

Labance v Brockunier
2021 NY Slip Op 32907(U)
July 14, 2021
Supreme Court, Orange County
Docket Number: Index No. EF000952-2019
Judge: Sandra B. Sciortino
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To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

-----X
HEATHER LABANCE and WILLIAM LABANCE,
Plaintiffs,

DECISION AND ORDER
INDEX NO.: EF000952-2019
Sequence No. 1.

-against-

JAMES BROCKUNIER, M.D. and
CRYSTAL RUN HEALTHCARE,
Defendants.

-----X
SCIORTINO, J.

The following papers numbered 1 to 26 were considered with this motion by defendants for an order granting summary judgment and dismissal of the complaint:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Affirmation (Horner)/ Exhibits A - N	1 - 16
Affirmation in Opposition (Kobin)/ /Exhibits A - G	17 - 25
Reply Affirmation (Horner)	26

Background

This action for medical malpractice arises out of medical treatment rendered to plaintiff Heather Labance on September 8 and 9, 2018. Plaintiffs claim that defendants failed to avoid, properly diagnose and repair an injury to plaintiff's right ureter during a laparoscopically-assisted vaginal hysterectomy. This matter was commenced by filing a Summons and Complaint on or about February 5, 2019. (Exhibit A) Defendants served their Answer on or about March 7, 2019. (Exhibit B) Plaintiffs subsequently served a Verified Bill of Particulars dated April 18, 2019. (Exhibit D)

Plaintiffs served a Supplemental Bill of Particulars dated June 11, 2019¹. The Bill of Particulars specified the allegations of malpractice asserted, *inter alia*:

- In failing to use due care;
- In failing to properly perform a laparoscopic assisted vaginal hysterectomy;
- In failing to palpate the ureter to safely keep the right ureter away from the operation field;
- In failing to protect the right ureter from injury;
- In failing to take appropriate precautions and measures to prevent suturing of Plaintiff's right ureter;
- In failing to diagnose and repair the injury to the right ureter intraoperatively;
- In failing to exercise that degree of care, caution, prudence and professional competence customarily exercised by medical professionals within the community; and
- In failing to act in accordance with the accepted standards of medical care in connection with the care and treatment rendered to plaintiff Heather Labance.

Plaintiff Heather Labance treated with Dr. Caban at Crystal Run on September 5, 2018 after experiencing heavy bleeding. She had a gynecologic history of two Cesarean sections, uterine fibroids, and abnormal uterine bleeding. A transvaginal ultrasound was performed, revealing a lower uterine segment fibroid. Dr. Caban identified the fibroid and prescribed Provera to control the bleeding. Plaintiff returned to Crystal Run on September 7, 2018 where she saw Dr. Landau, who referred her to defendant Dr. Brockunier for a dilation and curettage and hysteroscopy. The procedure was performed the same day at St. Anthony's Community Hospital, but Dr. Brockunier was unable to remove the fibroid. A laparoscopically-assisted vaginal hysterectomy was performed on September 8, 2018. After the hysterectomy, plaintiff experienced pain in her right flank and back, and the catheter was not filling. That evening, Dr. Brockunier cleared plaintiff for discharge. Plaintiff was discharged on September 9, 2018. The following morning, Dr. Brockunier spoke with plaintiffs and advised that plaintiffs go to the St. Anthony Community Hospital emergency room.

¹ While labeled a "Supplemental Bill of Particulars," this appears to be an Amended Bill of Particulars.

At the emergency room, Dr. Ronald Raspa, a urologist, examined the plaintiff. A CT scan was performed and damage to the right ureter was revealed. On September 10, 2018, Dr. Raspa performed a cystoscopy with right retrograde pyelogram to improve flow through the ureter; the cystoscopy was unsuccessful. Plaintiff was transferred by ambulance to Westchester Medical Center where a nephrostomy was performed. A stent was placed on September 24, 2018. The stent was replaced on November 7, 2018. The ureter was reimplemented by Dr. Wiklund at Mt. Sinai Hospital on January 15, 2019.

Motion for Summary Judgment

By Notice of Motion filed on December 22, 2020, and adjourned at the parties' request, defendants seek summary judgment. Defendants argue that the care rendered to the plaintiff Heather Labance by Dr. Brockunier did not depart from the standard of care or that any deviation was not the proximate cause of her alleged injuries.

In support of the application is the affidavit of defendant Dr. James Brockunier. Dr. Brockunier, duly licensed to practice medicine in New York State, is board certified in obstetrics and gynecology. Dr. Brockunier avers ureteral damage is a recognized risk of hysterectomy, as it is impossible to visualize the entire ureter during surgery. To safeguard the right ureter, he palpated the right side of the cervix and felt no adhesions. He directly visualized the right ureter before ligating the uterine vessels and did not visualize any injury to the right ureter. During the vaginal portion of the surgery, the area was palpated to make sure the ureters were not mispositioned. The internal operative fields were visually inspected, which were hemostatic under direct visualization. Normal anatomical surgical procedure and positioning of clamps were followed. While Dr. Brockunier could not recall whether he was aware of plaintiff's elevated creatinine level prior to discharge, her elevated creatinine level would not have been a reason to delay her discharge. Dr. Brockunier avers

that on September 10, 2018 the ureteral damage was immediately diagnosed and Dr. Raspa attempted a stent that afternoon. When that procedure was unsuccessful, plaintiff was transferred to Westchester Medical Center.

Dr. Brockunier opines, to a reasonable degree of medical certainty, that the surgery was done competently and in accordance with good and accepted gynecologic practice. Routine cystoscopy at the time of hysterectomy to check for bladder and ureter damage was not the standard of care in September 2018, and is not the standard of care now. There was no medical reason to perform a cystoscopy in connection with the surgery, as there was no indication of ureteral damage. Plaintiff's discharge on September 9, 2018 did not adversely affect the diagnosis and treatment of her ureteral injury.

Based upon the medical records; the testimony of the parties; Dr. Brockunier's affidavit, and the pleadings of this matter, defendants argue they have established entitlement to summary judgment.

Opposition

Plaintiffs argue that issues of fact exist as to whether defendant Brockunier departed from accepted standards of medical practice in failing to properly perform the laparoscopically assisted vaginal hysterectomy. Dr. Brockunier failed to diagnose the injury to plaintiff's right ureter intraoperatively, and discharged her despite her complaints of right flank and back pain, and her limited ability to urinate. Dr. Brockunier explained at his deposition, in contradiction to his operative report, that he could not visualize the distal portion of the right ureter.

In opposition, plaintiffs append the affidavit of Dr. X, a Board Certified Gynecologist. Plaintiffs' expert opines, within a reasonable degree of medical certainty, that an injury to the ureter during the performance of a laparoscopically assisted vaginal hysterectomy can occur both while

performing the laparoscopic and vaginal portion of the surgery. Dr. X avers that the injury to plaintiff's right ureter "more likely than not occurred when defendant Brockunier improperly placed a stitch during the vagina portion of the surgery." (Exhibit G)

With respect to the laparoscopic portion of the surgery, Dr. X states that "the standard of care required defendant Brockunier to trace the distal portion of the right ureter with his eyes so he had a good understanding of its location so that injury could be avoided to this area of the right ureter." Dr. X opines, to a reasonable degree of medical certainty, that defendant Brockunier departed from the accepted standards of medical practice in failing to trace the distal portion of the right ureter with his eyes so that he had a good understanding of its location and could avoid injury to plaintiff's right ureter during the laparoscopic and vaginal portions of his surgery.

With respect to the vaginal portion of the surgery, the standard of care requires the surgeon to develop an adequate vesicouterine space to protect the ureters from injury by sutures. This is done by tracing the ureter so he knows where it travels into the bladder. Dr. X opines that defendant Brockunier departed from the accepted standards of medical practice in failing to trace the distal portion of the right ureter and failing to develop an adequate vesicouterine space to prevent plaintiff Heather Labance's right ureter from entering the operative field. Dr. X opines, "BROCKUNIER'S departures from the accepted standard of medical practice in failing to trace the right ureter and in failing to create an adequate vesicouterine space which would have allowed him to palpate the right ureter, keep the right ureter out of the operative field and avoid injuring the ureter with stitches he utilized repairing the vagina." (Exhibit G)

Reply

In reply, defendants argue Dr. X's opinion is self-contradictory, speculative, and ignores the record. The record is silent as to the mechanism for the injury, as the CT report makes reference only

to the site of the injury. There is no factual basis for Dr. X's opinion that the injury "more likely than not occurred when defendant BROCKUNIER improperly placed a stitch during the vagina portion of the surgery." The evidence in the record indicates that the size and unique location of the fibroid caused displacement of plaintiff's abdominal anatomy, which made complete ureteral visualization impossible.

The Court has fully considered the submissions of the parties.

Discussion

Summary judgment is a drastic remedy, appropriate only when there is a clear demonstration of the absence of any triable issue of fact (*Piccirillo v. Piccirillo*, 156 AD2d 748 [2d Dept 1989], citing *Andre v. Pomeroy*, 35 NY2d 361 [1974]). The function of the Court on such a motion is issue finding, and not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). The function of the Court is not to resolve issues of fact or to determine credibility, but merely to determine whether such issues exist (*Kolivas v. Kirchoff*, 14 AD3d 493 [2d Dept. 2005]). In doing so, the Court is obliged to draw all reasonable inferences in favor of the non-moving party (*Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 [2d Dept 1995]). Where there is any doubt about the existence of a material and triable issue of fact, summary judgment must not be granted (*Anyanwu v. Johnson*, 276 AD2d 572 [2d Dept 2000]). However, summary judgment shall be granted where, upon all the papers and proofs submitted, the cause of action or defense is sufficiently established to warrant the court as a matter of law, in directing judgment in favor of any party (*Zuckerman v. City of New York*, 49 NY 2d 557, 52 [1980]). "Evidentiary proof must be in admissible form, and cannot be 'mere conclusions, expressions of hope or unsubstantiated allegations or assertions'" (*Javaherei v. Old Cedar Development Corp*, 84 AD3d 881, 887 [2d Dept 2011]).

In a medical malpractice action, plaintiff must prove that the physician deviated or departed from accepted community standards of practice, and that this departure was the proximate cause of plaintiff's injuries (*Stukas v. Streiter*, 83 AD3d 18 [2d Dept 2011]). A defendant physician seeking summary judgment bears the burden of making a *prima facie* showing that there was no departure from good and accepted medical practice, or any departure was not a proximate cause of the patient's injuries (*id.* at 24). A defendant medical provider may establish *prima facie* entitlement to summary judgment by submitting his or her own affidavit, or the affirmation of an expert, the deposition of the parties, and medical records (*Makin v. Torelli*, 106 AD3d 782, 784 [2d Dept 2013]). "A physician's affidavit in opposition to a summary judgment motion must attest to the departure from accepted practice and must contain an opinion that the challenged acts or omissions were a competent producing cause of the injury" (*Swezey v. Montague Rehab & Pain Management, P.C.*, 59 Ad3d 431 [2d Dept 2009]). A plaintiff's expert opinion must not be based on "hindsight reasoning" to speculate that, had more or different choices been made, the outcome may have been different (*Accord Samer v. Desai*, 179 AD3d 860 [2d Dept 2020]).

In the instant matter, defendants have made a *prima facie* showing of entitlement to judgment as a matter of law.

Dr. Brockunier opines to a reasonable degree of medical certainty that the surgery was done competently and in accordance with good and accepted gynecologic practice. Brockunier testified that he visualized the ureters "from the midportion of the ureter down to the beginning of the lower uterine segment." (Exhibit H at 34) Brockunier testified the distal portion of the ureters could not be visualized, only the upper portion. The operative report states "...ureters bilaterally were visualized as to make sure that we are not in the operative field." (Exhibit B to Opposition) When ligating the uterine vessels, the right ureter was under direct visualization. During the vaginal part

of the procedure, Dr. Brockunier palpated to make sure the right ureter was not in the area of the surgical procedure. (Exhibit H at 46) The CT scan report indicates, “Enlarged right kidney hydronephrosis and hydroureter extending to the distal one third of the right ureter wherein there is a V-shaped configuration of the distal ureter suggesting the site of the injury.” (Exhibit C to Opposition)

The defendants having met their initial burden, the burden shifts to plaintiffs to demonstrate the existence of a triable issue of fact as to those issues on which defendants have met their *prima facie* showing (*Garrett v. University Assocs. in Obstetrics & Gynecology, PC*, 95 AD3d 823 [2d Dept 2012], *Stukas v. Streiter*, 83 AD3d at 25).

Dr. X’s affidavit is insufficient to raise a triable issue of fact in opposition to defendants’ *prima facie* showing. Dr. X opines that defendant Brockunier departed from the accepted standards of medical practice in failing to trace the distal portion of the right ureter and failing to develop an adequate vesicouterine space to prevent plaintiff’s right ureter from entering the operative field. While plaintiffs’ expert opines generally as to departures from the standard of care, plaintiffs’ expert does not attest to specific departures made by these defendants. (*Benedetto v. Tannenbaum*, 186 AD3d 1596, 1598 [2d Dept 2020]) Plaintiffs’ expert makes no attempt to dispute Dr. Brockunier’s assertions regarding the inability to observe the distal portion of the right ureter during surgery.² He opines that plaintiff’s injury occurred, “more likely than not” when Dr. BROCKUNIER improperly

²Dr. X suggests that Dr. Brokunier contradicted his operative report when he testified at deposition that he was unable to visualize the distal portion of the right ureter, and thereafter he palpated them to ensure they were out of the operative field. The operative report states that the ureters bilaterally were visualized to make sure they were not in the operative field. The Court does not discern a meaningful difference, much less a contradiction. But even if it were, Dr. X fails to explain how that difference—visualization, followed by palpation—was a departure.

placed a stitch during the vaginal portion of the surgery, the injury which he also agrees “can occur while performing....the surgery.” Rather, Dr. X concludes, without reference to the medical evidence, that Dr. BROCKUNIER failed “to trace the distal portion of the right ureter with his eyes such that he had a good understanding of its location...” Without having refuted Dr. BROCKUNIER’s assertion that the distal portion of the ureter could not be visualized, such a conclusion is nothing more than speculation.

Plaintiffs’ expert opinion must not be based on “hindsight reasoning” to speculate that, had more or different choices been made, the outcome may have been different (*Accord Samer v. Desai*, 179 AD3d 860 [2d Dept 2020]). “Evidentiary proof must be in admissible form, and cannot be ‘mere conclusions, expressions of hope or unsubstantiated allegations or assertions’” (*Javaherei v. Old Cedar Development Corp*, 84 AD3d 881, 887 [2d Dept 2011]).

The defendants have sufficiently established entitlement to summary judgment. The plaintiffs have failed, by admissible evidence, to raise a triable issue of fact. (*Benedetto*, 186 AD3d at 1598)

On the basis of the foregoing, it is

ORDERED that the defendants’ application for summary judgment is granted and the complaint is dismissed

All matters not decided herein are denied.

This decision shall constitute the order of the Court.

Dated: July 14, 2021
Goshen, New York

ENTERED:

SANDRA B. SCIORTINO, J.S.C.

To: *Counsel of Record via NYSCEF*