

**Morrison v Roberson-Jasper**

2022 NY Slip Op 33996(U)

November 22, 2022

Supreme Court, New York County

Docket Number: Index No. 805101/2013

Judge: Debra A. James

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. DEBRA A. JAMES**

**PART 59**

*Justice*

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ROBERT MORRISON, as Administrator of the Estate of  
PETRALINE JOSEPH, Deceased,

Plaintiff,

**INDEX NO. 805101/2013**

**MOTION DATE 10/02/2020**

**MOTION SEQ. NO. 006 007**

- v -

NANCY ROBERSON-JASPER, JEREMY S POPPERS, The  
NEW YORK and PRESBYTERIAN HOSPITAL, and  
INTUITIVE SURGICAL, INC. D/B/A DA VINCI SURGICAL  
SYSTEMS,

Defendants.

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 272, 273, 277, 279, 281, 283, 284, 285, 286, 287, 288, 289, 290, 299, 316, 317

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 274, 275, 276, 278, 280, 282, 291, 292, 293, 294, 295, 296, 297, 298, 300, 301, 302, 303, 304, 305, 314

were read on this motion to/for DISMISSAL.

ORDER

Upon the foregoing documents, it is

ORDERED the motion of defendant Nancy Roberson-Jasper (motion sequence number 006) for summary judgment dismissing the complaint against her is granted only to the extent of the claims of any departures concerning (i) failure to obtain consults in neurology and/or cardiology, preoperatively; (ii) negligently selecting a robotic assisted hysterectomy over a myomectomy or medical management, pre-operatively; (iii)

participation of the resident physician in the robotic assisted surgery; (iv) failure to arrange for the presence of a representative from the robot manufacturer during the surgery; (v) failure to perform a diagnostic echocardiogram; (vi) negligent or careless use of the robotic assisted technology; (vii) failure to properly and timely lyse adhesions; (viii) failure to convert to an open surgery procedure in order to visualize the surgical field and identify anatomical structures and landmarks; (ix) failure to institute immediate corrective measures to reverse complications arising intra-operatively; (x) failure to timely identify anatomical landmarks and structures; (xi) failure to adequately angle the laparoscope; (xii) failure to recognize neurological deficits exhibited by patient Joseph immediately following the surgery; (xiii) failure to timely and properly diagnose patient Joseph's cerebral infarct; (xiv) failure to conduct timely, thorough and proper radiologic and diagnostic studies of patient Joseph; (xv) failure to timely and properly treat patient Joseph's cerebral infarct and (xvi) post operatively, (a) failure to confirm that patient Joseph had woken up from surgery prior to being transferred to PACU, (b) failure to communicate patient Joseph's last known "well time" to other physicians; (c) failure to adopt early extubation measures; (d) failure to treat initial thrombus; and (e)

abandonment of patient Joseph, and the foregoing claimed departures are dismissed; and it is further

ORDERED that such motion is otherwise denied; and it is further

ORDERED that the motion of defendants Lori Spoozak; E. Sander Connolly, Jr.; Susanna Horvath; Mitchell S. Elkind; Katherine Lecker Carson; Billy Yung; Elizabeth J. Fontana; Gregory Kapinos; Zianka H. Fallil (motion sequence number 007) is dismissed as moot per the Stipulations of Discontinuance so-ordered on April 28, 2021; and it is further

ORDERED that the motion of defendants Jeremy S. Poppers and The New York and Presbyterian Hospital for summary judgment dismissing the complaint against them (motion sequence number 007) is DENIED only to the extent of the claims of any departures concerning failing to (i) properly and timely monitor and diagnose patient Joseph for stroke, including but not limited to the alleged delay that resulted from patient Joseph being placed in the Post Anesthesia Care Unit (PACU) for ambulatory surgery patients instead of the PACU for admitted patients; and/or (ii) perform a full neurological examination upon the decision to admit her to the hospital post operatively, each of which are jointly was/were allegedly substantial factor(s) in depriving patient Joseph of the intervention treatments in the form of rt-PA intervention or

thrombectomy (mechanical) extraction that would have mitigated the effects of her stroke; and it is further

ORDERED the motion with respect to any other claimed departures of defendants Jeremy S. Poppers and/or The New York and Presbyterian Hospital is granted, and such claims are dismissed.

#### DECISION

On her motion for summary disposition, defendant Roberson-Jasper, by the affirmation of expert physicians, established prima facie that at all times, she exercised the standard of care in her treatment of plaintiff's decedent Joseph (patient Joseph).

