SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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DENISE QUATTRUCCI and BERNARD QUATTRUCCI,

DECISION and ORDER
Index No. 21549/2015E

Plaintiffs,

- against -

JOHN JAMES STARKE, D.O., KAMRAM TABADDOR,M.D.,CHRISTOPHER ADUBOR, M.D., STEPHEN KLASS, M.D., EMERGENCY MEDICAL ASSOCIATES, PLLC, MONTEFIORE NEW ROCHELLE HOSPITAL, and WESTCHESTER SQUARE PHYSICAL THERAPY, P.C.,

Defendants.
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Doris M. Gonzalez, J.

In Motion Sequence No. 3, defendants CHRISTOPHER ADUBOR, M.D., and STEPHEN KLASS, M.D. move pursuant to CPLR 3212 for summary judgment dismissing the supplemental summons and amended verified complaint and this action. In Motion Sequence No. 4, defendants JOHN JAMES STARKE, D.O., and EMERGENCY MEDICAL ASSOCIATES, PLLC, move for the same relief. In Motion Sequence No. 5, defendants KAMRAN TABADDOR, M.D. and MONTEFIORE NEW ROCHELLE HOSPITAL similarly move for the same relief. Plaintiffs oppose the motions.

The complaint in this medical malpractice action alleges, generally that the defendants failed to timely diagnose and treat plaintiff's back condition – i.e., cauda equine syndrome ("CES") – resulting in permanent injuries. Specifically, at 9:08 PM on February 15, 2014, plaintiff Denise

Quattrucci,[1] then 53 years old, arrived at Montefiore New Rochelle Hospital emergency department ("ED"), complaining of lower back pain and bilateral leg pain/weakness. Defendant Dr. John Starke,[2] the ED physician on duty at the time of the plaintiff's arrival, performed a neurological examination, and in addition, ordered a CT scan of the plaintiff's lumbar spine without contrast, which was performed at 9:40 PM. The CT scan revealed a broad-based disc bulges at L3/L4, with central canal narrowing.[3]

Soon after plaintiff arrived at the ED, defendant Starke contacted defendant Adubor, plaintiff's primary care physician. Dr. Adubor requested that Dr. Starke obtain neurological and neurosurgical consultations. Dr. Starke sought a consult from on-call neurosurgeon Dr. Tabaddor, who stated that he did not think plaintiff had either acute cord compression or cauda equina syndrome based on her symptoms, as plaintiff was able to void urine, and did not present with "saddle anesthesia."

At 9:00 AM on February 16, neurologist defendant Dr. Stephen Klass examined plaintiff. Dr. Klass performed a physical exam and noted that Ms. Quattrucci's history and clinical exam were not characteristic of spinal cord, but instead, were characteristic of cauda equina syndrome. Dr. Klass also recommended an MRI for further evaluation.

During the day on February 16, Dr. Starke had further discussions with Dr. Adubor and Dr. Tabaddor. A decision was made to admit plaintiff for Magnetic Resonance Imaging ("MRI"),[4] pain management, and further investigation. At 8:47 PM that evening, Dr. Adubor, noted that plaintiff was not getting any pain relief with Morphine, that she was exhibiting diminished strength of the

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[1] "Plaintiff" herein refers to plaintiff Denise Quattrucci, unless otherwise indicated. Plaintiff Bernard Quattrucci sues derivatively for loss of services.
[2] Dr. Starke was an employee of defendant Emergency Medical Associates.
[3] The ED record reflects that plaintiff's past medical history included spinal stenosis and a bulging disc.
[4] The MRI would have to be performed at an outside facility, as the defendant hospital did not have an MRI department.

musculoskeletal system, that sensation was intact, that she was exhibited a sudden onset of paraplegia, and that a neurosurgery consult was ordered. A patient admit order was placed by Dr. Starke at 11:56 PM. Dr. Starke had no further involvement in the care and treatment of plaintiff. The admission note reflects the plan was to rule out cord compression and severe spinal stenosis.

The following morning, on February 17, 2014 at 10:05 AM, Dr. Adubor noted that plaintiff had no new complaints, and that she continued to demonstrate diminished musculoskeletal strength and severe paraparesis, and that that they were awaiting an MRI and neurosurgery evaluation. At 5:26 PM, Dr. Tabaddor saw plaintiff and provided an in-patient neurosurgery consult. Dr. Tabaddor added a notation to the record that plaintiff had "weakness of her feet 5 days ago but she was able to walk until 2 night ago when she need help to ambulate." Dr. Tabaddor recommended a decompressive laminectomy and internal fixation/stabilization.

An MRI was performed at an outside facility on February 18. The MRI showed a large herniated disc at L3/L4 with cauda equina compression. Dr. Adubor also noted that there was a small chance for improvement of the distal muscles, but an expectation that the surgery could prevent further cauda equina damage. On February 19, surgery was performed. On February 22, 2014, was discharged for short-term rehabilitation at non-party Burke Rehabilitation Hospital.

In support of their motion, defendant Adubor argues that he, as the attending internist, did not confer upon have a duty to involve himself in additional treatment of a specialized nature, and that he appropriately obtained consultations from neurology and neurosurgery specialists. This argument is supported by the expert affirmation of Dr. Winters, a physician who is board-certified in internal medicine, who opines that Dr. Adubor's care and treatment of the patient was at all times in accordance with good and accepted medical practice. Dr. Winters further states that Dr. Adubor was entitled to rely on the specialists' opinions, because he was neither a neurologist nor a neurosurgeon himself, and that it was reasonable and entirely within the standard of care for Dr.

Adubor to defer to the examination and opinion of the neurosurgery specialist as to whether there existed the need for neurosurgical intervention, and if so, when.

Dr. Klass maintains that he saw plaintiff on one occasion, as a consultant, at Montefiore-New Rochelle on February 16, 2014, and he argues that this single neurological consultation did not render him responsible for plaintiff's subsequent care. In support of his arguments, Dr. Klass submits the affirmation or Dr. Segal, a physician who is board-certified in internal medicine and neurology. Dr. Segal explains that defendant Klass conformed to good and accepted medical practice and did not proximately cause or contribute to plaintiffs' claimed injuries and damages. Dr. Segal opines that Dr. Klass concurred with the plan to obtain an MRI of the lumbar region and the possible use of a short course of steroids, which he posits was sound medical reasoning within the standard of care, and further, that the ultimate decision about whether surgical intervention was warranted was within the purview of the neurosurgeon, Dr. Tabaddor, who had been consulted while the patient was in the emergency room, and had concluded hat emergency surgery was not required.

In support of the motion for summary judgment on behalf of Dr. Starke and Emergency Medical Associates, defendants have submitted the affirmation of Dr. Robert, a physician licensed to practice medicine in the State of New York and board certified in emergency medicine. Dr. Leviton has reviewed the records, testimony and bills of particulars, and he opines that the care and treatment provided by Dr. Starke to the plaintiff in the ER was in accordance with accepted standards of medical practice, and that no act or omission on the part of Dr. Starke was a proximate cause of any injury to the decedent or his death. Dr. Starke argues that was entitled to rely upon Dr. Tabaddor 's consultation, and that, in the absence of some reason why Dr. Starke should have disregarded the consult that he sought and obtained, Dr. Starke was entitled to rely upon the consulting specialist.

Dr. Tabaddor relies on his own expert affidavit in arguing that in the absence of bowel or bladder incontinence, decreased rectal tone, or loss of lower extremity function, it was appropriate to wait for an MRI, and to further evaluate the plaintiff's condition. Further, the L3-L4 laminotomy and microdiscectomy was timely in that it was performed on February 19, the day after the MRI was performed. He opines that the standard of care requires that a neurosurgeon evaluate a spinal MRI before proceeding with decompressive surgery so that the lesion can be appropriately identified prior to surgery. He further opines that the diagnosis and treatment of plaintiff's cauda equina syndrome was timely based on the fact that plaintiff's cauda equina compression was caused by bulging of the discs between vertebrae, rendering it a "static" form of compression, meaning it was not progressing further, in contrast to compression caused by a hematoma or an infectious process, which would become larger until surgical decompression was performed.

In opposition, plaintiff's expert states that the defendants each suspected CES, but nevertheless delayed obtaining an MRI and thus failed to ascertain the need for immediate surgical intervention. He states that when a patient presents with urinary and/or bowel symptomology (because urination is more frequent than defecation, the diagnosis is more often based on urinary issues), sciatica and/or back pain, it is imperative that an MRI be performed immediately. Dr. Starke departed from proper practice by failing to timely obtain an MRI because plaintiff was retaining urine ("a telltale sign of CES"), and the fact that she was eventually able to urinate, or that she did so after receiving pain medication, did not negate the fact negate that she was in urinary retention (a symptom of bladder dysfunction). Further, the CT scan revealed a new disc bulge at L3 with central canal narrowing. Thus, the plaintiffs' expert opines that Dr. Starke departed from acceptable practice in admitting the plaintiff to a hospital which lacked MRI facilities, or otherwise obtain an

immediate MRI. He also states that Dr. Starke deviated from accepted practice in admitting the plaintiff to the hospital without a proper neurosurgical consult.

Plaintiffs' expert opines that defendant Adubor departed from the standard of care when he failed to order and obtain an MRI of the patient's spine on a stat basis. Absent an MRI, he opines, a surgeon would not be able to determine the need for surgery, its timing, nor the precise location of the pathology to be operated on. This raises an issue of fact as to a departure.

As to Dr. Klass, plaintiffs' expert opines that a proper neurosurgical consultation was required at the outset. The lack of such recommendation, and the failure to push for an immediate MRI, he opines, is explained by Dr. Klass's testimony that he did not believe emergency surgery was required. The plaintiffs' expert opines that whether surgery is to be performed and on what basis is solely within the discretion of a surgeon. Dr. Klass allowed his opinion as to the need for surgery to negatively affect the patient's treatment plan.

As to Dr. Tabaddor, plaintiffs' expert opines that Dr. Tabaddor departed from the standard of care in failing to see the patient immediately upon the initial requests for neurosurgical consultation, failing to obtain an urgent MRI to evaluate the nature of the patient's injury and as an aide in making the determination for the necessity and type surgery, in delaying the performance of surgery to well beyond what is considered acceptable response time. "CES should have been on the neurosurgeon's differential diagnosis and led him to immediately come to evaluate the patient." In fact, Dr. Tabaddor did not examine the patient almost 48 hours after she arrived at the hospital [10:05 a.m. on February 17, 2014], which was "well beyond what comports with the standard of care." Moreover, he failed to obtain an MRI on an emergency basis, and delayed surgery even after the MRI results were known.

Analysis

"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 A.D.3d 1, 3, 5 N.Y.S.3d 92, 93, [1st Dept. 2015] [citation omitted]). If a defendant in a medical malpractice action establishes prima facie entitlement to summary judgment, by a showing either that he or she did not depart from good and accepted medical practice or that any departure did not proximately cause the plaintiff's injuries, plaintiff is required to rebut defendant's prima facie showing "with medical evidence that defendant departed from accepted medical practice and that such departure was a proximate cause of the injuries alleged." (*Pullman v. Silverman*, 125 A.D.3d 562, 562, 5 N.Y.S.3d 38 [1st Dept. 2015], aff'd 28 N.Y.3d 1060, 66 N.E.3d 663, 43 N.Y.S.3d 793 [2016]; s*ee Scalisi v. Oberlander,* 96 A.D.3d 106, 120, 943 N.Y.S.2d 23 [1st Dept. 2012].)

Each of the defendants has made a prima facie showing of entitlement to judgment as a matter of law by submitting medical records, deposition testimony, and the affirmation of an expert demonstrating that the defendants did not depart from accepted medical practice. (*See e.g. Kristal R. v. Nichter*, 115 AD3d 409, 411, 981 N.Y.S.2d 399 [1st Dept. 2014]).

The burden thus shifts to the plaintiff to demonstrate otherwise. A plaintiff's expert's opinion "must demonstrate 'the requisite nexus between the malpractice allegedly committed' and the harm suffered" (*Dallas-Stephenson v Waisman*, 39 A.D.3d 303, 307, 833 N.Y.S.2d 89 [1st Dept. 2007]). If "the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation . . . the opinion should be given no probative force and is insufficient to withstand summary judgment" (*Diaz v New York Downtown Hosp.*, 99 N.Y.2d 542, 544, 784 N.E.2d 68, 754 N.Y.S.2d 195 [2002]; *Giampa v Marvin L. Shelton, M.D., P.C.*, 67 A.D.3d 439, 886 N.Y.S.2d 883

[1st Dept. 2009]). Further, the plaintiff's expert must address the specific assertions of the defendant's expert with respect to negligence and causation (*see Foster-Sturrup v Long*, 95 A.D.3d 726, 728-729, 945 N.Y.S.2d 246 [1st Dept. 2012]).

