

**Quiroz v Arvelakis**

2021 NY Slip Op 31484(U)

April 16, 2021

Supreme Court, New York County

Docket Number: 805098/2016

Judge: Judith N. McMahon

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Arvelakis and Mount Sinai Hospital failed to timely diagnose the injured bladder until six days after the operation. Plaintiff developed right lower quadrant pain and suprapubic abdominal pain on the second day after the nephrectomy and passed a trial void on March 29, 2015. Plaintiff's scheduled discharge from the hospital was cancelled after Plaintiff complained of sharp pain that escalated over the next day.

On March 30, 2015, Dr. Palese was called for a urology consult after a CT scan showed a tear in the bladder. Dr. Palese performed an exploratory laparotomy and open complex cystography on March 31, 2015 to repair the tear located in the anterior portion of the bladder. Dr. Palese testified that he performed an open surgery to provide for better visualization and that he tested the anastomosis using 250mls of sterile water and Methylene Blue. According to Dr. Palese, no obvious leakage was observed or noted and he subsequently inserted a 20-French Foley Catheter. On April 1, 2015, Plaintiff's pain was managed and she was resting comfortably with no nausea or vomiting. Plaintiff was to continue with the Foley catheter for at least seven days and she was discharged on April 3, 2015. Plaintiff next presented to Dr. Palese for a follow-up on April 10, 2015 with symptoms of "fluid-cough" that was present for one week. Dr. Palese performed a cystogram after Plaintiff contained of increased leakage from the incision site that Dr. Palese noted began 48 hours prior to the appointment and worsened the night before. According to the cystogram, a leak from the bladder was observed.

On April 11, 2015, Dr. Palese performed an exploratory laparotomy with cystoscopy and wound wash-out. Plaintiff had an infection and abscess under the fascia that was tracking to the bladder. In addition to placing a large catheter and Jackson Pratt drain, Dr. Palese debrided the necrotic bladder tissue, flushed out the cavity and repaired the bladder. Plaintiff was discharged on April 15, 2015 and followed-up with Dr. Palese on April 17, 2015. According to Plaintiff,

she suffers from bladder spasms, frequency of urination with episodes or incontinence and difficulty emptying her bladder which required medication.

**Dr. Palese's Motion to Dismiss (Motion No. 003)**

In support of his motion for summary judgment dismissal of the Complaint, Dr. Palese submits the affirmation of Reza Ghavamian, M.D. ("Dr. Ghavamian"), who opines that Dr. Palese's treatment of Plaintiff conformed with accepted standards of care and that Dr. Palese did not cause Plaintiff's alleged injuries. Dr. Ghavmain states that Dr. Palese properly performed the first repair surgery, used surgical techniques that were within the standard of care, followed up with post-operative care and properly performed the surgical repair. According to Dr. Ghavamin, the leak that was identified on April 11, 2015 was not due to an improper repair, since Dr. Palese tested the area during surgery without any evidence of a leak and plaintiff did not present with any symptoms until ten days after being discharged. Dr. Ghavamin opines that Plaintiff's injuries were mostly likely caused by poor vasculature or necrosis. Dr. Ghavamin further explains that Dr. Palese properly repaired the leak in a timely manner and received informed consent from the Plaintiff for both surgical procedures.

**Dr. Arvelakis and Mount Sinai Hospital's Motion to Dismiss**

In support of their motion for summary judgment dismissal, Dr. Arvelakis and Mount Sinai Hospital submit three expert affirmations, the first being of Robert Montgomery, M.D. ("Dr. Montgomery"). According to Dr. Montgomery, the donor nephrectomy procedure was indicated for Plaintiff and proper informed consent was obtained. Dr. Montgomery opines that Dr. Arvelakis properly performed the nephrectomy procedure and that Plaintiff was properly treated post-operatively. In his affirmation, Dr. Montgomery states that Plaintiff had an undiagnosed bladder diverticulum that extended her bladder into Dr. Arvelakis' operative field.

Dr. Montgomery opines that nothing in the preoperative imaging suggested that any part of her bladder would be in this field. According to Dr. Montgomery, Dr. Arvelakis properly relied on the preoperative reports and was therefore unaware that there was a bladder diverticulum extending Plaintiff's bladder in to the operative field. Dr. Montgomery states that Dr. Arvelakis used proper surgical techniques and that the care rendered to her during her hospital admissions were within the standard of care. Dr. Montgomery states that Plaintiff's alleged injuries were not caused by any alleged negligent act or omissions of Dr. Arvelakis or Mount Sinai Hospital. Rather, Dr. Montgomery states, Plaintiff suffered from a bladder injury secondary to the vesicourethral diverticulum that extended into the operative field.

