

**Landy v Checo**

2021 NY Slip Op 33366(U)

April 2, 2021

Supreme Court, Nassau County

Docket Number: Index No. 600542/2019

Judge: Christopher G. Quinn

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**SHORT FORM ORDER**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU CIVIL TERM PART 22**

Present: HON. CHRISTOPHER G. QUINN  
Justice of the Supreme Court

**ROBERT LANDY and AMY LANDY,**

Plaintiff,

-against-

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MOTION SEQ. C-001 - MG  
MOTION SEQ. C-002 - MG  
MOTION SEQ. C-003 - MD  
MOTION SEQ. C-004 - MG  
MOTION SEQ. C-005 - MD

FERNANDO CHECO, M.D., SACHIN SHAH, M.D.,  
SHURIZ HISHMEH, M.D., THE CENTRAL ORTHOPEDIC  
GROUP, LLP, NEUROLOGICAL SURGERY, P.C., SHURIZ  
HISHMEH, M.D., PLLC, PLAINVIEW HOSPITAL, NYU  
WINTHROP HOSPITAL, and MERCY MEDICAL CENTER,

Defendants.

The following papers were read on this motion:

- (1) Mercy Medical Center Notice of Motion/Affirmations/Exhibits A-R
- (2) Winthrop Notice of Motion/Affirmation/Exhibits A-U
- (3) Hishmeh Notice of Motion/Affirmation/Affidavit/Exhibits A-T
- (4) Plainview Notice of Motion/Affirmation/Exhibits A-O
- (5) Shah Notice of Motion/Affirmation/Exhibits A-O
- (6) Affirmations in Partial Opposition/Exhibits
- (7) Mercy Reply
- (8) Plainview Reply
- (9) Hishmeh Reply
- (10) Shah Reply

In this matter the plaintiff is seeking damages for injuries allegedly sustained due to the malpractice and or negligence of the defendants. Defendants MERCY MEDICAL CENTER, NYU WINTHROP HOSPITAL, SHURIZ HISHMEH, M.D., SHURIZ HISHMEH, M.D., PLLC,

PLAINVIEW HOSPITAL, SACHIN SHAH, M.D. and THE CENTRAL ORTHOPEDIC GROUP, LLP all seek orders granting them summary judgment pursuant to CPLR §3212. Counsel for the plaintiff opposes the motions.

On or about March 9, 2018 plaintiff began seeing defendant CHECO at the CENTRAL ORTHOPEDIC GROUP with complaints of pain to his lower back and right hip pain. He was examined by CHECO and underwent x-rays. He was diagnosed with lumbar radiculopathy, lumbar spinal stenosis and lumbar spondylosis, all relating to arthritis of the spine (MERCY Motion, Exh. L). Plaintiff was prescribed Motrin and given an injection of Toradol.

Thereafter, plaintiff underwent an MRI on March 12, 2018, which revealed disc desiccation and a loss of disc height at L5-S1 and L1-L2 with moderate central canal stenosis, bulging, herniations and a cystic lesion (HISHMEH Motion, Exh. P).

Plaintiff saw CHECO again on March 16, 2018 with continued complaints of pain. He was prescribed physical therapy, restrictions and medication. The plaintiff declined an additional injection (HISHMEH Motion, Exh. P). The records reveal additional visits and treatment on April 9, 2018, April 14, 2018 and May 11, 2018.

Plaintiff went to the Emergency room at PLAINVIEW HOSPITAL on July 18, 2018 with severe back pain. An MRI revealed severe stenosis at L1-L2 and a herniated disc on the right at L3-L4 (WINTHROP, Exh. S). After consulting with CHECO, the plaintiff decided to proceed with surgery to alleviate the problem, a laminectomy. CHECO testified at his deposition that he discussed all of the risks with the plaintiff including risks of re-herniation, dural tear, back pain called post laminectomy syndrome and the need for future surgeries (WINTHROP Motion, Exh M).