The plaintiffs' expert affidavit raises issues of fact as to all defendants. To the extent each of the defendants, other than Dr. Tabaddor, argues that he was relying on the other physicians in the exercise of their expertise, plaintiffs' expert raises issues of fact as to whether a proper neurosurgical consultation for a suspected CES can only comport with the standard of care if a physical examination is performed, coupled with review of an MRI, and thus whether each of the defendants should have recognized the need to perform an immediate MRI.

As to the claim against defendant Starke that Dr. Starke failed to transfer plaintiff to another facility for care and treatment, defendant argues that plaintiff improperly raises new theories of malpractice in opposition to summary judgment. Clearly, a plaintiff cannot defeat a summary judgment motion that made out a prima facie case by asserting, without more, a new theory of liability for the first time in the opposition papers. (*Biondi v Behrman*, 149 A.D.3d 562, 2017 N.Y. App. Div. LEXIS 2977 [1st Dept. 2017] [as plaintiff's opposition papers were insufficient absent this new theory of recovery, defendants' summary judgment motion should have been granted]; *Abalola v. Flower Hosp.*, 44 A.D.3d 522, 522, 843 N.Y.S.2d 615, 616 [1st Dept. 2017] [plaintiff's physician expert improperly raised, for the first time in opposition to the summary judgment motion, a new theory of liability that had not been set forth in the complaint or bills of particulars]; *Concepcion v City of New York*, 139 A.D.3d 606, 33 N.Y.S.3d 28 [1st Dept. 2016].) Here, however, the alleged "new theories" are not in fact "new theories," because they were in fact encompassed by the claims raised in the plaintiff's bill of particulars, which alleges that Dr. Starke "failed to promptly and properly perform adequate, proper, and sufficient tests including MRI scans." This was sufficient to encompass the present claim. (*Mackauer v. Parikh*, 148 A.D.3d 873,

49 N.Y.S.3d 488 [2d Dept. 2017] [plaintiff's theory that defendant failed to diagnosis him with appendicitis was adequately set forth in his supplemental bill of particulars and, therefore, was not a new theory of liability raised for the first time in opposition to the defendant's motion; the failure-to-diagnose theory was a claim that the defendants anticipated and addressed in their motion for summary judgment].)

Plaintiffs' expert opines that defendant Adubor departed from the standard of care when he failed to order and obtain an MRI of the patient's spine on a stat basis. Absent an MRI, he opines, a surgeon would not be able to determine the need for surgery, its timing, nor the precise location of the pathology to be operated on. This raises an issue of fact as to a departure.

As to Dr. Klass, plaintiffs' expert raises issues of fact as to whether he failed to properly address the suspected CES.

As to Dr. Tabaddor, plaintiffs' expert raises issues of fact as to whether a proper consultation was performed, and whether he failed to obtain an MRI on an emergency basis, and delayed surgery even after the MRI results were known.

"Summary judgment is not appropriate where the parties adduce conflicting medical expert opinions, as such issues of credibility can only be resolved by a jury." (*Contreras v Adeyemi*, 102 A.D.3d 720, 721, 958 N.Y.S.2d 430, 431 [2d Dept. 2013] [citations omitted].) Here, each of the defendants' claims is countered by conflicting medical evidence.

Plaintiffs have opposed dismissal of their Second Cause of Action sounding in failure to obtain an informed consent. Accordingly, plaintiff cause of action for failure to obtain an informed consent should be dismissed with prejudice as a matter of law. A claim not addressed and argued in opposition to summary judgment should be deemed abandoned. (*See, e.g., Stewart v. Loudonville*, 210 A.D.2d 568, 569, 620 N.Y.S.2d 149 [3d Dept. 1994] [holding that plaintiffs failure to present evidence].)

To the extent that the plaintiffs argue that certain reply papers were filed in an untimely manner, those papers have been considered in the absence of demonstrable prejudice to the plaintiffs, and in view of the fact that the untimely filing was not willful.

Accordingly, it is

ORDERED that the respective motions are motion granted only to the extent of dismissing the cause of action alleging lack of informed consent, and the motions are otherwise denied.

This is the Decision and Order of the Court.

Dated: 1/18/2022

Doris M. Gonzalez, J.S.C.