Dr. Arvelakis and Mount Sinai Hospital also submit the affirmation of Matthew Ihn Seong Whang, M.D. ("Dr. Whang") who opines that the bladder repair procedures performed by Dr. Paelese were done properly and with informed consent. Dr. Whang also states that Dr. Palese appropriately tested the bladder repair during the laparotomy on March 31, 2015 and notes that there was no leak at the time since no blue dye came out of the repair anastomosis. According to Dr. Whang, the anastomosis leak that developed after this procedure was timely appreciated.

Dr. Arvelakis and Mount Sinai Hospital also include the affirmation of Evan Dillon, M.D. ("Dr. Dillon"), a physician who is board certified in radiology. Dr. Dillon states that while reviewing Plaintiff's preoperative MRI, he discovered a vesicourethral diverticulum that extended from the bladder into the area where Dr. Arvelakis made an incision at the site of her prior C-section scar. Since such a finding showed up on only 7 images out of 2044 contained in the study, Dr. Dillon opines that reading radiologist did not misintrepret the study. Rather, the study was "only evident in hindsight with the knowledge that there was an unexplained injury to

the bladder.” Dr. Dillon notes that Dr. Arvelakis would have been aware of this since the undiagnosed vesicourethral diverticulum was in the operative field and obscured due to adhesions from Plaintiff’s previous C-section. Dr. Dillon concludes that Defendants did not cause Plaintiff’s injuries since her bladder injury was secondary to her unusual anatomy rather than any surgical malpractice.

### **Plaintiff’s Opposition to Motions No. 003 and 004**

In opposition to Motions No. 003 and 004, Plaintiffs submit the affirmation of Matthew Cooper (“Dr. Cooper”), who agrees that Plaintiff was an appropriate candidate for donor nephrectomy surgery. According to Dr. Cooper, Dr. Arvelakis and Mount Sinai Hospital departed from the standard of care in failing to timely perform radiological studies to determine the cause of Plaintiff’s complaints of pain and inability to urinate post-operatively. Such a delay, Dr. Cooper states, “directly led to a significant delay in the diagnosis and treatment of the perforated bladder”, which resulted in urine leaking into the peritoneal cavity causing infection and the tear in the bladder to increase and neurotic tissue developing in the wall of the bladder. Dr. Cooper refutes the opinions of Dr. Dillon and Dr. Montgomery that Plaintiff had a vesicourethral diverticulum and states that it is the transplant surgeon’s responsibility to be aware of a patient’s anatomy. Dr. Cooper also disagrees with Dr. Dillon and Dr. Montgomery’s conclusion that Plaintiff’s "unexplained" bladder injury was secondary due to her undiagnosed anatomy and explains that even if this “rare congenital abnormality was indeed present and in the operative field”, this would have been encountered during Plaintiff’s prior C-section surgery and during her prior myectomy surgery. Dr. Cooper opines that the bladder injury would have happened during either surgery if such was due to this alleged abnormality. According to Dr. Cooper,

the only reasonable conclusion to be drawn is that Dr. Arvelakis and/or his surgical assistants injured the bladder due to poor identification of anatomical structures during the donor nephrectomy surgery. They failed to properly identify the bladder, they failed to properly identify the location of the bladder, they failed to take care not to cause injury and they failed to realize intra-operatively that the bladder had been damaged, all of which were departures from the good and accepted standard of medical care and practice.

Dr. Cooper further states that even if there was an anatomical abnormality, Dr. Arvelakis' failure to be aware of it was a departure from the standards of medical care and practice.

Turning to Dr. Palese's care of Plaintiff, Dr. Cooper opines that Dr. Paelese improperly repaired Plaintiff's bladder on March 31, 2015 and failed to excise all necrotic tissue and identify all the healthy and viable tissue. According to Dr. Cooper, the departures committed by Dr. Arvelakis, Mount Sinai and Dr. Palese caused Plaintiff to suffer multiple injuries and complications that were preventable.

Plaintiff also submits the affirmation of Tony Luongo, M.D. ("Dr. Luongo"), who states that there was an "unreasonable and lengthy delay" in diagnosing Plaintiff's bladder injury that directly led to a worsening of Plaintiff's medical condition, including necrosis of the bladder tissue and intra-abdominal infection. Dr. Luongo concedes that surgical intervention was properly indicated due to Plaintiff's extensive bladder damage, but states that Dr. Palese departed from the standard of care by using non-viable, unhealthy tissue to repair Plaintiff's bladder tear. Such a departure, Dr. Luongo notes, was a proximate cause of the suture line breaking down and causing a recurrence of the bladder leak, requiring further surgical intervention. While Dr. Palese properly placed a Foley catheter following the repair surgery on March 31<sup>st</sup>, Dr. Luongo states that Dr. Palese departed from the standard of care in failing to changing the Foley catheter to a larger size when Plaintiff complained of urine leakage post-bladder repair. Changing this catheter to a larger size would have prevented or reduced the pressure on the bladder and allowed the repair to heal. Dr. Luongo also disputes Dr. Ghavamian's statements regarding Plaintiff not

complaining for ten days after the surgery and represents that she called the hospital with such complaints on April 4<sup>th</sup> or April 5<sup>th</sup>. Regarding Defendants' argument that Plaintiff suffered from an anatomical abnormality, Dr. Luongo states that such would have been discovered during Plaintiffs' C-section, myomectomy surgery or Dr. Palese's bladder repair surgery if such an abnormality existed. Dr. Luongo explains that even if such an abnormality was present, such would not change the anatomical position of Plaintiff's bladder.<sup>1</sup>

### DISCUSSION

Pursuant to CPLR §3212(b), a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the Court as a matter of law in directing Judgment in favor of any party." CPLR §3212(b). A party seeking summary judgment must show that there are not material issues of fact that are in dispute and that it is entitled to judgment as a matter of law. *See Dallas-Stephenson v. Waisman*, 39 AD3d 303, 306 [1st Dept., 2007]. Once a movant makes such a showing, "the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial. *Id.*

"A defendant in a medical malpractice action establishes prima facie entitlement to summary judgment by showing that in treating the plaintiff, he or she did not depart from good and accepted medical practice, or that any such departure was not a proximate cause of the plaintiff's alleged injuries." *Anyie B. v. Bronx Lebanon Hosp.*, 128 AD3d 1, 3 [1st Dept 2015]. (*See Costa v. Columbia Presbyt. Med. Ctr.*, 105 AD3d 525, 525 [1st Dept 2013]). "Once a

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<sup>1</sup> The Court notes that based upon the Defendant's production of MRI images allegedly showing Plaintiff's vesicourachal diverticulum, Plaintiff submitted supplemental affirmations by Dr. Montgomery and Dr. Luongo disputing Defendants' experts' opinions regarding such images.

defendant has established prima facie entitlement to summary judgment, the burden shifts to plaintiff to ‘rebut the prima facie showing via medical evidence attesting that the defendant departed from accepted medical practice and that such departure was a proximate cause of the injuries alleged.’” *Ducasse v. New York City Health and Hosps. Corp.*, 148 AD3d 434, 435 [1st Dept 2017] (internal citations omitted). “The opinion of a qualified expert that a plaintiff’s injuries were caused by a deviation from relevant industry standards would preclude a grant of summary judgment in favor of the defendants.” *Diaz v. New York Downtown Hosp.*, 99 N.Y.2d 542, 544 [2002].

“To defeat summary judgment, the expert’s opinion “must demonstrate ‘the requisite nexus between the malpractice allegedly committed’ and the harm suffered.” *Anyie B. v. Bronx Lebanon Hosp.*, 128 AD3d 1, 3 [1st Dept 2015] (internal citations omitted). “General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat defendant physician’s summary judgment motion.” *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 325 [1986]. (See *Otero v. Faierman*, 128 AD3d 499, 500 [1st Dept 2015]. See generally *Cruz v. New York City Health and Hosps. Corp.*, 188 AD3d 592, 593 [1st Dept 2020]; *Henry v. Duncan*, 169 AD3d 421 [1st Dept 2019]). “In order not to be considered speculative or conclusory, expert opinions in opposition should address specific assertions made by the movant’s experts, setting forth an explanation of the reasoning and relying on ‘specifically cited evidence in the record.’” *Lowe v. Japal*, 170 AD3d 701, 703 [2d Dept 2019]. See *Frye v. Montefiore Med. Ctr.*, 70 AD3d 15, 24 [1st Dept 2009].

Turning first to Motion No. 003, the Court finds that Dr. Palese met his prima facie burden and showed that he did not depart from the standard of care in treating the Plaintiff or that

any alleged departure was not a proximate cause of Plaintiff's alleged injuries. Based upon the affirmation of Dr. Ghavamian, Dr. Palese demonstrated that he obtained proper informed consent, performed both surgical procedures in accordance with the standard of care and administered proper post-operative care. The Court finds that Dr. Palese also demonstrated prima facie that Plaintiff's leak was not due to improper repair, since Dr. Palese tested the bladder with dye during the March 31<sup>st</sup> procedure, and that her injuries were more than likely caused by poor vasculature or necrosis. Finally, the Court finds that Dr. Palese demonstrated that he timely and properly repaired the leak.

The burden now shifts to Plaintiff to rebut Dr. Palese's prima facie showing and demonstrate the existence of a triable issue of fact via medical evidence. This Court finds that based upon the affirmations of Dr. Montgomery and Dr. Luongo, Plaintiff has only shown an issue of fact exists as to whether Dr. Palese departed from the standard of care in failing change the Foley catheter to a larger size after Plaintiff complained of urine leakage after the procedure on March 31, 2015. However, the Court finds that the remainder of Dr. Luongo's affidavit and Dr. Montgomery's affidavit regarding Dr. Palese's treatment of the Plaintiff to be speculative, conclusory and unsupported by evidence in the record. *See lvarez v. Prospect Hosp.*, 68 NY2d 320, 325 [1986]. (*See Otero v. Faierman*, 128 AD3d 499, 500 [1st Dept 2015]. *See generally Cruz v. New York City Health and Hosps. Corp.*, 188 AD3d 592, 593 [1st Dept 2020]). Neither Dr. Luongo or Dr. Montgomery dispute Dr. Ghavamian's opinion that Dr. Palese properly tested Plaintiff for a leak before closing during the March 31<sup>st</sup> procedure. Furthermore, Dr. Luongo and Dr. Montgomery do not provide any medical evidence supporting their position that Dr. Palese used non-viable, unhealthy tissue to repair Plaintiff's bladder tear and that such caused a recurrence of the bladder leak. Therefore, the Court dismisses Plaintiff's claims against Dr.

Palese except that regarding his alleged failure to insert a larger catheter after the procedure on March 31, 2015.

Regarding Motion No. 004, the Court finds that based upon the affirmations of Dr. Montgomery, Dr. Whang and Dr. Dillon, Dr. Arvelakis and Mount Sinai Hospital also made a prima facie showing that they did not depart from the standard of care or proximately cause Plaintiff's alleged injuries. Dr. Montgomery provides a detailed analysis of how Dr. Arvelakis properly performed the nephrectomy procedure and how Plaintiff was appropriately treated post-operatively. Dr. Montgomery and Dr. Dillon's statements regarding Plaintiff's alleged anatomical abnormality, which Dr. Arvelakis was supposedly unaware of, is also sufficient to demonstrate prima facie that Dr. Arvelakis and Mount Sinai did not depart from the standard of care or proximately cause Plaintiff's alleged injuries. Therefore, the Court finds that Dr. Arvelakis and Mount Sinai met their burden and showed their entitlement to summary judgment as a matter of law.

However, the Court further finds that Plaintiff has sufficiently rebutted such showing and demonstrated via medical evidence that a triable issue of fact exists as to whether Dr. Arvelakis and Mount Sinai departed from the standard of care and proximately caused her alleged injuries. The Court finds that Dr. Cooper and Dr. Luongo sufficiently demonstrated "the requisite nexus between the malpractice allegedly committed' and the harm suffered." *Anyie B. v. Bronx Lebanon Hosp.*, 128 AD3d 1, 3 [1st Dept 2015] (internal citations omitted). Dr. Cooper and Dr. Luongo sufficiently address the points raised by Dr. Montgomery and Dillon, specifically concerning whether Plaintiff had an undiagnosed anatomical abnormality that was not observed by Dr. Arvelakis which led to her alleged injuries. (*See generally Lowe v. Japal*, 170 AD3d 701, 703 [2d Dept 2019]. *See Frye v. Montefiore Med. Ctr.*, 70 AD3d 15, 24 [1st Dept 2009]).

Therefore, Dr. Arvelakis and Mount Sinai’s motion to dismiss Plaintiff’s allegations of medical malpractice as against them is hereby denied.

The Court further holds that Plaintiffs’ allegations of lack of informed consent as against all Defendants are hereby dismissed, as Plaintiff’s experts failed to dispute the opinions of Defendants’ experts that Plaintiff gave informed consent for the procedures done by Dr. Arvelakis and Dr. Palese.

Accordingly, it is hereby

ORDERED that Plaintiff’s allegations against Dr. Palese, except for those regarding his alleged failure to insert a larger catheter after the procedure on March 31, 2015, are hereby dismissed; it is further

ORDERED that Plaintiff’s causes of action for lack of informed consent as against all Defendants are hereby dismissed; it if further

ORDERED that the remainder of Motion No. 004 is hereby denied; and it is

ORDERED that any and all other requests for relief are hereby denied.

This is the decision and order of the Court.

<u>4/16/2021</u> DATE	<hr/> JUDITH REEVES MCMAHON, J.S.C.			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE

