

**Gibson v Eid**

2023 NY Slip Op 32513(U)

July 17, 2023

Supreme Court, New York County

Docket Number: Index No. 805129/2020

Judge: Judith N. McMahon

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

PRESENT: HON. JUDITH N. MCMAHON PART 30M

*Justice*

-----X  
CRAIG GIBSON, DARNELLY PORTOCARRERO  
Plaintiff,  
- v -  
JEAN EID, M.D., ADVANCED UROLOGICAL CARE, P.C.,  
Defendant.

INDEX NO. 805129/2020  
MOTION DATE 06/27/2023  
MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64

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

Upon the foregoing documents, the motion for summary judgment of the defendants Jean Eid, M.D. and Advanced Urological Care, P.C. to dismiss plaintiffs' complaint pursuant to CPLR 3212 is granted to the extent that plaintiffs' "First Cause of Action" for medical malpractice is severed and dismissed. The balance of defendants' motion, seeking dismissal of plaintiffs' "Second" and "Third" causes of action for lack of informed consent and loss of spousal services, is denied.

This matter arises out of a February 14, 2018, surgery performed by defendant urologist, Dr. Eid, to provide the then 70-year-old Craig Gibson with an inflatable penile prosthesis ("IPP"). While plaintiff concedes that the penile implant was successful, he claims to have sustained permanent injuries<sup>1</sup> during the direct vision internal urethrotomy ("DVIU") portion of the procedure, when Dr. Eid admittedly incised through a "very narrow stricture" at the bladder

<sup>1</sup> Injuries include acute urinary retention, acute chronic hematuria, the placement of a suprapubic catheter, daily bladder spasms, bladder neck obstruction/contracture, surgeries to remove blood clots from the bladder, months of hyperbaric oxygen treatment and multiple hospitalizations (*see* Verified Bill of Particulars; NYSCEF Doc. No. 21, para 9).

neck, to allow for bladder catheterization (*see* February 13, 2018, Operative Record; NYSCEF Doc. No. 28, pp 11-12). Plaintiff maintains that the DVIU was not medically necessary and that had he been apprised of the risks of the DVIU he would not have undergone the IPP.

It is undisputed that plaintiff's medical history is significant for prostate cancer, which necessitated a radical prostatectomy in August of 2010 and a seven-week course of radiation in 2012. Plaintiff also underwent a successful heart transplant at the Cleveland Clinic on November 23, 2009, for which he takes immunosuppressive drugs for life. He previously had bilateral knee replacements, a total right hip replacement, right shoulder surgery and cataract removal. Plaintiff suffers from chronic kidney disease, hypertension, and gout.

#### PLAINTIFFS' ALLEGATIONS

In their Verified Complaint, plaintiffs allege that: (1) on February 14, 2018, Dr. Eid performed a "cystoscopy with direct vision internal urethrotomy, insertion of multicomponent inflatable penile prosthesis, correction of angulation and injection of corpora with hemostatic matrix" at Lenox Hill Hospital Northwell Health; (2) the defendants' "services were rendered...carelessly, unskillfully, negligently and not in accordance with accepted standards of medical care...in the community"; (3) the defendants failed to inform plaintiff of the reasonably foreseeable risks and benefits of the treatment proposed; (4) a reasonably prudent person in the position of plaintiff would not have undergone the surgery had he been fully informed, and (5) plaintiffs' lack of informed consent is a proximate cause of the injuries (*see* NYSCEF Doc. No. 1, paras. 12, 13, 22, 23, 24).

In their Verified Bill of Particulars, plaintiffs define their theory of liability as follows: "defendants were negligent in *failing to obtain* [Mr. Gibson's] *informed consent* for the performance of the February 14, 2018 surgery including the direct vision internal urethrotomy

(“DVIU”) given his then existing medical history and comorbidities and the high probability that complications would ensue; as well as *the performance of the DVIU during the surgery* performed on February 14, 2018” (see Plaintiffs’ August 19, 2020, Verified Bill of Particulars; NYSCEF Doc. No. 21, paragraphs 3, 6, 7; [emphasis supplied]). Specific as to informed consent, plaintiffs claim that “the answering defendants did not advise plaintiff of the potential for likely complications arising from the performance of the subject surgery, including the DVIU, which was part of defendants’ surgery and more specifically by cutting the stricture knowing that in a patient with a history of radiation cystitis, immunocompromised state from the known heart transplant, and other co-morbidities, that the high likelihood of urinary retention and its attendant chronic infections would require extensive care and treatment, jeopardizing and damaging the patient’s health in a permanent and irreversible manner. Had the plaintiff been advised of these risks related to the surgery, and specifically related to the DVIU, as opposed to being solely advised of risks related to the penile prosthesis, he would have foregone the surgery in its entirety” (*id.*, para 20).

It is noted at the outset that plaintiffs inappropriately raised a new theory of liability in opposition to defendants’ motion and during oral argument: namely, that Dr. Eid should have used the less invasive “urethral dilation” (*i.e.*, stretching) instead of the DVIU to access the bladder and catheterize plaintiff. Until then, as detailed above, plaintiffs’ claim for relief was grounded in (1) Dr. Eid’s failure to furnish informed consent and (2) Dr. Eid’s alleged departures during the DVIU. There is a difference between improperly performing a surgical procedure and choosing to perform the wrong surgery.

It is well settled that a plaintiff cannot defeat a motion for summary judgment by asserting a new theory of liability (see *Sutin v. Manhattan & Bronx Surface Transit Operating*

*Auth.*, 54 AD3d 616 [1<sup>st</sup> Dept. 2008]; *Abalola v. Flower Hosp.*, 44 AD3d 522 [1<sup>st</sup> Dept. 2007]). Here, plaintiffs' efforts to raise a triable issue of fact as to Dr. Eid's liability—by now claiming that he should have performed a urethral dilation over the surgical DVIU—is entirely unavailing. Notably, plaintiffs' expert is silent on specific departures made by Dr. Eid during his performance of the DVIU. Accordingly, plaintiffs' first cause of action for medical malpractice is dismissed for failure to raise a triable issue of fact on the issue of Dr. Eid's performance of the DVIU.

### FACTUAL BACKGROUND

Plaintiff's first visit with Dr. Eid was on January 10, 2018, via telephone, solely to discuss a penile implant. Prior thereto plaintiff never sought the care of a urologist for urinary retention or inadequate urine stream, which he admits had weakened over the years but was not problematic. On February 12, 2018, plaintiff presented for an in-person pre-operative visit and workup, at which time Dr. Eid confirmed that plaintiff suffered from organic erectile dysfunction. A cystoscopy performed during that visit revealed an obstructed bladder neck with a dense, narrow stricture that "would have to be addressed during surgery" (*see* affidavit of Craig Gibson; NYSCEF Doc. No. 40, para 20). Dr. Eid described the surgery as "a dual operation in which the stricture would be cut in order that [plaintiff] could be catharized for the penile implant, and then the penile implant would be inserted" (*id.*). According to plaintiff, "when I asked about the risks of the surgery, Dr. Eid exclusively focused on issues related to the penile implant" (*id.*, para. 21).

The surgery was performed at Lenox Hill on February 14, 2018, under spinal anesthesia. When plaintiff removed the Foley catheter three days later, he experienced severe urinary retention which brought him to an emergency room in Cali, Colombia, where he lived with his

wife. A catheter was inserted so that plaintiff could void. Thereafter, he was treated for urinary retention and hematuria by several urologists in Colombia throughout the remainder of 2018 and underwent two additional cystoscopies. Plaintiff also had a second DVIU in December of 2018, after being advised by his then treating surgeon “of the serious risks and complications of this [DVIU] procedure, including that the stricture would likely close down again...[but] unlike in February of 2018 I needed to undergo that procedure because I was in urinary retention---a medical emergency” (*id.*, para 29). This stricture, found in a new area from the bladder neck, involved the bulbous-membrane urethra.

