McPherson v Ravich
2021 NY Slip Op 31373(U)
April 23, 2021
Supreme Court, Kings County
Docket Number: 509858/17
Judge: Genine D. Edwards
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At an IAS Term, Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 23rd day of April 2021.

P R E S E N T:

HON. GENINE D. EDWARDS,
Justice.

- -X

Edris McPherson,

Plaintiff,

- against -

Steven J. Ravich, M.D.,
Drew Stal, M.D.,
Northwell Health, Inc.,
Long Island Jewish Medical Center,
Northwell Health Physician Partners,
and "John Doe" and "ABC Corp,"
fictitious names for persons, nurses, doctors, radiologists, interns, medical health care providers, technicians, professional corporations, partnerships and/or other entities whose true names and identities are presently unknown and who treated and/or provided medical and health care services for and on behalf of plaintiff on, about and after June 20, 2016,

Defendants.

- -X

Decision and Order

Index No. 509858/17

Mot. Seq. No. 3-4

Recitation, as required by CPLR 2219 (a), of the papers considered in the review of these motions:

Papers:	NYSCEF #:
Notice of Motion, Affirmations (Affidavits)and Exhibits Annexed	37-61; 63-80
Affirmations (Affidavits) in Opposition and Exhibits Annexed	85-87
Reply Affirmations (Affidavits) and Exhibits Annexed	89-91; 92

In this action to recover damages for, among other things, medical malpractice and lack of informed consent, defendants Drew Stal, M.D., Northwell Health, Inc., and Long Island Jewish Medical Center (collectively, the "LIJ defendants"), jointly, and defendant Steven J. Ravich, M.D. ("Dr. Ravich"), separately, moves, in the third and fourth motion sequence, respectively, for summary

judgment dismissing the complaint of plaintiff Edris McPherson ("plaintiff") as against them. Plaintiff opposes both motions.[1]

Background

In the early hours of Wednesday, June 22, 2016,[2] plaintiff, while an inpatient at Long Island Jewish Medical Center ("LIJ"), underwent a 6½-hour emergency vascular surgery performed by nonparty Yana Yetkin, M.D. ("Dr. Yetkin"), for "[a]cutely ischemic left lower extremity with popliteal artery injury."[3] Plaintiff's ischemia arose following – and as a consequence (whether iatrogenic, or not) of – her elective, primary, total knee replacement ("TKR") for unilateral osteoarthritis, performed on her left knee on the morning of Monday, June 20th, at LIJ, by her private orthopedic surgeon, Dr. Ravich, with the assistance of second-year resident, Drew Stal, M.D. ("Dr. Stal").

Plaintiff's principal contentions are twofold. First, according to plaintiff's expert vascular surgeon, David A. Mayer, M.D. ("Dr. Mayer"), she began exhibiting signs and symptoms of ischemia[4]

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[1] The remaining named defendant, Northwell Health Physician Partners, did not answer or otherwise appear in this action, but no default judgment was sought against it. *See* Preliminary Conference Order, dated Nov. 28, 2017 (NYSCEF #17), at 1.

[2] All references are to year 2016, unless otherwise indicated. The Court converted military time, as used in the certified LIJ medical record, to regular time for purposes of this Decision and Order. When quoting from the LIJ certified medical record (NYSCEF #79), the Court spelled out abbreviations.

[3] In the course of the vascular surgery, Dr. Yetkin and her team, not only sew the hole in plaintiff's left *popliteal artery* and evacuated the surrounding hematoma, but also performed: (1) an above-the-knee to below-the-knee popliteal artery bypass with an autologous vein graft to establish blood flow in the popliteal artery, (2) a thrombectomy in the left *posterior tibial artery* to remove a blood clot of 11 centimeters (4.4 inches) long, and (3) a four-compartment *fasciotomy* to relieve intracompartmental pressure and to restore tissue perfusion. One of the large arteries of the body, a *popliteal artery* is the "continuation of femoral artery in the popliteal space," which is "the diamond-shaped space posterior to the knee joint." A *posterior tibial artery* is "the larger and more directly continuous of the two terminal branches of the popliteal [artery]." *Fasciotomy* is an "[i]ncision through a *fascia*; used in the treatment of certain disorders and injuries when marked swelling is present or anticipated, that could compromise blood flow. . . ." *Fascia* is "[a] sheet of fibrous tissue that envelops the body beneath the skin . . . ." All definitions are from Stedman's Medical Dictionary (online edition) ("Stedman's").

[4] The key signs and symptoms of leg ischemia on physical examination, as gleaned from the extensive record before the Court, are the presence or absence, as applicable, of one or more of the following: (1) numbness or decreased sensation; (2) coolness to touch (loss of heat); (3) absence (or diminution) of the dorsalis pedalis ("DP") pulses; (4) pallor (loss of color); (5) pain; and (6) paresthesia (tingling, skin crawling, or itching).

in her left leg as early as 2:30 p.m. on the day of the TKR (June 20th).[5] She maintains that despite repeated references in the LIJ record to those signs and symptoms during the approximately 30 hours before the vascular surgery team was consulted,[6] neither Dr. Ravich, Dr. Stal, nor any other health care provider at LIJ appreciated those indications of her developing ischemia.[7] Plaintiff further maintains that the delay in excess of six hours[8] was significant, in that, among other things: (1) the performance of a four-compartment fasciotomy, as part of her vascular surgery, became necessary;[9] and (2) as a result of that delay, she developed a foot drop in her left ankle.[10]

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[5] *See* Dr. Mayer's Expert Physician Affirmation, dated Oct. 22, 2020 (NYSCEF #87), ¶¶ 16, 18-19, 21).

[6] The 30-hour period is calculated by counting from the time when plaintiff's ischemic signs and symptoms were first recorded by P.A. Lauren Mahler ("P.A. Mahler") at 2:30 p.m. on June 20th and stopping at approximately 9 p.m. on June 21st when Dr. Ravich had a vascular surgery resident paged to consult on her case. Although the earliest observation of plaintiff's acute ischemia could arguably be traced back to 11:36 a.m. on June 20th when Nurse Mariette Wigand ("Nurse Wigand") at the post-anesthesia care unit ("PACU") documented that plaintiff's left leg was cool *with sensation absent* (*see* Dr. Mayer's Affirmation, ¶ 18), common-sense allowance must be made for the fact that the OR time ended only 39 minutes earlier at 10:57 a.m. on June 20th and that plaintiff remained under post-operative pain management (a regional nerve block) while in PACU. *See* Nursing Intraop Record, timed at 10:57 a.m. on June 20th, page 2 of 7 ("OR Time: Start Time 7:43 [a.m.] Out Time 10:57 [a.m.] Duration 194 minutes.") (underlining omitted).

[7] In that regard, Dr. Yetkin's operative report corroborates, in part, plaintiff's contention that she continuously complained of symptoms of ischemia to the LIJ staff. *See* Dr. Yetkin's Operative Report/Operating Note, pages 1-2 ("This is a 61-year-old female who a day prior had elective left knee replacement. Next day after the [knee] surgery she started complaining of left foot pain, numbness and coolness. *The patient had been complaining of symptoms [for] about 10 hours [i.e., since approximately 12 p.m. on June 21st] prior to Vascular Surgery being called.* On our initial examination we found that the foot was cool and the patient had foot[]drop with no palpable pulses. *The patient was rushed to the operating room for intervention*") (emphasis added).

[8] A delay of six hours can make the difference between successful limb salvage and limb amputation (or even death) due to irreversible ischemia. *See* Dr. Mayer's Affirmation, ¶ 25 (noting "the generally accepted 6-hour window to prevent limb paralysis and permanent injury").

[9] *See* Dr. Yetkin's EBT tr (NYSCEF #48) at page 46, lines 15-19 ("Anytime we perform a revascularization of an acute cold leg that we think . . . that ischemia is more than *four to six hours*, we perform prophylactic four compartment fasciotomy.") (emphasis added).

[10] Whether plaintiff's foot drop – an inability to flex or extend her left ankle – ultimately resolved with physical therapy and her use of an ankle-foot orthosis is an issue of fact that goes to damages, not liability.

Second, according to plaintiff's expert orthopedic surgeon, Omar D. Hussamy, M.D. ("Dr. Hussamy"),[11] Dr. Ravich (either on his own or vicariously as a result of the acts/omissions of his operating assistant, Dr. Stal) failed to protect her left popliteal artery from injury with a surgical instrument or appliance during the performance of the TKR, and failed to discover the intraoperative hole (and the ensuing bleeding) after releasing the pneumatic tourniquet and before closing the wound; and that such acts/omissions led to an extensive limb-saving vascular surgery emergently performed by Dr. Yetkin.