Plaintiff underwent spinal surgery performed by CHECO and assisted by DR. SHAH on July 20, 2018 at PLAINVIEW HOSPITAL. He had a bilateral laminectomy at L1-L2 and a partial laminectomy on the right side at L3-L4. Plaintiff was treated as an outpatient with CHECO on July 21, 25, 28, 2018 and August 3, 8, 2018, during which time there were no signs

of cerebrospinal fluid (“CSF”) leakage or symptomology. On August 13, 2018, the plaintiff complained of fluid buildup, at which time CHECO testified he aspirated the area. This was repeated on August 15, 2018.

On August 17, 2018 the plaintiff again complained of fluid build up and a headache. CHECO told the plaintiff to go to MERCY MEDICAL CENTER for an MRI to see if there was a dural tear. Thereafter, CHECO wanted to schedule a blood patch to be performed outpatient to repair any dural tear. On August 22, 2018 CHECO saw plaintiff again, fluid was aspirated and the plaintiff still had some headaches as symptoms. A test of the fluid was performed and the results revealed that there was CSF fluid. CHECO recommended revision surgery to plaintiff and testified that he explained all the risks of such a procedure.

On August 24, 2018, CHECO saw the plaintiff at NYU WINTHROP. Laminectomy Revision surgery was scheduled, at CHECO’s request, for August 25, 2018. CHECO requested defendant HISHMEH assist him. CHECO testified that they found the dural tear during the surgery and it was repaired, and no intraoperative complications were encountered.

Plaintiff claims that he remained at WINTHROP under CHECO’s care. He was seen by neurosurgery and orthopedic Physicians Assistants. He had a consult with a urologist and cardiologist. Plaintiff claims that while there, he experiences symptoms, and complained of urinary retention, constipation and perianal anesthesia. He states CHECO told him these were likely related to surgical manipulation and post operative edema. A psychiatry consult was performed and it was noted that the plaintiff experienced anxiety and depression before his admission to WINTHROP, including problems with sleeping, concentration, energy and appetite.

The plaintiff was discharged on September 2, 2018. Prior to discharge he was examined by neurology. This treatment plan included updates with urology, cardiology, plastic surgery and psychiatry as well as with CHECO. Plaintiff’s medical records reveal continued complaints of numbness to the perianal area as well as bowel and bladder difficulties. He also reported

problems with urination and an inability to obtain an erection. CHECO recommended an EMG which plaintiff refused.

Plaintiff brings this Complaint alleging that he suffers injuries, including sacral nerve dysfunction with saddle anesthesia, urinary retention, bowel dysfunction and erectile dysfunction as a result of the defendants' negligence and/or malpractice (Plaintiff Opposition).

WINTHROP, MERCY and PLAINVIEW all seek summary judgment dismissing the claims against them. Counsel for plaintiff does not oppose any of these applications.

Based on the proof and arguments presented, the motion of WINTHROP, MERCY and PLAINVIEW are Granted. CPLR § 3212.

Defendants SHAH and NEUROLOGICAL SURGERY also seek summary judgment dismissing the claims against them. The movants argue that there is no proof that these defendants departed from good and accepted medical practice in their treatment of the plaintiff. Counsel for SHAH argues that since his client was only brought in to do the surgery by CHECO, he has no responsibility to personally evaluate the patient post-operatively at PLAINVIEW HOSPITAL. They argue that participating in the surgery does not create a further duty to participate in the plaintiff's postoperative care [*Micciola v. Saachi*, 36 AD3d 869 (2<sup>nd</sup> dept 2007); *Bettencourt v. Long Island College Hosp., Inc.*, 306 AD2d 425 (2<sup>nd</sup> Dept 2003)].

As to Dr. SHAH, plaintiff opposes alleging that there were two departures from good and accepted medical practice which resulted in or exacerbated his injuries. Plaintiff offers a medical expert affidavit which states that the defendant SHAH's departures were (1) the surgical technique used during the July 20, 2018 surgery and (2) the timing of the diagnoses of the dural tear and CSF leak post-operatively. As to the remainder of the plaintiff's claims against the defendant SHAH and NEUROLOGICAL SURGERY, those claims are dismissed.

