

**Walsh v Resnick**

2021 NY Slip Op 33464(U)

August 5, 2021

Supreme Court, Orange County

Docket Number: Index No. EF004132-2019

Judge: Sandra B. Sciortino

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This opinion is uncorrected and not selected for official publication.

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

**DALE WALSH,**

Plaintiff,

**DECISION AND ORDER**  
**INDEX NO.: EF004132-2019**  
**Motion Date: 6/10/21**  
**Sequence No. 3**

-against-

**EPHRAIM RESNICK, M.D., HIGHLAND  
MEDICAL, P.C., ROBERT FISHER, M.D.,  
JAMES RIELLY, M.D., and MONTEFIORE  
NYACK HOSPITAL,**

Defendants.

-----X

**SCIORTINO, J.**

The following papers numbered 1 to 22 were considered in connection with the unopposed motion of defendant JAMES RIELLY, M.D. for summary judgment:

PAPERS

NUMBERED

Notice of Motion/Statement of Material Facts/Affirmation (McElrath)/  
Memorandum of Law/Exhibits A; B-1 through B5; C; D-1  
through D-2; E-1 through E-2; F-1 through F-2; G-1 through  
G-3; H-1 through H-2

1 - 22

**Background**

This action for medical malpractice arises out of a medical procedure performed on March 14, 2018 at Montefiore Nyack Hospital (Nyack). That day, defendant EPHRAIM RESNICK, M.D. (Resnick) performed a total laparoscopic hysterectomy; bilateral salpingo-oophorectomy, and right pelvic node dissection for treatment of plaintiff's well-differentiated endometrial cancer. While doing so, Resnick noticed bleeding and called for a vascular surgeon; moving defendant JAMES RIELLY, M.D. (Rielly) responded. Rielly arrived at the operating room at approximately 2:00 p.m., more than

two hours after the procedure began. The plaintiff was in a supine position, unconscious and under anesthesia. Resnick had already converted the procedure from laparoscopic to open. Rielly identified and sutured a laceration to plaintiff's right internal iliac vein, a procedure which took approximately twenty (20) minutes. The plaintiff remained in supine position. Rielly then left the operating room and had no further involvement in plaintiff's care or treatment.

### Procedural History

This matter was commenced by the filing of a Summons and Verified Complaint (Exhibit A) on May 23, 2019. The Complaint asserts two causes of action: first, medical malpractice arising out of allegedly inadequate surgical care; and, second, lack of informed consent. It is asserted that the defendants caused injury and nerve damage to plaintiff's right perineal nerve as a result of poor positioning. Rielly's Answer was filed on June 24, 2019. (Exhibit B) On or about November 5, 2020, Rielly's attorney forwarded a proposed stipulation of discontinuance to plaintiff's counsel, based on the absence of substantive factual or medical support for medical malpractice or lack of informed consent. The proposed stipulation was rejected. (Exhibits F-1 and F-2)

The Note of Issue has not yet been filed.

By Notice of Motion filed May 4, 2021, Rielly seeks summary judgment dismissing the complaint as against him. Plaintiff's Bill of Particulars to Rielly (Exhibit D) contains allegations relating to the plaintiff's surgical positioning and failures relating to plaintiff's post-surgical care. Rielly asserts that, "distilled to their essence" plaintiff's claims assert that all defendants, including Rielly, failed to appreciate the medical significance of the extended duration of plaintiff's surgery and her being in the dorsolithotomy position for more than two hours. (McElrath Affirmation at ¶12)

Rielly asserts that he was not present at the commencement or the end of plaintiff's surgical procedure; nor did he serve any role or participate in any aspect of plaintiff's care, except for

performing a repair of the plaintiff's intra-operative lacerated vein. It is not disputed that Rielly's limited role was performed in conformance with good and accepted standards of medical care. Nor was there any issue regarding plaintiff's positioning that arose while Rielly was involved with plaintiff's care. Rielly's limited responsibility as a consulting surgical specialist did not include patient positioning or any other conduct which occurred before or after the brief period of his attendance. Rielly contends by affidavit that his limited services were properly provided.

Plaintiff's claims against Rielly extend beyond the duties of a consulting surgical specialist whose sole interaction with plaintiff was of a limited scope and duration. His duty of care to plaintiff is limited only to those medical functions which he undertook, none of which had anything to do with the positioning of the plaintiff during her surgery. Where he was not involved in that aspect of plaintiff's care, liability may not be imposed against him. Nor may any theory of vicarious liability be imposed against him as there is an absence of any evidence supporting the existence of a relationship between Rielly and any other named provider. Finally, a limited exigent surgical consultation role, in an instance where the patient was unconscious and could not give consent, cannot provide the foundation for a claim of lack of informed consent in the absence of evidence of an independent departure from standards of good and accepted medical care.

No opposition was filed.

### Discussion

#### Summary Judgment

Summary judgment is a drastic remedy, and is 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 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]) The Court must 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, 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 [1980])


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 seeking summary judgment in a medical malpractice action bears the burden of making a *prima facie* showing that there was no departure from good and accepted medical practice, or that the plaintiff was not injured thereby. (*id.* at 24) A physician's duty to a patient is limited to those medical functions undertaken by the physician and relied on by the patient. Liability is not imposed upon a care provider when that defendant is "not involved in this aspect of [the patient's] care." (*Wasserman v. Staten Island Radiological Assoc.*, 2 AD3d 713, 714 [2d Dept 2003])

In the instant matter, Rielly has made a *prima facie* showing that the limited services he performed fell within the applicable standards of care at all times, and that no act or omission on his part contributed to plaintiff's alleged injuries. Such a showing sufficiently demonstrates that Rielly was not negligent in treating plaintiff.

Neither plaintiff nor the co-defendants have raised any issues of fact in opposition to Rielly's position. On the basis of the foregoing, Rielly's motion for summary judgment is granted.

This decision shall constitute the order of the Court.

Dated: August 5, 2021  
Goshen, New York

ENTER:  
  
HON. SANDRA B. SCIORTINO, J.S.C.

To: *Counsel of Record via NYSCEF*