The LIJ Defendants' Motion

LIJ

Medical Malpractice

"In general, under the doctrine of respondeat superior, a hospital may be held vicariously liable for the negligence or malpractice of its employees acting within the scope of employment, but not for negligent treatment provided by an independent physician, as when the physician is retained by the patient himself [or herself]." *Seiden v. Sonstein*, 127 A.D.3d 1158, 7 N.Y.S.3d 565 (2d Dept. 2015). "[A] hospital is not liable for the negligence of a private attending physician, and cannot be held concurrently liable with such a physician *unless [1] its employees commit independent acts of negligence or [2] the attending physician's orders are contraindicated by normal practice*." *Cerny v. Williams*, 32 A.D.3d 881, 822 N.Y.S.2d 548 (2d Dept. 2006) (internal citations omitted; emphasis added).

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[11] *See* Dr. Hussamy's Expert Physician Affirmation, dated Oct. 26, 2020 (NYSCEF #86), ¶¶ 9, 14, 16-17. The Court disregarded ¶ 15 of Dr. Hussamy's expert affirmation to the extent it incorporated Dr. Mayer's opinions regarding Dr. Ravich's and Dr. Stal's respective failures to observe and remediate the injured popliteal artery during the TKR. *See* Dr. Mayer's Affirmation, ¶¶ 9-12. As a vascular surgeon, Dr. Mayer, who did not indicate in his affirmation that he had any training in the field of orthopedics, is not qualified to opine on the appropriate TKR operating techniques. *See Keane v. Dayani*, 178 A.D.3d 797, 114 N.Y.S.3d 93 (2d Dept. 2019).

LIJ established, prima facie, that Dr. Ravich as plaintiff's private attending physician was responsible for her care during and after the TKR, and that Dr. Stal, a resident physician employed by LIJ, acted, during those times, under Dr. Ravich's supervision and control. LIJ proved that Dr. Ravich's directive "to continue observation"[12] of plaintiff post-TKR was not contraindicated, and that none of LIJ's employees committed any independent acts of negligence. *See Cynamon v. Mount Sinai Hosp.*, 163 A.D.3d 923, 81 N.Y.S.3d 520 (2d Dept. 2018); *see also Samer v. Desai*, 179 A.D.3d 860, 116 N.Y.S.3d 377 (2d Dept. 2020).

In opposition, plaintiff, through Dr. Mayer's affirmation, raised triable issues of fact as to whether the LIJ staff[13] – considering: (1) plaintiff's preexisting comorbidities, particularly her long-standing diabetes mellitus;[14] and (2) her post-TKR complaints to the LIJ staff, as well as its own post-TKR findings of her signs and symptoms, which, as early as 2:30 p.m. on June 20th[15] and again at 6 a.m. on June 21st,[16] were indicative of the ongoing ischemia in her left leg – should have realized that

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[12] *See* Dr. Stal's Progress Note, timed at 6 a.m. on June 21st, cosigned by Dr. Ravich with a notation, "continue observation." Dr. Ravich testified (at page 177, lines 3-6 of his pretrial deposition) that he, independently of Dr. Stal, examined plaintiff.

[13] The LIJ staff included P.A. Maher, Dr. Stal, and various daytime and nighttime nurses, including Nurse Wigand, MaryEllen Loonie, R.N., and Kameel Ramsammy, R.N.

[14] Plaintiff's other major comorbidities were her obesity, hypercholesterolemia, hypertension, and Raynaud disease. The latter, also known as the "Raynaud syndrome," is defined as the "idiopathic paroxysmal bilateral cyanosis of the digits due to arterial and arteriolar contraction; caused by cold or emotion." Stedman's, *Raynaud syndrome*.

[15] *See* P.A. Maher's Progress Notes, timed at 2:30 p.m. on June 20th, indicating a "decreased sensation throughout" and that her DP pulses of "1+." The P.A. note was cosigned by Dr. Ravich corroborating his deposition testimony that he reviewed it. Dr. Ravich EBT tr at page 173, lines 17-19. Plaintiff's expert vascular surgeon characterized the PA's reading of the DP pulses of 1+ as "grossly diminished." *See* Dr. Mayer's Affirmation, ¶ 16. Although pulses are typically graded on a scale from 0 to 4, it appears that the LIJ staff here graded them on the scale of "absent," "1+," and "2+."