This court finds that plaintiff's submission in opposition to defendant Roberson-Jasper motion fails to raise an issue of fact concerning his claims of any departures on the part of defendant Roberson-Jasper concerning her alleged (i) failure to obtain consults in neurology and/or cardiology, preoperatively; (ii) negligently selecting a robotic assisted hysterectomy over a myomectomy or medical management, pre-operatively; (iii) participation of the resident physician in the robotic assisted surgery; (iv) failure to arrange for the presence of a representative from the robot manufacturer during the surgery; (v) failure to perform a diagnostic echocardiogram; (vi) negligent or careless use of the robotic assisted technology; (vii) failure to properly and timely lyse adhesions; (viii)

failure to convert to an open surgery procedure in order to visualize the surgical field and identify anatomical structures and landmarks; (ix) failure to institute immediate corrective measures to reverse complications arising intra-operatively; (x) failure to timely identify anatomical landmarks and structures; (xi) failure to adequately angle the laparoscope; (xii) failure to recognize neurological deficits exhibited by patient Joseph immediately following the surgery; (xiii) failure to timely and properly diagnose patient Joseph's cerebral infarct; (xiv) failure to conduct timely, thorough and proper radiologic and diagnostic studies of patient Joseph; (xv) failure to timely and properly treat patient Joseph's cerebral infarct and (xvi) post operatively, (a) failure to confirm that patient Joseph had awoken from surgery prior to being transferred to PACU, (b) failure to communicate patient Joseph's last known "well time" to other physicians; (c) failure to adopt early extubation measures; (d) failure to treat initial thrombus; and (e) abandonment of patient Joseph.

However, the affidavits of plaintiff's gynecologic surgeon expert and board certified neurologist<sup>1</sup> raise issues of fact that

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<sup>1</sup>The court does not consider the affidavit of plaintiff's out of state hematology expert, since, as argued by defense counsel, such is not accompanied by a certificate of conformity, as required pursuant to CPLR 2309(c). Nonetheless, such omission is one that might be cured on such terms as are just, or disregarded if a substantial right of a party is not prejudiced.

defendant Roberson-Jasper departed from good and accepted practice

- when she cleared patient Joseph for the elective robotic assisted hysterectomy without obtaining a hematology consultation, in light of her elevated lab values as to glucose level, platelet count and red blood cell distribution, coupled with her family history of strokes and thrombocytosis, resulting in patient Joseph undergoing elective robotic assisted hysterectomy without the proper clearances, contributing to her two ischemic strokes either during or post-surgery;
- when she failed to ascertain the family history of patient Joseph, and cleared her for elective surgery without having the patient undergo pre-operative anticoagulant therapy, resulting in patient Joseph undergoing elective robotic assisted hysterectomy without the proper clearances, contributing to her two ischemic strokes either during or post-surgery;
- when she performed the robotic assisted hysterectomy and maintained patient Joseph in steep Trendelenburg position during a robotic assisted surgery that took upwards of six hours, increasing her risk of blood clots, contributing to her two ischemic strokes.

Neither the sities of their board certifications/licenses nor the particular specializations of the parties' dueling physician experts are dispositive, as "the qualifications of [the medical] expert[s] go to the weight and not the admissibility of the experts['] testimony. [T]he weight to be accorded conflicting expert testimony is a matter for the jury" (Rojas v Palese, 94 AD3d 557, 558 [1<sup>st</sup> Dept 2012] [citations omitted]). See also Meiselman v Crown Heights Hospital, 285 NY 389, 398 (1941).

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See Supreme Automotive Mfg Corp v Continental Cas Co, 97 AD2d 700 (1<sup>st</sup> Dept 1983).

Plaintiff's gynecologic surgeon opined that placing patient Joseph in steep Trendelenburg position for approximately five (5) hours increased her risk of stroke and was a departure from the standard of care. Defendant Roberson-Jasper argues that this court should not consider such claim of plaintiff, on the grounds that neither plaintiff's complaint, nor original or supplemental bills of particulars mentions the word "positioning" or "Trendelenburg", with plaintiff alleging such theory of recovery for the first time, in opposition to defendant Roberson-Jasper's motion for summary judgment. Defendants cite Biondi v Behrman, 149 AD3d 562 (1st Dept 2017) for its holding that bars the consideration of an untimely interposition of a new claim for the first time in opposition to a defendant's motion for summary judgment.

This court finds, however, the herein matter to be distinguishable from the facts of Biondi, pp. 564, in which the First Department found that the new theory posited by plaintiff Biondi, was "never mentioned in the pleadings or at depositions" and "not related to the claims in the pleadings". In contrast, in her own deposition testimony, defendant Roberson-Jasper stated that during the surgery, patient Joseph was in the Trendelenburg position for an hour. Unlike in Biondi, where there was never "any mention of any presurgical consultation", defendant Roberson-Jasper's deposition testimony about the length of time patient Joseph was in steep Trendelenburg position constituted evidentiary

facts, making out a cause of action based upon such alleged departure. Defendants themselves point out that such testimony was elicited more than three years before their making of the motion at bar. Given that in his bill of particulars, verified on November 8, 2013, plaintiff asserts that defendant Roberson-Jasper "negligently failed to consider the risk of stroke to the [patient Joseph] caused by the increased surgical duration", this court does not find that defendants are prejudiced or surprised by the related claim concerning the positioning of patient during that very surgery. Plaintiff has consistently asserted that the length of time to complete the surgery, during part of which the patient Joseph was maintained in the Trendelenburg position, was longer than commanded by the standard of care. See DB by Arlene B. v Montefiore Medical Center, 162 AD3d 478 (2018).

The plaintiff's and defendants' experts offer conflicting opinions about whether the hospital records establish that patient Joseph's preoperative and post operative laboratory values/"blood work" results were abnormal, whether the development of blood clots was implicated in patient Joseph's massive right Middle Cerebral Artery (MCA) occlusive stroke, the evidence with respect to the duration of the surgery and any attendant heightened risks of stroke therefrom. Such issues must be resolved by a jury at trial.

"The parties submitted conflicting medical experts' opinions regarding the sufficiency of the informed consent." Miller v

Mount Sinai Hospital, 197 AD3d 1069 (1st Dept 2021). Defendant Roberson-Jasper's testimony that she verbally discussed the heart disease history of the mother of plaintiff's decedent with plaintiff decedent does not refute the consent forms that tend to show that there was no discussion about plaintiff decedent's family members' history of strokes. In addition, there is no evidence that defendant Roberson-Jasper reviewed with patient Joseph the relative outcomes of robotic assisted versus abdominal hysterectomies, or complications such as the risk of extended surgery time, or how many robotic assisted hysterectomies defendant Roberson-Jasper had performed, as of 2011. In her deposition testimony, defendant Roberson-Jasper admitted that an extended operative time places a patient at an increased risk of blood clots. Plaintiff comes forward with evidence, in the form of the opinion of a board certified gynecologic surgeon, that a reasonable patient in the decedent plaintiff's circumstances would not have consented to the robotic hysterectomy had she been informed of the medical significance of her family history of strokes, the anticipated surgical time and recovery time of each option, the success rate of defendant Roberson-Jasper's previous patients with such robotic hysterectomy, and defendant Roberson-Jasper's relative inexperience with such technology. This court disagrees with defendant that such surgeon's opinion must be disregarded because such surgeon is only licensed in New Jersey

and Florida, as "an expert need not be from the same locality as where the occurrence took place." M.C. v Huntington Hospital, 175 AD3d 578, 580 (2d Dept 2019).

Plaintiff, through its expert neurologist, has raised issues of fact that defendants Jeremy S. Poppers and The New York and Presbyterian Hospital departed from the standard of care in failing to properly and timely monitor and diagnose patient Joseph for stroke, including but not limited to the alleged delay that resulted from patient Joseph being placed in the Post Anesthesia Care Unit (PACU) for ambulatory surgery patients instead of the PACU for admitted patients, and/or in failing to perform a full neurological examination upon the decision to admit her to the hospital post operatively, and that as a result patient Joseph was deprived of the intervention treatment, such as rt-PA intervention or thrombectomy (mechanical) extraction that would have mitigated the effects of her stroke.

Plaintiff's expert neurologist disagrees with defendants' physician experts opinions that patient Joseph was not a candidate for rt-PA intervention or thrombectomy (mechanical extraction) treatment in that (a) the time of her stroke was greater than three hours since her "last known normal", even assuming her stroke took place intraoperatively, and (b) she had just undergone major surgery. Plaintiff's neurologist expert likewise disagrees that implementing such interventions upon

patient Joseph under such circumstances, would have subjected her to a very high risk of brain hemorrhage and immediate death, and would afford her little or no chance of improvement, which raise issues of fact that must be determined by a jury at trial.

*Debra A. James*

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11/22/2022

DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE