

Ptak v Blacksburg

2020 NY Slip Op 35378(U)

February 28, 2020

Supreme Court, Kings County

Docket Number: Index No. 523119/2017

Judge: Bernard J. Graham

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

CHARLES J. PTAK, JR.,

Index No.: 523119/2017

Plaintiff,

DECISION/ORDER

-against-

SETH BLACKSBURG, M.D., MICHAEL OHEBSHALOM,
M.D., SHERMAN CHAN, M.D., & DIMITRI N. KESSARIS,
M.D., P.C.,

Hon. Bernard J. Graham
Supreme Court Justice

Defendants.

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, 3-4 _____
Order to Show cause and Affidavits Annexed.....	_____
Answering Affidavits.....	_____ 5,6 _____
Replying Affidavits.....	_____ 7,8 _____
Exhibits.....	_____
Other:(memo).....	_____

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KINGS COUNTY CLERK
FILED

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

Defendant, Seth Blacksburg, M.D., has moved, pursuant to CPLR§ 3212, for an Order awarding summary judgment and a dismissal of plaintiff’s complaint, upon the grounds that he did not depart from accepted medical practice in the care and treatment rendered to the plaintiff, Charles J. Ptak, Jr., (“Mr. Ptak”) and that any alleged departure was not the proximate cause of his alleged injuries. Dr. Blacksburg further moves for a dismissal of plaintiff’s cause of action for lack of informed consent as plaintiff was properly informed as to the risks, benefits and alternatives of Cyberknife radiation therapy and his consent was properly obtained. In addition, defendants Michael Ohebshalom, M.D., (“Dr. Ohebshalom”), Sherman Chan, M.D., (“Dr. Chan”), and Dimitri N. Kessarlis, M.D., P.C., (“Dr. Kessarlis”) have also moved for summary judgment and a dismissal of plaintiff’s complaint upon the grounds that these defendants

conformed to good and accepted medical practice, they did not proximately cause or contribute to plaintiff's claimed injuries and/or damages, and they properly procured plaintiff's consent after advising the plaintiff as to the risks, benefits and alternatives of the procedure they performed. In opposition to the defendants' motions, the plaintiff asserts that summary judgment and a dismissal of the complaint is not warranted as there are triable issues of fact as to whether the defendants departed from good and accepted medical practice in the care and treatment that was rendered to Mr. Ptak, and that those departures were a substantial factor in causing the injuries that he sustained, which included the plaintiff's permanent and disabling urinary incontinence. The plaintiff maintains that both the microwave and Greenlight laser procedures that were performed by defendants Dr. Ohebshalom and Dr. Chan, respectively, were contraindicated, and thus, these procedures were a departure from good and accepted medical practice. As to the cause of action of lack of informed consent, plaintiff alleges that there is an issue of fact regarding whether the risks and alternatives were imparted to the plaintiff by each of the defendants.

Background:

An action was commenced on or about November 30, 2017, by the filing of a summons and complaint on behalf of the plaintiffs. Issue was joined on behalf of defendant Dr. Blacksborg by service of a verified answer, on or about January 5, 2018. Verified answers were served on behalf of defendants, Dr. Obershalom, Dr. Chan and Dr. Kessariss, on or about December 29, 2017.

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. In response, the plaintiff served a Bill of Particulars as to each of the defendants.

A deposition was conducted of Mr. Ptak on June 12, 2018. Depositions of the defendants were conducted of Dr. Blacksborg on November 15, 2018, Dr. Obershalom on January 24, 2019, and Dr. Chan on January 31, 2019.

A Compliance Conference was conducted on August 9, 2018, wherein the plaintiff was directed to serve a Note of Issue on or before April 16, 2019. The Note of Issue and Certificate of Readiness was filed on behalf of the plaintiff on or about February 1, 2019.

Facts:

It is not disputed that Mr. Ptak's urological issues began as early as 2004 when he underwent a transurethral needle ablation of the prostate (TUNA)¹ Following this procedure, Mr. Ptak allegedly continued to experience irritative symptoms of frequency and urgency.

On January 14, 2015, as a result of an elevated Prostate-Specific Antigen ("PSA"), the plaintiff underwent a needle biopsy of the prostate. The pathology report revealed adenocarcinoma of the prostate. The plaintiff, who had been under the care of Dr. John Fracchia of Urological Associates, was referred to Dr. Blacksborg, a radiation oncologist.

The plaintiff was initially treated by Dr. Blacksborg on February 18, 2015. Following a physical examination, Mr. Ptak was allegedly advised by Dr. Blacksborg as to the risks, benefits and alternatives of Cyberknife radiation therapy.

Thereafter, the plaintiff elected to proceed with Cyberknife radiation therapy. On March 5, 2015, Dr. Blacksborg placed an order to administer the treatment. In preparation for the therapy, the plaintiff presented for a CAT scan/body mold and an MRI scan on April 1, 2015. On April 16, 2015, Dr. Blacksborg and Matthew Witten, Ph.D., a physicist, utilized the CT and MRI scans to develop the Cyberknife treatment. Dr. Blacksborg performed the radiation therapy in five separate treatments on consecutive days between April 20, and April 24, 2015. Thereafter, on April 27, 2015, when the plaintiff complained that his "urinary stream was thinning", Dr. Jonathan Hass, an associate of Dr. Blacksborg, prescribed Medrol, a steroid medication. On May 5, 2015, when the plaintiff complained of a decrease in urine output with straining for two days,

¹ TUNA is a procedure used to treat benign prostatic hyperplasia and is performed by placing interstitial radio frequency needles through the urethra and into the lateral lobes of the prostate. The radio waves that pass through the needles leave scar tissue. Scarring shrinks the prostate tissue allowing urine to flow more frequently.

decreased urinary stream and blood in the urine, Dr. Blacksburg adjusted the medication. Two weeks later, when Mr. Ptak experienced acute and complete urinary retention, Dr. Blacksburg advised the plaintiff to schedule a consult with Dr. Ohebshalom, a urologist.

On May 5, 2015, the plaintiff presented to Dr. Ohebshalom, who after examination catheterized Mr. Ptak due to his urinary retention. Dr. Ohebshalom opined that the acute inflammation that the plaintiff was experiencing was expected as it had been only two weeks since the Cyberknife treatment was performed. During that office visit, Dr. Ohebshalom allegedly discussed with the plaintiff several treatment options that took into consideration plaintiff's enlarged prostate.

On May 11, 2015, Mr. Ptak reported to Dr. Ohebshalom that his gross hematuria² was improving. The catheter was then removed to allow for the inflammation to subside and to determine whether urination had improved. On May 15, 2015, a urodynamic study was performed which revealed an obstructive pattern associated with prostate enlargement. On May 19, 2015, the plaintiff reported persistent symptoms of urgency, frequency and a weak urinary stream which were being treated with Flomax.

On June 2, 2015, a cystoscopy was performed at the direction of Dr. Ohebshalom which allegedly showed a normal urethra, moderate trilobar obstruction of the prostate and trabeculation of the bladder.³

Thereafter, the plaintiff had office visits with Dr. Ohebshalom on August 4, 2015 and November 9, 2015. At both visits the plaintiff expressed that his prostate symptoms were still bothersome, and the urgency, frequency and weak stream still existed. At the November 9, 2015 office visit, Dr. Ohebshalom allegedly advised the plaintiff that it was okay at that point to proceed with microwave therapy, as six months had passed since the completion of Cyberknife therapy, and the edema and inflammation had subsided.

In the interim period, the plaintiff allegedly spoke with Dr. Blacksburg by phone on October 9, 2015, as the plaintiff was still having some urological concerns.

² Gross hematuria is the term used when one can see the blood in his or her urine.

³ Trabeculation is thickening of the bladder wall which occurs over time because of an obstructing prostate.

On January 11, 2016, at an office visit with Dr. Ohebshalom, the plaintiff expressed that he still had the same symptoms, which led to a discussion of performing transurethral microwave therapy (TUMT). A Uroflow study performed that day showed an obstructive pattern. The plaintiff decided to proceed with TUMT to treat the plaintiff's enlarged prostate, which was performed on January 12, 2016. Following the microwave procedure, a spanner stent was inserted on January 14, 2016 to hold the prostatic urethra open. The stent was removed two weeks later, but when the plaintiff was still unable to urinate well, a catheter was inserted.

On February 2, 2016, Dr. Ohebshalom once again catheterized Mr. Ptak due to urinary retention. Since there was allegedly no improvement, a further procedure was discussed with the plaintiff. On March 1, 2016, the plaintiff underwent a Greenlight laser⁴ vaporization of the prostate at Winthrop University Hospital, which was performed by Dr. Chan, the partner of Dr. Ohebshalom. The intraoperative findings from this procedure indicated that there had been an obstruction of the prostate, edema inside of the bladder, and that the remainder of the bladder appeared to be trabeculated which is indicative of a long-standing obstruction and a thickened bladder wall, as well as scarring in the prostate area.

Thereafter, the March 2016 office visits with Dr. Ohebshalom dealt with the plaintiff's urinary tract infection which was addressed by an injection of an antibiotic (gentamycin), and later by administering Bactrim. In April 2016, when the plaintiff still complained of mild burning, some urgency, as well as incontinence, Dr. Ohebshalom referred Mr. Ptak to an infectious disease specialist.

On August 17, 2016, the plaintiff presented to Dr. David Hoenig, a urologist at North Shore University Hospital. Dr. Hoenig assessed the plaintiff with having a urinary tract infection, MRSA infection, a history of malignant neoplasm of the prostate and incomplete emptying of the bladder. On October 14, 2016, Dr. Hoenig performed a

⁴ The procedure is performed by inserting a scope into the urethra (which carries urine from the bladder). A laser is passed through the scope, which delivers energy that vaporizes the excess tissue interfering with the passage of urine through the urethra.

transurethral resection of the bladder neck (TURBN).⁵ Intraoperatively, the bladder wall showed evidence of chronic urinary retention and significant necrotic debris which debris was removed from the bladder neck to the external sphincter. The plaintiff returned to Dr. Hoenig one month later and reported that while he was able to void, he had little control since the October 14th procedure. Mr. Ptak also allegedly had more burning, dysuria, dripping, and urge related incontinence.

The plaintiff treated with Dr. Hoenig until April 11, 2017, when he was referred to another urologist, Dr. Justin Han. Mr. Ptak reported to Dr. Han that he had severe urgency and frequency and that one to two times per day he had severe urgency requiring catheterization. Dr. Han opined that the urinary retention was caused by severe bladder neck contracture and prostatic stricture. On May 5, 2017, Dr. Han performed a urethrogram.⁶ Over the ensuing six-month period, the plaintiff's symptoms allegedly improved, as he did not have urges to void, but still complained of constant leakage. On November 13, 2017, Dr. Han performed another TURP.

The plaintiff maintains that he continues to be treated for incontinence and other urinary and prostate related issues.

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 [2nd Dept. 2013]; Giacinto v. Shapiro, 151 AD3d 1029, 1030, 59 NYS3d 42 [2nd Dept. 2017]; Brinkley v. Nassau Health Care Corp., 120 AD3d 1287, 993 NYS2d 73 [2nd Dept. 2014]). Thus, on a motion for summary judgment, the defendant has the initial burden of establishing the absence of any

⁵ The TURBN is a procedure performed to treat patients with urinary problems due to an enlarged prostate. The goal of this procedure is to trim and remove excess prostate tissue that interferes with the flow of urine.

⁶ The urethrogram is used to obtain radiographic images of the urethra and for the diagnosis of urethral stricture.

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 [2nd 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 [2nd 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 [2nd 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 [2nd Dept. 2004]; Gargiulo v. Geiss, 40 AD3d 811, 911-812 [2nd 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 [2nd Dept. 2005], quoting Holton v. Sprain Brook Manor Nursing Home, 253 AD2d 852 [2nd 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 [2nd Dept. 2011], quoting Goldberg v. Horowitz, 73 AD3d 691, 694 [2nd Dept. 2010], quoting Alicea v. Liguori, 54 AD3d 784, 786 [2nd Dept. 2008]).

As to the cause of action 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 [2nd Dept. 2013]); Spano v. Bertocci, 299 AD2d 335, 749 NYS2d 275 [2nd Dept. 2002]).

Here, this Court is presented with whether the defendants deviated or departed from good and accepted medical practice in the care and treatment rendered to Mr. Ptak, with respect to their management and treatment of his prostate cancer and urological condition, and if so, whether that departure from good and accepted medical practice was the proximate cause of the injuries/damages that the plaintiff allegedly sustained. In addition, at issue is whether the risks and alternatives to the procedures that were performed by the defendants were communicated to the plaintiff by said defendant doctors.

Dr. Blacksborg:

In support of the motion for summary judgment by defendant Dr. Blacksborg and a dismissal of plaintiffs’ cause of action as against said defendant, counsel offers the affirmation of a medical expert, Dr. Peter B. Schiff, board certified in radiation oncology, who opined that Dr. Blacksborg did not depart from good and accepted medical practice in the care, treatment and services rendered to Mr. Ptak, and that any alleged acts or omissions on the part of this defendant was not the proximate cause of the plaintiff’s injuries.

Dr. Schiff opined that Dr. Blacksborg treated the plaintiff for prostate cancer in accordance with the standard of care appropriate for a radiation oncologist. The expert opined that Dr. Blacksborg took a proper history of the plaintiff and performed a proper physical examination which included a rectal exam of the prostate. The expert further opined that the CT scan and MRI scan that were performed prior to the Cyberknife procedure were done so to ensure that the radiation was being applied to the correct tissue and no additional studies were needed to be performed prior to the Cyberknife procedure.

In further addressing the Cyberknife treatment that Dr. Blacksborg performed, Dr. Schiff opined that treating the plaintiff with 700 cGy per day for five consecutive days is the standard dose for this type of prostate cancer. In addition, Dr. Blacksborg properly advised the plaintiff as to the risks and benefits of Cyberknife therapy, as well as of alternative treatment, and even no treatment, and this information was also imparted to plaintiff's urologist, Dr. Fracchia. Dr. Schiff noted that the decision to proceed with Cyberknife therapy was not made until nearly two weeks after the consultation with Dr. Blacksborg and it was entirely the choice of Mr. Ptak to proceed.

In addressing the allegation by plaintiff that Dr. Blacksborg did not address the complications that Mr. Ptak experienced following Cyberknife therapy, Dr. Schiff opined that the one indicated complication that occurred, urinary retention, is an expected side effect following Cyberknife therapy, and it had resolved as of August 2015. In addition, Dr. Blacksborg properly referred Mr. Ptak to a urologist for treatment.

As to the claim that Dr. Blacksborg did not treat and remove prostatic hyperplasia, failed to properly treat urinary frequency and failed to properly treat MRSA, Dr. Schiff opined that when Mr. Ptak presented to Dr. Blacksborg, he did so to treat his prostate cancer and not hyperplasia or MRSA. Dr. Schiff pointed out that Dr. Blacksborg is a radiation oncologist, not a urologist, and did not treat the plaintiff for hyperplasia, but solely for prostate cancer. Dr. Blacksborg testified that he was treating the prostate cancer (see Dr. Blacksborg EBT p. 135).

Dr. Schiff opined that most of the claims by the plaintiff as to any wrongdoing on the part of Dr. Blacksborg are either unsupported by the records or concern procedures

that were not performed by Dr. Blacksborg. The plaintiff alleged that Dr. Blacksborg improperly performed a TUMT procedure, as it was performed too soon when the patient was at a significantly increased risk for complications, and at a time when it was contraindicated. In addition, the plaintiff alleged that Dr. Blacksborg improperly performed the Greenlight laser procedure, as it was also performed too soon when Mr. Ptak was at an increased risk from complications, and when it was contraindicated. In response, Dr. Schiff opined that Dr. Blacksborg should not be liable for the performance of either procedure as he did not perform the TUMT nor the Greenlight laser procedure.

As to the claim by plaintiff of having sustained a permanent injury, Dr. Schiff opined that any injuries that plaintiff allegedly sustained would have occurred subsequent to the performance of the microwave and Greenlight laser procedures and were not attributable to the Cyberknife treatment.

Dr. Blacksborg in moving for summary judgment and a dismissal of the plaintiffs' causes of action, maintains that he has met his burden of establishing both the absence of any departure and that any alleged departure was not the proximate cause of Mr. Ptak's alleged injuries as he fully performed his duties as a medical professional.

This Court finds that defendant Dr. Blacksborg made a prima facie showing of his entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against Dr. Blacksborg by submitting the affirmation of an expert in urology, demonstrating that the defendant did not depart accepted medical practice and that any alleged departure was not a proximate cause of the claimed injuries (see Gachette v. Leak, 172 AD3d 1327, 1329; Breland v. Jamaica Hosp. Med. Ctr., 49 AD3d 789, 790. The burden then shifted to the plaintiff to establish the existence of a triable issue of fact.

In opposing the defendants' motion for summary judgment, the plaintiffs offer the expert affirmation of a physician who is board certified in urology. The expert opined that Dr. Blacksborg deviated from accepted standards of medical care in proceeding with Cyberknife therapy because such treatment was contraindicated. At the time that the plaintiff began treating with this doctor, he was already experiencing irritative symptoms related to his frequency and urgency. The expert opined that the use of high power

Cyberknife treatment where there is existing scar tissue as a result of the TUNA, would have made such treatment contraindicated. In fact, Mr. Ptak testified that he was never incontinent prior to the Cyberknife procedure (see Mr. Ptak EBT p. 71-72).

The expert further opined that this type of intervention could result in a substantial risk of complications. In fact, Dr. Blacksbury acknowledged that “previously eradicated tissue may not heal as well” (see Dr. Blacksbury EBT p. 22).

Plaintiff’s expert points out that Dr. Schulsinger concedes that Mr. Ptak’s pre-existing urinary problems elevated the likelihood of urinary frequency and urgency following Cyberknife radiation therapy. This was further demonstrated through the testimony of Mr. Ptak, that following the first Cyberknife treatment, he advised Dr. Blacksbury that he felt like he had a sensation that his perineum was “on fire” with a “pool ball” sensation in his rectum that continued throughout the treatments and for at least a month thereafter (see Mr. Ptak EBT p. 34-35). Mr. Ptak further testified that he felt like he was going to explode and wanted to die from the pain of his urinary retention which prompted Dr. Blacksbury to refer him to Dr. Ohebshalom (see Mr. Ptak EBT p. 43).

Additionally, plaintiff’s expert opined that Dr. Blacksbury deviated from the accepted standards of care with respect to his advice to the plaintiff, (see Mr. Ptak EBT p. 44,78) as to whether he should undergo the microwave procedure. In addition, the expert opined that Dr. Blacksbury had offered improper advice and it was an error on the part of Dr. Blacksbury to manage the plaintiff’s care based upon an enlarged prostate.

This Court finds that the plaintiff has failed to raise a question of fact sufficient to warrant denial of summary judgment and a dismissal of the causes of action pertaining to claims of malpractice and informed consent as to Dr. Blacksbury. This Court considered that when the plaintiff presented to Dr. Blacksbury in March 2015 it was to address the findings from the pathology report of January 2015 in which Mr. Ptak was diagnosed with adenocarcinoma of the prostate. Over the ensuing two-month period, Dr. Blacksbury and other medical personnel under his direction, took the necessary steps to treat and eventually perform radiation therapy. There is no contention on the part of the

plaintiff that the Cyberknife treatment was not performed properly and it achieved its purposes. This Court further finds that the plaintiff was informed of the risks and benefits of Cyberknife therapy, that a full report had been sent to plaintiff's urologist, Dr. Fracchia prior to the treatment and Mr. Ptak had the opportunity to refuse this treatment or proceed in another manner. Following Cyberknife therapy, the plaintiff had contact with Dr. Blacksburg, either by phone or in an office visit, and referrals were made to a urologist.

Accordingly, this Court finds that the motion to dismiss the cause of actions as against Dr. Blacksburg is granted upon the grounds that he did not depart from good and accepted medical practice in the care and treatment rendered to the plaintiff.

Defendants Dr. Ohebshalom, Dr. Chan and Dr. Kessarlis:

In support of the motion by these defendants for summary judgment, and a dismissal of the cause of actions as against these parties, they offer the expert medical opinion of Dr. David Schulsinger, a board-certified urologist. Dr. Schulsinger maintains that Mr. Ptak, who is a practicing oral surgeon, had serious urologic problems when he first presented to these defendants in 2015. This is evidenced by the fact that in 2004 Mr. Ptak underwent a TUNA procedure which is designed to treat the section of the urethra surrounded by the prostate gland and was intended to relieve severe urinary retention caused by BPH.⁷ Thereafter, in 2008, Mr. Ptak was being treated by New York Urologic Associates due to an elevated PSA, at which time Flomax was prescribed. On January 14, 2015, a pathology report following a needle biopsy revealed prostatic adenocarcinoma. It was at that time the plaintiff was referred to Dr. Blacksburg by Dr. Fracchia. When the plaintiff experienced complete urinary retention following Cyberknife therapy, Mr. Ptak was referred to Dr. Ohebshalom by Dr. Blacksburg.

⁷ BPH is related bladder outlet obstruction.

Dr. Ohebshalom:

In moving to dismiss plaintiff's cause of action based upon defendant's negligence, his expert, Dr. Schulsinger opined that Dr. Ohebshalom properly performed his duties as a medical professional. The expert opined that after obtaining a complete history, Dr. Ohebshalom properly concluded that Mr. Ptak had long term chronic enlarged prostate symptoms. The expert noted that the patient's BPH symptoms were quite bothersome and Dr. Blacksborg's notes indicated that the plaintiff's prostate symptoms had been exacerbated following his radiotherapy. A cystoscopy performed on June 2, 2015 revealed that plaintiff's prostate was enlarged and blocking the urethra and affecting his urination.

As to the issue of negligence, the expert opined that the TUMT procedure was performed correctly and it was done to relieve Mr. Ptak's prostatic obstruction when his symptoms had continued for three weeks. According to the expert, the operative report of Dr. Ohebshalom accurately describes the procedure which is alleged to be within the standard of care, and there is no indication that any aspect of the procedure was performed negligently. The patient's symptoms of having post-operative dribbling⁸ and urinary retention are not uncommon following a microwave procedure and the expert further opined that the fact that the procedure was not successful in relieving the patient's symptoms is not suggestive of either negligence or a departure from the standard of care.

The expert further opined that the microwave procedure which was performed eight and one-half months after the Cyberknife therapy, was beyond the recommended six-month period to wait following completion of Cyberknife therapy, and thus the timing of this procedure was in accordance with the standard of care.

As to the issue of informed consent, the expert maintains that on five different occasions (June 2, August 4, November 2, 2015 and January 11 and January 12, 2016), Dr. Ohebshalom explained to Mr. Ptak the microwave procedure, the potential complications or risks, as well as alternatives such as medication or a laser procedure.

⁸ Post void dribbling occurs when urine remaining in the urethra after voiding the bladder slowly leaks out after urination.

Dr. Ohebshalom explained that there were risks such as infection, bleeding/hemorrhage, urinary retention, acute or chronic stricture formation within the urethra or at the bladder neck, incontinence either temporary or long term, dysuria after the procedure, as well as urgency and frequency which usually resolves over time. Mr. Ptak was further advised that because he was a radiation patient, the likelihood that he might encounter complications was increased. Prior to undergoing the microwave procedure, Mr. Ptak executed an informed consent document which included the risks involved.

Dr. Ohebshalom in moving for summary judgment and a dismissal of the plaintiffs' causes of action, maintains that he has met his burden of establishing both the absence of any departure and that any alleged departure was not the proximate cause of Mr. Ptak's alleged injuries.

This Court finds that defendant Dr. Ohebshalom made a prima facie showing of his entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against Dr. Ohebshalom by submitting the affirmation of an expert in urology, demonstrating that the defendant did not depart from accepted medical practice and that any alleged departure was not a proximate cause of the claimed injuries (see Gachette v. Leak, 172 AD3d at 1329; Breland v. Jamaica Hosp. Med. Ctr., 49 AD3d at 790. The burden then shifted to the plaintiff to establish the existence of a triable issue of fact.

In opposing the motion for summary judgment, plaintiff's expert opined that it was a deviation from the accepted standard of urologic care for Dr. Ohebshalom to have performed a TUMT. The expert stated that in his opinion the patient did not have an enlarged prostate. The patient had already been subjected to considerable inflammation and scarring as a result of the TUNA procedure performed in 2004, as well as the high intensity procedure that was performed during Cyberknife treatment eight months earlier. The expert opined that while the plaintiff had long term chronic prostate symptoms, his condition was exacerbated by the Cyberknife therapy.

The expert further opined that Dr. Ohebshalom had erred in diagnosing the plaintiff with BPH since Mr. Ptak's prostate size was far smaller than the average

prostate size of a sixty-nine-year-old male.⁹ In fact, the diagnosis appears to have been based upon a urodynamic study in May 2015 which was conducted while Mr. Ptak was in an acute phase of recovery from Cyberknife therapy. The expert opined that Mr. Ptak had an overactive bladder, exacerbated by bladder outlet obstruction that was a consequence of scar tissue that emanated from the TUNA procedure and was further worsened by inflammation and subsequent scarring from the high dose radiation that occurred during the Cyberknife procedure. Since Mr. Ptak had been subjected to and underwent all the inflammatory changes and scarring that his prostate and prostatic urethra could tolerate, he was not a candidate for further invasive treatment.

As to the issue of informed consent with respect to Dr. Ohebshalom, the plaintiff maintains that the doctor departed from accepted standards of care in not advising Mr. Ptak of the alternatives to the microwave procedure which included conservative therapy with anticolagenic and beta-agonistic medications. The microwave procedure, due to its high energy, could result in scar tissue that would cause permanent and irreversible incontinence. Mr. Ptak maintains that Dr. Ohebshalom never advised him that there was a risk of considerable scarring resulting in permanent, irreversible incontinence or that there were alternatives to the microwave procedure including conservative management.

This Court finds that the plaintiff has raised a question of fact as to defendant Dr. Ohebshalom with the submission of an expert affirmation which offered a detailed opinion as to the treatment rendered to Mr. Ptak which conflicts with defendant's expert opinions, sufficient to warrant denial of summary judgment and a dismissal of the causes of action pertaining to claims of negligence as to this defendant (see Contreras v. Adeyemi, 102 AD3d 720, 721, 958 NYS2d 430 [2nd Dept. 2013]); Shahid v. NYC Health & Hosps. Corp., 47 AD3d 798, 850 NYS2d 521 [2nd Dept. 2008]).

In reaching this determination, this Court finds that the medical experts have offered conflicting opinions pertaining to whether the microwave procedure was indicated in light of the inflammation and scar tissue that was allegedly present and

⁹ Mr. Ptak was 69 years old at the time of the procedure.

whether Mr. Ptak had undergone all the inflammatory and scarring that his prostate and prostatic urethra could tolerate. Differing opinions were offered as to whether Mr. Ptak had BPH since the size of his prostate was far smaller than the average prostate size of a man of his age and whether it was a deviation to base that finding upon a urodynamic study which was undertaken when the plaintiff was in an acute phase of recovery from Cyberknife therapy. Additionally, there were contradictory opinions as to whether anticholinergic or beta-agonist medications should have been offered by the doctor prior to administering the additional 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 [2nd 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 [2nd Dept. 2016]; (Feinberg v. Feit, 23 AD3d 517, 519 [2nd Dept. 2005]; Shields v. Baktidy, 11 AD3d 671, 672 [2nd Dept. 2014]).

In determining the portion of the motion of Dr. Obershalom which seeks a dismissal of the cause of action as to lack of informed consent, the Court considered the argument of Dr. Ohebshalom that on five different occasions he explained the TUMT procedure to Mr. Ptak, as well as the risks, potential complications and alternatives to this procedure. In addition, this Court considered that Mr. Ptak was allegedly further advised that since he had undergone radiation, the likelihood that he would encounter a complication had increased. The Court also considered the contention by the plaintiff that Dr. Ohebshalom failed to advise Mr. Ptak as to the alternatives to the TUMT procedure which included conservative treatment and the use of medications and that Mr. Ptak was allegedly not advised that the additional scarring that could occur might result in irreversible incontinence.

This Court finds that the plaintiff did not offer adequate proof nor set forth the elements necessary to establish a prima facie claim of lack of informed consent. Here, it

appears that Dr. Obershalom on numerous occasions explained the TUMT procedure and its ramifications to Mr. Ptak who executed a consent form which included the risks involved. This Court further determined that a reasonably prudent person in the same position as Mr. Ptak may have undergone the treatment since he had been experiencing a lengthy period of urological issues and was seeking more than just conservative treatment to address his problems and difficulties.

As such, this Court finds that the plaintiff failed to raise an issue of fact with respect to the cause of action of lack of informed consent, (see Johnson v. Staten Is. Med. Group, 82Ad3d 708, 918 NYS2d 132 [2nd Dept. 2011]), and that portion of the motion by Dr. Obershalom to dismiss the cause of action for lack of informed consent is granted.

Dr. Chan:

In moving to dismiss plaintiff's cause of action based upon defendant's negligence, Dr. Chan maintains that he did not depart from good and accepted medical practice in the care and treatment that was rendered to the plaintiff. The expert, Dr. Schulsinger agreed with the analysis of Dr. Chan that proceeding with Greenlight therapy was indicated as the patient was experiencing obstructive voiding symptoms which was being caused by an enlarged prostate, and possibly he had residual symptoms from the radiation treatments. The Greenlight procedure has been approved for all clinical issues, including treatment of BPH. Dr. Schulsinger opined that the plaintiff's expert was incorrect when stating that the first line of therapy for treatment of an overactive bladder is medical therapy with anticholinergic or beta-against medications because urinary retention (which the plaintiff had) is a contra-indication to these medications.

Dr. Chan concurred with Dr. Obershalom that the plaintiff had an enlarged prostate based upon both an ultrasound and cystoscopy. While plaintiff's expert maintained that Mr. Ptak did not have an enlarged prostate, and thus should not be treated as such, defendant maintains that a difference of opinion over the metric used for determining an enlarged prostate does not in and of itself support a claim of alleged malpractice.

Greenlight laser therapy was performed ten (10) months following completion of the Cyberknife treatment. The expert opined that similar to when the microwave procedure was performed, Greenlight therapy was conducted beyond the recommended six-month waiting period following completion of Cyberknife treatment, when both the edema and inflammation had subsided, and thus the timing of this procedure was in accordance with the standard of care. Dr. Schulsinger stated that plaintiff's expert failed to explain why allowing the inflammation to subside for a period beyond six months was an insufficient period of time.

As to plaintiff's cause of action of lack of informed consent, the expert opined that prior to the plaintiff undergoing Greenlight therapy, Dr. Chan and the plaintiff had a lengthy telephone conversation regarding the treatment. The plaintiff had advised Dr. Chan that he had not been satisfied with his conservative treatment nor with the conservative management that had been utilized. During the discussion, Dr. Chan explained the possible side effects of this therapy which included bleeding, infection, and potential development of contractures, stricture and incontinence, as well as hematuria, and dysuria from the catheter. Dr. Chan maintains that Mr. Ptak was satisfied with his responses to specific and detailed questions and they were consistent with the research that he (Mr. Ptak) had performed on this topic. Mr. Ptak signed a consent form prior to the procedure being performed at Winthrop Hospital.

Dr. Chan in moving for summary judgment and a dismissal of the plaintiffs' causes of action, maintains that he has met his burden of establishing both the absence of any departure and that any alleged departure was not the proximate cause of Mr. Ptak's alleged injuries.

This Court finds that defendant Dr. Chan made a prima facie showing of his entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against Dr. Chan by submitting the affirmation of an expert in urology, demonstrating that the defendant did not depart from accepted medical practice and that any alleged departure was not a proximate cause of the claimed injuries (see Gachette v. Leak, 172

AD3d at 1329; Breland v. Jamaica Hosp. Med. Ctr., 49 AD3d at 790. The burden then shifted to the plaintiff to establish the existence of a triable issue of fact.

In opposing the relief sought by Dr. Chan, plaintiff's expert opined that the Greenlight laser procedure performed by Dr. Chan on March 2, 2016 was a deviation from the standard of care. The expert opined that the Greenlight laser procedure carries with it a risk of irritation, inflammation, scarring, as well as erectile dysfunction and Mr. Ptak, who had an overactive bladder which had been exacerbated by scar tissue from the TUNA procedure, and further worsened by inflammation and subsequent scar tissue from the Cyberknife treatment and TUMT, was not a candidate for further invasive treatment. The expert opined that the Greenlight laser treatment was contraindicated, was not approved for management of scar tissue and created further scar tissue which worsened the plaintiff's symptoms.

The expert opined that the first line of therapy for an overactive bladder is medical therapy with anticholinergic or beta-agonist medications. Since Dr. Chan did not recommend these medications as first line therapy, this constituted a deviation from accepted standards of urological practice.

In further support of plaintiff's opposition to the summary judgment motion, the plaintiff refers to the observations of Dr. Han, who Mr. Ptak presented to on April 11, 2017. The plaintiff was seen by Dr. Han to address his incontinence, prostate stenosis and bladder neck contracture, and the doctor acknowledged the damage that resulted from the prior procedures which included the TUNA, Cyberknife, TUMT and Greenlight laser procedures.

The plaintiff asserts that Mr. Ptak currently suffers from permanent and complete urinary incontinence which requires the use of diapers at all times.

As to the issue of informed consent with respect to Dr. Chan, the plaintiff maintains that the defendant departed from accepted standards of care in not advising Mr. Ptak of the alternatives to the Greenlight laser procedure which included conservative therapy with anticolagenic and beta-agnostic medications. The Greenlight procedure, due to its high energy, could result in scar tissue that would cause permanent and irreversible

incontinence. Mr. Ptak contends that Dr. Chan did not advise him that the presence of scar tissue was significant enough to produce irreversible and permanent incontinence and was a risk incidental to the Greenlight laser procedure.

This Court finds that the plaintiff has raised a question of fact pertaining to claims of negligence as to defendant Dr. Chan with the submission of an expert affirmation which offered a detailed opinion as to the treatment rendered to Mr. Ptak which conflicts with defendant's expert opinions, sufficient to warrant denial of summary judgment and a dismissal of the causes of action.

In reaching this determination this Court finds that the medical experts have offered conflicting opinions pertaining to whether the Greenlight procedure was indicated in light of the inflammation and scar tissue that was allegedly present and whether Mr. Ptak had undergone all the inflammation and scarring that his prostate and prostatic urethra could tolerate. Differing opinions were offered as to whether Mr. Ptak was a candidate for the Greenlight laser procedure because his overactive bladder may have been further worsened by inflammation and scar tissue from the Cyberknife treatment and the recent microwave procedure. Similar to what was presented by the parties in the motion of Dr. Obershalom, there were contradictory opinions presented as to whether anticholinergic or beta-agonist medications should have been offered by the doctor prior to administering the additional therapy.

In determining the portion of the motion of Dr. Chan which seeks a dismissal of the cause of action as to lack of informed consent, the Court considered the argument of Dr. Chan that prior to Mr. Ptak undergoing a Greenlight laser procedure at Winthrop Hospital, the two parties had a lengthy telephone conversation regarding the treatment and its possible side effects. During the conversation Mr. Ptak allegedly stated that he had not been satisfied with the conservative treatment that he had undergone, and that the information provided by Dr. Chan was consistent with the research he had undertaken on this subject. The Court also considered the contention by the plaintiff that Dr. Chan failed to advise Mr. Ptak as to the alternatives to the Greenlight laser procedure which included conservative treatment and the use of medications and that the plaintiff was allegedly not

advised that the additional scarring that could occur might result in irreversible incontinence.

This Court finds that the plaintiff did not offer adequate proof nor set forth the elements necessary to establish a prima facie claim of lack of informed consent. Here, it appears that Dr. Chan explained the Greenlight procedure to the plaintiff and that Mr. Ptak who is a professional in the medical field acknowledged that his research was in accord with the information that was imparted to him by Dr. Chan. This Court further determined that a reasonably prudent person with similar urological issues that the plaintiff was experiencing may have undergone this treatment.

As such, this Court finds that the plaintiff failed to raise an issue of fact with respect to the cause of action of lack of informed consent, (see Johnson v. Staten Is. Med. Group, 82 Ad3d at 708), and that portion of the motion by Dr. Chan to dismiss the cause of action for lack of informed consent is granted.

Dr. Dimitri Kessarlis:

As to the motion to dismiss the action as against defendant Dr. Kessarlis, neither the defendant movant nor the plaintiff addressed the merits of the motion. A reading of the deposition testimony of the parties indicates that Dr. Kessarlis was part of a group practice with Dr. Ohebshalom and Dr. Chan, and that he issued their paychecks (see Dr. Ohebshalom EBT p. 11). In addition, Dr. Chan testified that he was an employee of Kessarlis, P.C. (see Dr. Chan EBT p. 21-22). In addressing Dr. Kessarlis treatment of the plaintiff, both Dr. Ohebshalom and Mr. Ptak acknowledged that Mr. Ptak had one visit with Dr. Kessarlis (see Dr. Ohebshalom EBT p. 100-101) which was brief (see Mr. Ptak EBT p. 94). This Court, in accordance with its determination of the motions as to Dr. Ohebshalom and Dr. Chan, denies the motion to dismiss with respect to claims of negligence as against Dr. Kessarlis, as there may be a viable claim for vicarious liability since Dr. Chan stated that Dr. Kessarlis is his employer. As for the cause of action for lack of informed consent, since Dr. Kessarlis did not perform a procedure and the plaintiff has not offered any argument to support the viability of this cause of action, Mr. Ptak has

failed to make a prima case, and thus the motion to dismiss the cause of action pertaining to lack of informed consent against Dr. Kessarlis is granted.

Conclusion:

The motion by defendant, Seth Blacksbury M.D., for summary judgment and a dismissal of plaintiff's complaint with respect to the issue of negligence and lack of informed consent, pursuant to CPLR§ 3212, is granted. The motion by defendants, Michael Ohebshalom, M.D., Sherman Chan, M.D., and Dimitri N. Kessarlis, M.D., P.C., for summary judgment and a dismissal of plaintiff's complaint with respect to the issue of negligence, pursuant to CPLR§ 3212, is denied. The portion of defendants' Michael Ohebshalom, M.D., Sherman Chan, M.D., and Dimitri N. Kessarlis, M.D., P.C., motion seeking a dismissal of the cause of action pertaining to lack of informed consent, is granted.

The caption is amended to read:

CHARLES J. PTAK, JR.,

Index No.: 523119/2017

Plaintiff,

-against-

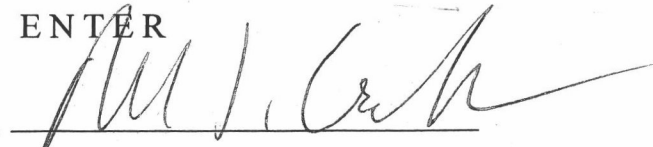
MICHAEL OHEBSHALOM, M.D.,
SHERMAN CHAN, M.D., & DIMITRI N. KESSARIS,
M.D., P.C.,

Defendants.

This shall constitute the decision and order of this Court.

Dated: February 28, 2020
Brooklyn, New York

ENTER



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

HON. BERNARD J. GRAHAM

KINGS COUNTY CLERK
FILED
2020 MAR -5 AM 10:24