[16] *See* Dr. Stal's Progress Note, Orthopedics, timed at 6 a.m. on June 21st, documenting, among other things: (1) plaintiff's complaint of a "slight[,] *global* decreased sensation [in her] left foot"; and (2) a slightly reduced sensation in her spine at the L4-S1 level (emphasis added). There is some confusion in the record about the contents of that note. Dr. Stal, at his deposition, omitted the word "global" when he read aloud his note for plaintiff's counsel. *See* Dr. Stal EBT tr at page 45, lines 16-18. In addition, plaintiff's vascular surgery expert, Dr. Mayer (in ¶ 19 of his affirmation), mischaracterized Dr. Stal's note as stating that plaintiff had a weakness

Dr. Ravich's directive "to continue observation" was *contraindicated by standard medical practice*, and that an urgent vascular consultation was necessary within six hours of plaintiff's first presentation of ischemic signs and symptoms.[17] *See Fink v. DeAngelis*, 117 A.D.3d 894, 986 N.Y.S.2d 212 (2d Dept. 2014); *Pearce v. Klein*, 293 A.D.2d 593, 741 N.Y.S.2d 89 (2d Dept. 2002). By so framing (or, more precisely, limiting) the parameters of Dr. Mayer's position, the Court found triable issues of fact as to whether plaintiff's signs and symptoms, as documented by the LIJ staff during the relevant time period, were sufficient to alert them to her ongoing left-leg ischemia and obtain a vascular consultation within six hours of plaintiff's first presentation of those signs and symptoms. In so doing, the Court did not need to consider Dr. Mayer's further position (as propounded in ¶ 14 his affirmation) that the LIJ staff committed *independent acts of negligence*, in that a bedside arterial Doppler ultrasound should have been performed on plaintiff, as a patient with long-standing diabetes, upon any suggestion – to be documented on the neurovascular checks to be performed every two hours – of any diminished lower extremity pulses.

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in her left foot and that "[n]o pulses were documented," when, in fact, Dr. Stal's note was to the contrary (*i.e.*, that Dr. Stal's note stated "no weakness" in plaintiff's left foot and that her pulses were "DP 2+.").

[17] It was at approximately 9 p.m. on June 21st when orthopedic resident Daniel Kiridly, M.D., telephoned Dr. Ravich with the news that no DP pulses in plaintiff's left foot were detectable by arterial Doppler ultrasound, that he instructed Dr. Kiridly to turn to the vascular surgery team for assistance. Thereupon, the vascular surgery team rushed plaintiff to the operating room where she was operated on for approximately 6½ hours (a total of 390 minutes) from 2:09 a.m. to 8:39 a.m. on June 22nd (the total OR time lasted from 1:23 a.m. to 8:59 a.m. on June 22nd for a total of 456 minutes). *See* Nursing Intraop Record, timed at 9:24 a.m. on June 22nd, page 3 of 7. Indeed, when the vascular surgery team *did* become involved in plaintiff's care, Dr. Ravich tried to convince attending vascular surgeon Dr. Yetkin *not* to operate on plaintiff. *See* Dr. Yetkin EBT tr page 90, lines 13-23 ("I stated to Dr. Ravich [in a telephone call with him preceding surgery] that I think the patient has a popliteal artery injury [as suspected on the CT scan ordered by the vascular surgery team] and I'm taking the patient to the OR to repair the injury. *As per my recollection, Dr. Ravich . . . wasn't in agreement with me. He thought that the patient's symptoms [were] not due to the [intraoperative] injury, but rather due to . . . some lidocaine pump that she was getting* [*i.e.*, a regional nerve block], and I proceeded to state that I don't agree with him and I will proceed to take the patient to the operating room.") (emphasis added).

Informed Consent

"[W]here a private physician attends his or her patient at the facilities of a hospital, it is the duty of the physician, not the hospital, to obtain the patient's informed consent." *Salandy v. Bryk*, 55 A.D.3d 147, 864 N.Y.S.2d 46 (2d Dept. 2018). "Moreover, the mere recording or witnessing of a consent by a hospital employee is a ministerial task that does not subject the hospital to liability." *Id*.

LIJ evidenced that there was no reason for it to know or suspect that Dr. Ravich as plaintiff's private attending physician was acting or would act, as plaintiff alleged, without her informed consent. In opposition, plaintiff failed to raise a triable issue of fact. *See Cynamon v. Mount Sinai Hosp.*, 163 A.D.3d 923, 81 N.Y.S.3d 520 (2d Dept. 2018).

Negligent Credentialing

Finally, plaintiff abandoned her negligent credentialing claim[18] by failing to address it in her opposition papers. *See e.g. Elam v. Ryder Sys., Inc.*, 176 A.D.3d 675, 107 N.Y.S.3d 718 (2d Dept., 2019).

Dr. Stal

"A resident who assists a doctor during a medical procedure, and who does not exercise any independent medical judgment, cannot be held liable for malpractice so long as the doctor's directions did not so greatly deviate from normal practice that the resident should be held liable for failing to intervene." *Soto v. Andaz*, 8 A.D.3d 470, 779 N.Y.S.2d 104 (2d. Dept. 2004). Here, Dr. Stal made a prima facie showing of his entitlement to judgment as a matter of law through the LIJ records and Dr. Ravich's deposition testimony, which demonstrated that the latter had complete control over his (Dr. Stal's) surgical techniques. *See Tsocanos v. Zaidman*, 180 A.D.3d 841, 118 N.Y.S.3d 219 (2d Dept.

[18] As pleaded in ¶ 21 of plaintiff's Verified Bill of Particulars as to LIJ, dated Nov. 22, 2017 (NYSCEF #41).

2020). Although Dr. Stal actively participated in the TKR as more fully set forth in the margin,[19] he did so exclusively under Dr. Ravich's direction and supervision (and thus exercised no independent medical judgment), and Dr. Ravich's directions did not so greatly deviate from standard orthopedic practice that Dr. Stal should be held liable for failing to intervene.[20]

In opposition, plaintiff failed to raise a triable issue of fact as to whether Dr. Stal exercised any independent medical judgment, or that Dr. Ravich's directions so greatly departed from standard orthopedic practice that Dr. Stal should be held liable for failing to intervene. *See Nasima v. Dolen*, 149 A.D.3d 759, 51 N.Y.S.3d 189 (2d Dept. 2017). In that regard, plaintiff's expert orthopedic surgeon, Dr. Hussamy, failed to identify any *specific departures* allegedly committed by Dr. Stal, rather than by Dr. Ravich. Instead, Dr. Hussamy only opined *generally* that Dr. Stal, *along with Dr. Ravich*, deviated from good and accepted orthopedic practice, and caused injuries to plaintiff.

Further, Dr. Stal, *individually*, cannot be blamed for his acts/omissions in connection with his bedside examination of plaintiff at approximately 6 a.m. on June 21st. For that bedside examination, Dr. Stal documented, among other things: (1) plaintiff's complaint of a "slight[,] global decreased sensation [in her] left foot";[21] and (2) a slightly reduced sensation in her spine at the L4-S1 level. Inasmuch as Dr. Stal's bedside examination note was cosigned and concurred with by his orthopedic

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[19] *See* Dr. Stal's EBT tr at page 20, line 23 to page 21, line 3; page 22, lines 20-21; page 35, line 23 to page 36, line 3 ("From what I recall, I assisted in some of the exposure, incision and exposure, retracting, suctioning. I believe I did a bone cut or two [specifically recalling, the distal femur cut], but I don't remember exactly when and then I assisted with the closure."); page 26, line 18 to page 27, line 2 ("Q. After the pressure was released relevant to the tourniquet, was there anything that you had done after that with regard to the procedure? A. Assist Dr. Ravich in locating any small bleeders that needed to be cauterized. Q. Tell me approximately how long of a period of time did that take place? A. No more than a couple of minutes."); page 29, lines 6-10 ("Q. Did you do anything during the closing process? A. From what I remember, I used scissors to cut his [Dr. Ravich's] sutures and then I assisted in closing the most superficial layer."); page 32, lines 11-13 ("I just remember using a retractor posterior to the tibia in a standard fashion."); page 34, lines 9-10 ("I remember extending her knee to neutral [*i.e.*, straight]. . . .").

[20] *See* LIJ defendants' Expert Affidavit of Tony Wanich, M.D., dated May 5, 2020 (NYSCEF #61), ¶¶ 18-20.

[21] Dr. Stal's Progress Note, Orthopedics, timed at 6 a.m. on June 21st (abbreviations spelled out).

attending, Dr. Ravich with a directive "to continue observation," no *individual* liability can be imposed on Dr. Stal who, as a member of the orthopedic post-operative care team, remained under Dr. Ravich's direction and supervision.

Northwell Health, Inc.

Without a supporting affidavit from an individual having personal knowledge of the facts or other evidence in admissible form, Northwell Health, Inc. ("Northwell") failed to establish its prima facie showing of entitlement to judgment as a matter of law, without regard to the sufficiency of plaintiff's response.[22] The sworn statement of the LIJ defendants' outside counsel (in ¶ 24 of his supporting affidavit) regarding Northwell Health's relationship with LIJ is inadmissible. *See e.g. Zuckerman v. New York City Tr. Auth.*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980).

Dr. Ravich's Motion

Medical Malpractice

Inasmuch as the opening affirmation of Dr. Ravich's expert, Russell E. Windsor, M.D. ("Dr. Windsor"), was silent on the proximate cause element of the medical malpractice claim,[23] this Court was required to consider only whether plaintiff raised a triable issue of fact regarding the departure element of that claim. Dr. Hussamy's detailed affirmation raised triable issues of fact as to whether Dr. Ravich, *in performing the TKR*, departed from good and accepted medical practice and whether any such departures proximately caused plaintiff's injury. Dr. Hussamy explained the knee anatomy, the workings of the popliteal artery, and the total knee replacement surgery. He reviewed the facts

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[22] *Compare* Northwell Health's Consent to Change Attorney, dated Jan. 18, 2018, which was executed on Northwell Health's behalf by its Vice President-Risk Management (NYSCEF #18).

[23] *See* Dr. Windsor's Affidavit, dated June 10, 2020 (NYSCEF #80), ¶ 36 ("For the above reasons, Dr. Ravich did not deviate from accepted standards of orthopedic surgical practice in any way in treating the plaintiff. . . ."). Dr. Windsor's one-sentence opinion on the subject of proximate cause, made for the first time in ¶ 14 of his Reply Affirmation, dated Nov. 18, 2020 (NYSCEF #91), cannot be considered by the Court. *See e.g. Deutsche Bank Natl. Tr. Co. v. March*, 191 A.D.3d 762, 138 N.Y.S.3d 356 (2d Dept. 2021).

underlying plaintiff's TKR; set forth the accepted medical practice governing a TKR, including the examination of the operating field after releasing the pneumatic tourniquet and before closing the wound; and identified several alleged departures from the accepted practice which proximately injured plaintiff; namely: (1) Dr. Ravich's failure to adequately protect the popliteal artery from injury while the oscillating power saw and the osteotomy blade were used to cut the proximal tibia;[24] and (2) Dr. Ravich's failure to properly examine the operating field and detect the intraoperative hole in the popliteal artery after releasing the pneumatic tourniquet and before closing the wound.

Further, Dr. Mayer, plaintiff's expert in the field of vascular surgery, raised triable issues of fact as to whether, Dr. Ravich, *in the post-operative care*, departed from good and accepted medical practice in failing to appreciate the signs and symptoms of the ongoing ischemia in plaintiff's left leg, as documented in the LIJ records by his orthopedic team at 2:30 p.m. on June 20th[25] and again at 6 a.m. on June 21st,[26] as well as by Dr. Ravich himself when he, independently of Dr. Stal, examined plaintiff in the early morning of June 21st and directed her continued observation *without* calling in the vascular surgery team for consultation at any of those times.[27]

Contrary to Dr. Ravich's contention, he may *not* expand on his Operative Report by relying on his deposition testimony as to his general custom and practice in performing TKRs, in order to establish his prima facie entitlement to summary judgment.[28] "A party can rely on custom and practice

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[24] Stated otherwise, Dr. Hussamy's position is that arterial complications from a TKR are usually preventable if proper care is taken.

[25] As reflected in P.A. Maher's note timed at 2:30 p.m. on June 20th *cosigned by Dr. Ravich*.

[26] As reflected in Dr. Stal's note timed at 6 a.m. on June 21st *cosigned by Dr. Ravich* with his (Dr. Ravich's) directive "to continue observation."

[27] *See* Dr. Ravich's EBT tr at page 177, lines 3-12; page 178, line 4 to page 180, line 24.

[28] Dr. Ravich admitted (at page 107, lines 3-6 of his pretrial deposition) that he generally did "not recall the specifics of [plaintiff's] operation."

evidence to fill in evidentiary gaps where the proof demonstrates a deliberate and repetitive practice by a person in complete control of the circumstances." *Martin v. Timmins*, 178 A.D.3d 107, 110 N.Y.S.3d 707 (2d Dept. 2019) (internal quotation marks omitted). Whereas "[e]vidence of such a practice is generally admissible to allow the inference of the persistence of the habit on a particular occasion," "*evidence of conduct however frequent yet likely to vary from time to time depending upon the surrounding circumstances is not admissible as custom and practice evidence*." *Id.* (internal quotation marks and citations omitted; emphasis added). Here, Dr. Ravich's procedures for performing TKRs lacked an unvarying uniformity and necessarily varied, as Dr. Ravich's expert frankly conceded (in ¶ 13 of his reply affidavit), "due to the body habitus of the patient, comorbid medical problems, the extent of arthritis, scarring or adhesions."[29] *See Martin v. Timmins*, 178 A.D.3d 107, 110 N.Y.S.3d 707 (2d Dept. 2019); *cf. Heubish v. Baez*, 178 A.D.3d 779, 113 N.Y.S.3d 755 (2d Dept. 2019).[30]

Dr. Ravich's contentions that: (1) there was sufficient space behind plaintiff's left knee for him to operate on without touching the popliteal artery;[31] (2) if the popliteal artery had been cut, the bleeding would have been profuse and would certainly have been noticeable; and (3) as part of the TKR, an osteotomy blade was used to complete the initial cut made by the oscillating power saw in the

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[29] For example, whereas Dr. Ravich testified (at page 131, line 23 to page 132, line 5; page 133, line 21 to page 134, line 2) that his standard practice was to wait for approximately 15 minutes after releasing the pneumatic tourniquet and before closing the wound to examine for "bleeders," his surgical assistant, Dr. Stal, recalled (at page 27, line 16 to page 29, line 5) that the corresponding time period in plaintiff's TKR was much shorter; that is, "[n]o more than a couple of minutes." In addition, whereas Dr. Ravich testified to his standard practice of using the tourniquet pressure of 250 or 300 milligrams and of applying it for 90 minutes (Dr. Ravich EBT tr at page 75, lines 14-19), the actual tourniquet pressure during plaintiff's TKR was at 300 milligrams and lasted for 82 minutes. *See* Nursing Intraop Record, timed at 10:57 a.m. on June 20th, page 3 of 7.

[30] *See also Guido v. Fielding*, 190 A.D.3d 49, 134 N.Y.S.3d 34 (1st Dept. 2020); *Michalko v. DeLuccia*, 187 A.D.3d 1365, 133 N.Y.S.3d 122 (3d Dept. 2020); *see generally* Thomas A. Moore & Matthew Gaier, *Custom and Practice Revisited*, NYLJ, Apr. 5, 2021 (online edition).

[31] At no time did Dr. Ravich or his expert, Dr. Wanich, approximate the distance (for example, 10 millimeters) between the osteotomy blade and the popliteal artery either at the 90-degree or at the 40-degree flexion of plaintiff's left knee.

proximal tibia; were vigorously disputed by plaintiff's expert orthopedic surgeon and, therefore, constituted matters to be determined by a trier of fact. "It is not the function of a court deciding a summary judgment motion to make . . . findings of fact, but rather to identify material triable issues of fact." *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 942 N.Y.S.2d 13 (2012).

Informed Consent

"It is well settled that lack of informed consent is a distinct cause of action requiring proof of facts not contemplated by an action based merely on allegations of negligence." *Jolly v. Russell*, 203 A.D.2d 527, 611 N.Y.S.2d 232 (2d Dept. 1994). "The mere fact that the plaintiff signed a consent form does not establish the defendants' prima facie entitlement to judgment as a matter of law." *Schussheim v. Barazani*, 136 A.D.3d 787, 24 N.Y.S.3d 756 (2d Dept. 2016). Here, plaintiff signed a generic consent form that made no mention of any risk to her popliteal artery from surgery.[32] Further, Dr. Ravich submitted in support of his motion, among other things, a transcript of plaintiff's deposition, during which she testified that he never explained to her the risks of the TKR or whether

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[32] The "Consent To Operative / Invasive / Diagnostic Procedures, Anesthesia / Sedation / Analgesia" stated, in relevant part, that:

> "2. **Explanation of procedure(s), risks, benefits and alternatives**. *Dr. ________ [left blank]* has fully explained to me the nature and purpose of the operation(s)/procedure(s) and has also informed me of expected benefits and complications (from known causes), attendant discomforts and the risks that may arise, as well as possible alternative methods of diagnosis and/or treatment to the proposed procedure(s), including no treatment. I have been given an opportunity to ask questions, and all my questions have been answered fully and satisfactorily.
>
> * * *
>
> 7. **Understanding of this form**. I confirm that I have read this form, fully understand its contents, and that *all the blank spaces above have been completed prior to my signing*. . ." (emphasis added).

It is obvious from the face of the consent form that, notwithstanding ¶ 7, some of the blank spaces remained before she signed it. In particular, ¶ 2 regarding the explanation of procedure(s), risks, benefits and alternatives had *a blank space* for the name of the advising physician.

there were any alternatives.[33] *See Xiao Yan Ye v. Lam*, 191 A.D.3d 827, ___ N.Y.S.3d ___ (2d Dept. 2021). In any event, plaintiff's expert orthopedic surgeon explained that:

> "It is my firm opinion that the type of injury sustained by plaintiff is not an ordinary risk of knee replacement surgery as claimed by the defendants but demonstrates a careless technical performance on the part of the [orthopedic] surgical team. *I do not consider injury to the popliteal artery as one such acceptable risk since the neurovascular bundle containing the popliteal artery lies behind the knee and is adjacent to, but not part of, the knee arthroplasty operative field*. It should also be noted that any type of neurovascular injury involving the popliteal artery is not something a patient should or would consent to as one of the risks of total knee replacement. . . . While there may be other risks involved in total knee replacement surgery (I generally warn my patients of the possibilities of knee infections, rejection or loosening of the prosthetics implanted, deep vein thrombosis and bleeding from other blood vessels directly present within the operating area), a popliteal artery injury is not one of them as injury to the popliteal artery would involve negligence on the part of the surgical team."

(Dr. Hussamy's Affirmation, ¶ 8 [emphasis added]).[34]

Arterial (as opposed to venous) complications in a primary TKR are rare.[3535] Rarer still is the occurrence of a popliteal artery injury in a primary TKR as is the case here,[3636] but when it does occur,

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[33] *See* Plaintiff's EBT tr at page 172, lines 6-9 ("Q. Did Dr. Ravich discuss with you any risks or benefits or alternatives of surgery in the office on April 26th, 2016? A. No."); page 182, lines 5-8 ("Q. Did you have any understanding when you went into this [June 20th] operation whether there were any risks at all? A. No."). Although a single entry in Dr. Ravich's office chart (NYSCEF #78) stated that he advised plaintiff of the risks of a "neurovascular compromise" (among other risks) of a TKR during her office visit on July 1, 2014 (approximately two years before the TKR at issue), plaintiff's position to the contrary must be accepted as true at the summary judgment stage.

[34] In light of Dr. Hussamy's explicit opinion on the subject of informed consent as quoted in the text, the assertion of Dr. Ravich's defense counsel (in ¶ 4 of his reply affirmation) that plaintiff did not oppose Dr. Ravich's motion as to that cause of action was incorrect.

[35] Dr. Ravich testified that in his 30 years of orthopedic surgery practice he never encountered an arterial (as opposed to a venous) complication of a TKR. See Dr. Ravich EBT tr at page 58, lines 17-19; page 60, line 10-20; page 132, lines 11-14.

[36] *See* Laura J. Matsen Ko, M.D., *et al.* (Dept. of Orthopaedics & Rehabilitation, Portland, Oregon, Health & Science Univ.), *Popliteal Artery Injury Associated With Total Knee Arthroplasty: Trends, Costs & Risk Factors*, J. of Arthroplasty, 29 (2014), at 1182 ("We found a total of 1,120,508 hospitalizations coded for [TKR] in the [National Inpatient Sample] database in 1998 to 2009; of these, 633 (*0.057%*) were identified as

it is devastating. Whether it would have been reasonable for plaintiff to consent to the TKR, had she been fully informed of the risk of having a hole in (or other injury to) her popliteal artery, is a matter for the jury to consider.

Conclusion

Accordingly, it is

ORDERED that in the third motion sequence, the joint motion of defendants Drew Stal, M.D., Northwell Health, Inc., and Long Island Jewish Medical Center is *granted only to the extent* that: (1) all direct claims *as against Dr. Stal* and vicariously *as against LIJ with respect to Dr. Stal* are dismissed without costs and disbursements, (2) LIJ is *not* vicariously liable for any alleged acts or omissions of Dr. Ravich (either on his own or through Dr. Stal) *as limited to the performance of the TKR in the operating room*, (3) the informed consent claim *as against LIJ* is dismissed, and (4) the negligent credentialing claim *as against LIJ* is dismissed as abandoned; and *the remainder of their motion is denied*; and it is further

ORDERED that in the fourth motion sequence, the motion of defendant Steven J. Ravich, M.D., is *denied in its entirety*; and it is further

ORDERED that the action is severed to reflect the dismissal of Dr. Stal; the remainder of the action is continued as against the remaining defendants; and the caption is amended to read in its entirety as follows:

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having a popliteal artery injury.") (emphasis added). The medical article, filed under NYSCEF #90, is part of the record before the Court.

- -X
Edris McPherson,

Plaintiff,

- against -

Steven J. Ravich, M.D.,
Northwell Health, Inc.,
Long Island Jewish Medical Center,
Northwell Health Physician Partners,
and "John Doe" and "ABC Corp,"
fictitious names for persons, nurses, doctors,
radiologists, interns, medical health care providers,
technicians, professional corporations, partnerships
and/or other entities whose true names and identities
are presently unknown and who treated and/or
provided medical and health care services for and on
behalf of plaintiff on, about and after June 20, 2016,

Defendants.
- -X

and it is further

ORDERED that plaintiff's counsel is directed to electronically serve a copy of this Decision and Order with notice of entry on the respective counsel to the LIJ defendants and Dr. Ravich, and to electronically file an affidavit of service thereof with the Kings County Clerk.

This constitutes the Decision and Order of the Court.

E N T E R,

Genine D. Edwards

J. S. C.