Within a month plaintiff developed further obstructive urinary symptoms due to the recurrence of strictures. When plaintiff presented to the Cleveland Clinic for his annual visit in February of 2019, he was advised that he would likely develop progressive obstructive voiding symptoms and would require another DVIU procedure in the coming weeks or months.

Ultimately on February 26, 2019, an interventional radiologist from Lenox Hill placed a suprapubic tube (an indwelling catheter) into plaintiff’s bladder through an incision in the lower abdomen. Plaintiff claims that this permanent catheter, which remains with him to date, requires “constant daily attention, is a constant source of potential infection and an obvious embarrassment” (*id.*, para 32), and causes bladder spasms resulting in blood clots (*id.*, para 35).

On April 29, 2019, plaintiff consulted with a reconstructive urologist in Texas, who advised that Mr. Gibson was not a candidate for urethral repair. While the IPP was successful, plaintiff maintains that due to complications “whether from the suprapubic catheter, the urinary retention or the bladder spasms” he has not engaged in sexual intercourse with his wife, which is “especially disheartening to me as my single motivation to undergo the penile implant surgery was to increase the frequency of marital relations with my spouse” (*id.*, para. 36).

Defendants move for summary judgment dismissing the causes of action for medical malpractice, lack of informed consent, and the derivative claim of Darnelly Montano Portocarrero. Plaintiffs oppose the motion.

To prevail on a motion for summary judgment, the proponent must make *prima facie* showing of entitlement to judgment as a matter of law, through admissible evidence demonstrating the absence of any material issue of fact (*see Klein v. City of New York*, 89 NY2d 833 [1996]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]; *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). “Since summary judgment is the equivalent of a trial, it has been a cornerstone of New York jurisprudence that the proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law” (*Ostrov v. Rozbruch*, 91 AD3d 147 [1<sup>st</sup> Dept. 2012]).

In support of the motion defendants attach, *inter alia*, the affirmation of urologist David Schulsinger, M.D., (*see* NYSCEF Doc. No. 18) who sets forth with a reasonable degree of medical certainty that “Dr. Eid obtained plaintiff’s informed consent for the February 14, 2018, DVIU and IPP procedures, which were both indicated and properly performed” (*id.*, para 6). Specifically, Dr. Schulsinger opines that (1) the DVIU was medically necessary irrespective of whether plaintiff opted to proceed with the elective IPP; (2) plaintiff suffered from a pre-existing stricture brought on by radiation-induced fibrosis, which “needed to be treated sooner rather than later, as it was causing progressive urinary obstruction and placed Mr. Gibson at an increased risk of infection, stones, and kidney problems” (*id.*, para 7), and (3) no proximate cause exists between the DVIU and plaintiff’s recurrent gross hematuria, new stricture at a different segment of the urethra, and the need for a suprapubic catheter, as these are sequelae of radiation cystitis after pelvic radiation therapy. Defendants’ expert explains that in most cases, urethral/bladder

neck strictures are managed initially by either DVIU or an endoscopic dilation (*i.e.*, the gradual stretching of the stricture with dilators or balloons) the latter of which is “typically ineffective for denser strictures like Mr. Gibson’s” (*id.*, para. 52). Thus, apart from a DVIU, Mr. Gibson’s only other treatment option would have been an open reconstructive surgery, and “[t]he standard of care did not require Dr. Eid to offer open reconstructive surgery as an alternative to DVIU” (*id.*, para 52). Dr. Schulsinger concludes that “Dr. Eid’s performance of a DVIU did not alter Mr. Gibson’s trajectory or affect his treatment options in any significant way,” and that Dr. Eid “committed no departures from good and accepted standards of urologic care, obtained Mr. Gibson’s informed consent, and did not proximately cause any of the injuries alleged in the case” (*id.*, para. 62).

Dr. Schulsinger’s affirmation is detailed, specific and factual in nature, and is based upon the facts in the record (*see Roques v. Noble*, 73 AD3d 204, 206 [1<sup>st</sup> Dept. 2010]; *see also Pasocello v. Jibone*, 161 AD3d 516 [1<sup>st</sup> Dept. 2018]; [*internal citations omitted*]). Accordingly, “[t]he affirmation of defendants’ expert was sufficient to meet defendants’ *prima facie* burden of establishing the absence of a departure from good and accepted medical practice, or that any such departure was not a proximate cause of plaintiff’s injuries” (*Einach v. Lenox Hill Hosp.*, 160 AD3d 443 [1<sup>st</sup> Dept. 2018]).

“Where a defendant makes a *prima facie* case of entitlement to summary judgment dismissing a medical malpractice action by submitting the affirmation from a medical expert establishing that the treatment provided to the injured plaintiff comported with good and accepted practice, the burden then shifts to the plaintiff to present evidence in admissible form that demonstrates the existence of a triable issue of fact” (*Bartolacci-Meir v. Sassoon*, 149 AD3d 567, 570 [1<sup>st</sup> Dept. 2017]; *see also DeCintio v. Lawrence Hosp.*, 25 AD3d 320 [1<sup>st</sup> Dept. 2006];

*Ducasse v. New York City Health & Hosps Corp.*, 148 AD3d 434 [1<sup>st</sup> Dept. 2017]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

In opposition to the motion, plaintiffs submit, *inter alia*, the expert affirmation of a surgeon and urologist, Steven J. Hirshberg, M.D. (*see* NYSCEF Doc. No. 41), who opines that the DVIU was not medically necessary (given that plaintiff was largely asymptomatic, and his bladder scan showed no evidence of urinary retention), and that Dr. Eid failed to adequately address and inform plaintiff of the complications that might arise from incising the stricture (*i.e.*, high risk for stricture recurrence), or offer plaintiff the option of urethral dilation. According to Dr. Hirshberg, “had Mr. Gibson not sought medical treatment for ED, his urethral stricture would have remained asymptomatic” (*id.*, para 38). He concludes that Dr. Eid departed from good and accepted standards of care when he (1) failed to obtain appropriate informed consent preoperatively and (2) failed to counsel plaintiff about the DVIU portion of the surgery.

As previously set forth, the plaintiffs’ expert affirmation is insufficient to raise a triable issue of fact as to the malpractice cause of action, since Dr. Hirshberg fails to identify any departures made by defendant in performing the DVIU. However, the expert’s affirmation does raise clear questions of fact sufficient to defeat summary judgment on the issue of plaintiffs’ lack informed consent. This is a case where “the medical experts’ conflicting opinions...raise issues of fact that must be resolved at trial” (*Hendricks v. Transcare New York, Inc.*, 158 AD3d 477, 478 [1<sup>st</sup> Dept. 2018]). As such, so much of defendants’ motion seeking to dismiss plaintiffs’ second and third causes of action is denied.

Accordingly, it is

ORDERED that the motion for summary judgment by the defendants Jean Eid, M.D., and Advanced Urological Care, P.C. is granted to the extent that plaintiffs' First Cause of Action for damages arising from medical malpractice is severed and dismissed; and it is further

ORDERED that the balance of the motion is denied; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of the defendants Jean Eid, M.D. and Advanced Urological Care, P.C. dismissing plaintiffs' First Cause of Action with prejudice; and it is further

ORDERED that the parties shall appear for a virtual pre-trial conference via Microsoft Teams on **September 21, 2023 at 3:00 p.m.**

7/17/2023  
DATE

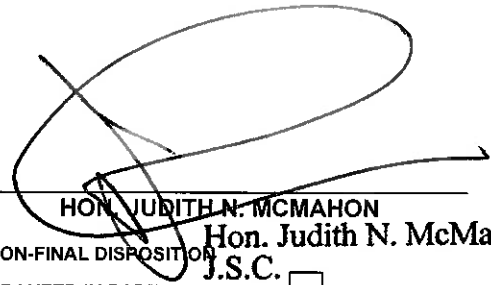
CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
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APPLICATION:

CHECK IF APPROPRIATE:

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
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 HON. JUDITH N. MCMAHON  
 Hon. Judith N. McMahon  
 J.S.C.