), and that plaintiff's head properly was placed in a neutral position into the ProneView Headrest consistent with the foregoing (*id.*, 60:9-25).

Defendants adduce an expert affidavit from anesthesiologist Dr. Eisenkraft, who opined after reviewing the pleadings and plaintiff's medical file – and consistent with Dr. Kim's testimony – that the positioning of a patient's head and application of Tegaderm prior to surgical anesthesia is the responsibility of the anesthesiology team. Accordingly, Dr. Eisenkraft concluded that Dr. Kim and Dr. Danoff are not responsible for any resulting injury to plaintiff. As to Dr. Pavelic, Dr. Eisenkraft's affidavit opines that Dr. Pavelic met the standard of care at all times, including in relation to the application of Tegaderm and the placement of plaintiff's head. In relation to the alleged injury itself, Dr. Eisenkraft opined based on the medical records and plaintiff's 2018 photos that plaintiff's facial abrasion was minor, of the kind consistent with the foregoing and which he would expect to heal, and that in fact any such facial abrasion had healed. Dr. Eisenkraft also opined that defendants met the standard of care for informed consent: in his view, a physician need not inform a patient of the risk of minor skin abrasion due to anesthesia, and a reasonably prudent patient still would undergo anesthesia for surgery even had the patient been informed of that risk.

Defendants also adduce an expert affidavit from dermatologist Dr. Anderson, who opined after reviewing plaintiff's medical records and photographs that any facial abrasion healed and left no permanent scar. Dr. Anderson recited that patient's face presented with facial pigment changes due to smoking and exposure to ultraviolet light, and with acne scars and normal wrinkles, but no scarring where plaintiff complained of the facial abrasion.

In opposition, plaintiff's papers allege that Dr. Knobler, the treating dermatologist, told her that there was nothing to be done for the facial scar (Pl's Aff in Opposition [NYSCEF Doc. 74]), at ¶ 12); as noted, however, plaintiff offers no testimony from Dr. Knobler and points to nothing in her medical file from Dr. Knobler indicating the existence of any such scar. Plaintiff asserts that nevertheless, there was still a facial scar as of September 2018.

Plaintiff asserts that the Dr. Eisenkraft's expert opinion is conclusory and unsupported by evidence, on grounds that it fails to recognize the permanence of the facial scar, fails to recognize that permanent facial scarring can occur from even non-negligent use of the ProneView device, and fails to opine as to whether defendants used the ProneView device and its padding correctly. Plaintiff argues that Dr. Anderson's expert affidavit also should be rejected as conclusory and non-factual, on grounds that she too fails to recognize the permanence of the scar. Principally on these grounds, plaintiff argues that defendants do not carry their prima facie burden, and thus this dismissal motion must be denied even without shifting the burden to plaintiff.

Plaintiff further argues that even if defendants carried their prima facie burden, there exist multiple triable issues of material fact any one of which precludes dismissal. One, according to plaintiff, is record disagreement as to whether plaintiff sustained a facial injury at all. A second relates to the relevant standards of care for anesthesia. Plaintiff adduces an expert affidavit from an anonymous anesthesiologist (NYSCEF Doc. 75) who opines, among other things, that the standard of care is to place the entire face into a padded headrest, and that otherwise a pressure injury may result – including permanent scarring if the pressure is of a long enough duration. The anonymous expert opines that “The medical records and photographs following the surgery demonstrate that [plaintiff's] face was not properly placed within the headrest cushion,” which was “a departure of accepted standards of care by Dr. Pavelic ... and [NYPH]” that proximately caused the injury (Anonymous Aff., at ¶ 4). This departure from the standard of care, in the anonymous expert's opinion, include “failing to properly ensure the equipment, including the headrest[,] was properly cushioned prior to, during, and immediately following the surgical procedure” (*id.*, ¶ 17), and in failing to “properly monitor the status of the headrest and cushion” to ensure that it properly guarded plaintiff's face (*id.*, ¶ 18). The anonymous expert further opined that there “is no reasonable non-negligent explanation for how this injury occurred” (*id.*, at ¶ 15). Principally on these grounds, plaintiff argues that this expert affidavit suffices to create a triable issue of material fact as to the standard of care and defendants' compliance therewith, thus precluding summary judgment.

In reply, defendants note that plaintiff's expert affidavit does not so much as mention Dr. Kim or Dr. Danoff, or rebut their testimony that any departure from the standard of care was by

the anesthesiology team. Accordingly, on that basis alone, defendants press their entitlement for dismissal as against Dr. Kim and Dr. Danoff. Defendants also assert that plaintiff's expert affidavit is entirely conclusory on grounds that it expressly is conditional: *if* the anesthesiology team improperly used the ProneView headrest or improperly positioned plaintiff in it, *then* a facial abrasion injury could be expected. However, defendants continue, plaintiff's expert offers no evidence of any such improper use, positioning or monitoring. As such, defendants assert that plaintiff's expert affidavit must be disregarded. Defendants further observe that plaintiff offers no expert to rebut Dr. Anderson's expert opinion that plaintiff suffered no injury. Accordingly, defendants conclude that plaintiff failed sufficiently to posit a triable issue of material fact, and therefore this action must be dismissed.

### Analysis

A defense proponent of a CPLR 3212 summary judgment motion must establish its defense sufficient to warrant judgment in its favor as a matter of law (*see. Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003], *citing Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). To prevail on such a dismissal motion, the defense must tender evidentiary proof in admissible form sufficient to show that there remains no reasonably disputable triable issue of material fact such that judgment should be directed in its favor (*see e.g. Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Only upon the defendant's sufficient *prima facie* showing does the burden then shift to the plaintiff to rebut such showing (*see id.*). If plaintiff then adduces record evidence and other materials that create any triable issue of material fact – giving plaintiff the benefit of every reasonable favorable inference – then summary judgment must be denied as to claim for which the plaintiff successfully rebuts the defendant's *prima facie* showing (*see id.*).

A medical malpractice plaintiff can prevail only by proving that a health care provider negligently deviated from acceptable medical standards of care and that such deviation proximately caused the personal injury alleged (*see e.g. Weingrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Fileccia v Massapequa Gen. Hosp.*, 63 NY2d 639 [1984]). Thus, on this motion, defendants first must make a *prima facie* showing, based on the record, that they did not depart from acceptable medical standards of care of their treatment of plaintiff, and/or that any

such departure proximately caused no cognizable injury to plaintiff.

This Court agrees with defendants that plaintiff's deposition testimony disclaimed any injury that she alleged in her bill of particulars other than a single facial abrasion. As to that alleged injury, this Court further agrees that defendants carried their burden to show both that there was no departure from the relevant standards of care and that any such departures caused plaintiff no such injury.

As to the standards of care, the aforementioned deposition testimony and the medical record support the opinion of defendants' anesthesiology expert that the medical standard of care to prepare a patient for prone-position surgery and administration of general anesthesia included non-traumatic placement of the patient into a properly padded ProneView, affixation of tape to the eyes to avoid corneal injury, and visualization of the face before, during and after anesthesia. Defendants' anesthesiology expert also satisfactorily opined that the anesthesia team met these standards of care based on the deposition transcripts and medical records. As to plaintiff's informed consent theory, the expert satisfactorily opined that the duty of care includes eliciting informed for general anesthesia but not necessarily based on risk of facial abrasion, and that a reasonably prudent patient would give consent to receive anesthesia even if such risk were disclosed.

As to any injury, defendants' anesthesiology expert further indicated that any facial abrasion plaintiff sustained was minor, consistent with treatment that satisfied the foregoing standard of care, and that in any event any such abrasion was healed. While this Court may question an anesthesiologist's expert opinion about recovery of skin absent adequate foundation to support that opinion (*see e.g. Samer v Desal*, 179 AD3d 860, 863 [2d Dept, Jan. 15, 2020] [collecting cases]), defendants' dermatology expert likewise opined – based on her review of plaintiff's medical records and photographs – that any facial skin abrasion had healed to a reasonable degree of medical certainty.

For each and all of the foregoing reasons, this Court concludes that defendants met their prima facie burden. This Court rejects plaintiff's attack on defendants' expert affidavits as conclusory, speculative or based on an incorrect understanding of the facts (*see Miccola v Sacchi*, 36 AD3d 869 [2d Dept 2007]). Contrary to plaintiff's argument, a fair reading of the defense

anesthesiology expert's affidavit does indeed opine that the anesthesiology team did not violate a duty of care in relation to the ProneView device. Neither would it necessarily be fatal to that affidavit if it failed to address potential facial abrasion from even non-negligent use of the ProneView device, as plaintiff suggests without demonstrating legal basis for that proposition. Moreover, that defendants' two experts factually disagree with plaintiff about the permanence of any facial scar does not render those expert affidavits insufficient to carry defendants' prima facie burden – especially given that nothing in the medical records of plaintiff's treating dermatologist points to any such scar. This Court further notes plaintiff's concession that she herself is not a dermatologist or other medical professional, and that any remnant of any facial abrasion is "subtle." Thus, plaintiff fails to show that defendants' expert affidavits are so contrary to the evidence that this Court should disregard them as a matter of law. For these reasons, plaintiff's facial challenge to those affidavits is without merit.

Defendants having made their prima facie showing, the burden shifts to plaintiff to submit evidentiary facts or materials sufficient to rebut the prima facie showing (*see Alvarez*, 68 NY2d at 324). Plaintiff failed to respond with any record basis to find a triable issue of material fact as to Dr. Kim and Dr. Danoff. Even granting plaintiff the benefit of every favorable inference, defendants are correct that plaintiff's expert affidavit does not so much as mention Dr. Kim and Dr. Danoff, or offer any cognizable basis to support any theory of liability against them. Accordingly, so much of this motion as seeks dismissal against those two defendants must be granted.

As to the remaining defendants, this Court finds that plaintiff's anonymous expert affidavit is impermissibly conclusory and speculative to rebut defendants' showing. Defendants are correct that plaintiff's expert affidavit offers not a scintilla of basis for its conclusion that the anesthesiology team improperly positioned plaintiff's head in the ProneView, or failed to ensure that the ProneView was properly cushioned, or that the anesthesiology team failed to properly monitor the ProneView's status. Plaintiff adduces nothing in the record about the ProneView itself that might tend to suggest that it was positioned, cushioned or operated improperly. Indeed, neither the anonymous expert nor plaintiff point to any evidence in the record that might support those opinions other than the fact of the alleged injury itself. Such is the hallmark of "hindsight

reasoning” that is impermissible for a medical expert affidavit of this nature (*Samer*, 179 AD3d at 863; see *Zawadski v Knight*, 76 NY2d 898, 900 [1990]; *Ortiz v Wyckoff Heights Med. Ctr.*, 149 AD3d 1093, 1095 [2d Dept 2017]; *Miccola*, 36 AD3d at 871). Indeed, the anonymous affiant was explicit in opining that there was no non-negligent basis for this alleged injury, but offered no basis for this conclusion – an irony and inexplicable logical inconsistency given that plaintiff attacks defendants’ expert affidavits for failing to opine, in plaintiff’s view, that facial abrasion can result even from non-negligent use of the ProneView. Even if plaintiff is entitled to argue alternative legal theories, here none of them bear scrutiny.

Neither is plaintiff’s demonstration any more availing concerning the duty of care as to informed consent. Nothing in plaintiff’s expert affidavit addresses that issue. Thus, plaintiff leaves undisturbed defendants’ showing that there was no duty of care to warn plaintiff of this risk and that, in any event, a reasonably prudent patient would consent to receive general anesthesia even given notice of this risk (see e.g. *Gilmore v Mihall*, 174 AD3d 686 [2d Dept 2019]; *Figueroa-Burgos v Bieniewicz*, 135 AD3d 810, 811 [2d Dept 2016]).

For each and all of the above reasons, defendants Dr. Pavelic and NYPH are entitled to dismissal of the action against them.

Separate and apart from all of the foregoing, all defendants would be entitled to dismissal of this action because plaintiff failed to rebut defendants’ showing that plaintiff sustained no injury as a proximate result of any negligent act or omission by any defendant. While plaintiff asserts that subjectively she notices a facial scar, and leaving aside the concession by plaintiff’s counsel that any such scar is “subtle,” plaintiff fails to offer record evidence tending to raise a triable issue of material fact that any facial abrasion did not, in fact, heal. Plaintiff offers no expert affidavit to that effect. The records of plaintiff’s treating dermatologist indicate nothing about a facial scar. Plaintiff’s deposition testimony about anything the treating dermatologist told her is inadmissible hearsay. Moreover, the Court’s own review of the evidence does not support plaintiff’s contention of a permanent injury. On this independent basis, defendants are entitled to dismissal of this action.

For each and all of the foregoing reasons, and even giving plaintiff the benefit of every favorable inference, all defendants are entitled to dismissal of this action.

This Court has considered plaintiff's additional arguments not explicitly addressed herein, and finds them to lack merit or to be moot based on the foregoing.

Accordingly it is hereby

ORDERED that defendants' motion is granted, and this action is dismissed; and it is further

ORDERED that within five days hereof, counsel for defendants shall serve this Decision and Order, with Notice of Entry hereof, on plaintiff's counsel via NYSCEF.

The foregoing constitutes the Decision and Order of this Court

Dated: New City, New York  
April 23, 2020



HON. ROBERT M. BERLINER, J.S.C.

To: All counsel via NYSCEF