Defendant HISHMEH also seeks an Order granting summary judgment to him and his practice. Counsel for HISHMEH, like SHAH, contends that since his client was only brought in

to do the surgery by CHECO, he has no responsibility to personally evaluate the patient post-operatively at WINTHROP. He also argues that participating in the surgery does not create a further duty to participate in the plaintiff's postoperative care. HISHMEH provides an expert affirmation which states that there is no evidence of a departure from good and accepted medical practice in HISHMEH's treatment of the plaintiff prior to, during, or after the revision surgery at WINTHROP (Motion, Exh. A). He further opines that there is no evidence HISHMEH caused, created or exacerbated plaintiff's injuries.

As to HISHMEH, plaintiff opposes alleging that there is evidence of departures from good and accepted medical practice by this defendant. Counsel for the plaintiff notes that HISHMEH testified at his deposition that the plaintiff reported headaches that were medically significant, as they could represent an infection or CFS leak. Counsel also notes that HISHMEH testified that he had no recollection of the plaintiff or the surgery.

HISHMEH testified that he did not necessarily see the plaintiff after the surgery while he was still at WINTHROP. The records indicate that HISHMEH saw the plaintiff at WINTHROP in September, noting his continued catheterization and numbness and that he never formed an opinion as to the cause.

The elements of proof in a medical malpractice action are (1) departure from accepted practice and (2) evidence that such a departure was a proximate cause of injury or damage [*Bloom v. City of New York*, 202 A.D.2d 465 (2<sup>nd</sup> Dept. 1994)]. An affidavit of a medical expert stating an opinion that defendant physician was negligent and that negligence harmed plaintiff, when accompanied by the specific factors used as the basis of that opinion, is sufficient to raise a triable issue of fact [*Menzel v. Plotnick*, 202 A.D.2d 558 (2<sup>nd</sup> Dept. 1994)]. Here, plaintiff has provided such an affidavit.


Although counsel for defendants argue that the claims against both SHAH and HISHMEH should be dismissed, the Court cannot agree. According to the deposition testimony of the parties, including the defendants, plaintiff met with both of these physicians regarding the procedure they participated in. Both defendants were advised by the plaintiff of his complaints

and symptoms. A trier of fact could find that SHAH was negligent in failing to recommend additional testing to determine if there was a CSF leak. HISHMEH's expert does not specifically set forth what applicable standard of care he relies upon to determine no departure by their defendant. Plaintiff's expert, a board certified neurologist, states that HISHMEH did not take proper precautions during the surgery to prevent nerve damage nor did he perform necessary post-operative exams to investigate damage which could have been corrected (Opposition, Exh. A).

Although counsel claims that since plaintiff's expert did not specifically address each alleged departure of each defendant. The Court disagrees. It is clear from defendant HISHMEH's testimony that plaintiff's symptoms and complaints were all noted to be addressed, and treated in the same and continued course of treatment. A trier of fact could find that he departed from good and accepted medical standards in treating the polaintiff during surgery and in his lack of follow up care [*Henry v. Bronx Lebanon Med. Ctr.*, 53 AD2d 476 (1<sup>st</sup> Dept 1976)].

Summary judgment is a drastic remedy which should be employed only when there is no doubt regarding the absence of triable issues [*Marine Midland Bank, N.A. v. Bullard Orchards Inc.*, 140 AD2d 870 (3<sup>rd</sup> Dept. 1988)]. Based on the proof and arguments presented the motions of both SHAH and HISHMEH, with their related corporate entities, are Denied

It is **SO ORDERED**.



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HON. CHRISTOPHER G. QUINN, J.S.C.

Dated: April 2, 2021

**ENTERED**

**Apr 05 2021**

NASSAU COUNTY  
COUNTY CLERK'S OFFICE