

Torres v Tischler

2023 NY Slip Op 32907(U)

August 22, 2023

Supreme Court, Kings County

Docket Number: Index No. 515034/2019

Judge: Consuelo Mallafre Melendez

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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GRACIELA TORRES,

Plaintiff(s),

-against-

DECISION and ORDER

Index No.: 515034/2019

Mo. Seq.: 002

HENRY TISCHLER, M.D., KHAJA AHMED, D.O.,
VICTORYA GERSHTEYN, M.D., PRASANTHI
SUNKESULA, M.D., PARK SLOPE ANESTHESIA
ASSOCIATES, P.C., AND NEW YORK-
PRESBYTERIAN BROOKLYN METHODIST
HOSPITAL,

Defendants,

-----X
HON. CONSUELO MALLAFRE MELENDEZ, J.S.C

Recitation, as required by CPLR §2219 [a], of the papers considered in the review: NYSCEF #s: 74-92; 93-104; 405-106.

Upon the papers cited above, oral argument held on July 26, 2023, and further conference with the attorneys for the parties held on August 16, 2023, the Order dated July 26, 2023, and Amended Order dated July 31, 2023 are hereby VACATED and this Decision and Order stands in place.

Defendants, HENRY TISCHLER, M.D., KHAJA AHMED, D.O., VICTORYA GERSHTEYN, M.D., PRASANTHI SUNKESULA, M.D., PARK SLOPE ANESTHESIA ASSOCIATES, P.C., and NEW YORK PRESBYTERIAN BROOKLYN METHODIST HOSPITAL move this court for an Order pursuant to CPLR § 3212 granting summary judgment to the moving defendants, dismissing the plaintiff's Complaint. Plaintiff did not oppose the motion of KHAJA AHMED, D.O., VICTORYA GERSHTEYN, M.D., PRASANTHI SUNKESULA, M.D., PARK SLOPE ANESTHESIA ASSOCIATES, P.C. but opposed the motion as to Dr. Tischler and PA Schropp and PA Hahn, and as to the claim of lack of informed consent. Plaintiff presented an unredacted copy of their expert's affirmation to the Court.

Plaintiff claims that Dr. Tischler used high tourniquet pressures, excessively inflated the tourniquet during the surgery, and allowed the tourniquet to remain in place for an unreasonable amount of time. It is also claimed that the negligent use of the tourniquet caused compression of the peroneal/sciatic nerve, which ultimately caused the plaintiff to develop a foot drop. Plaintiff further claims that Defendants failed to perform physical examinations and failed to timely order diagnostic tests and studies. As a result of these alleged departures, Plaintiff claims she sustained injuries, including but not limited to a drop foot.

““In order to establish the liability of a physician for medical malpractice, a plaintiff must prove that the physician deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff’s injuries [internal citations omitted].” *Hutchinson v. New York City Health and Hospitals. Corp.*, 172 AD3d 1037, 1039 [2d Dept. 2019] citing *Stukas v. Streiter*, 83 AD3d 18, 23 [2d Dept. 2011]. “Thus, in moving for summary judgment, a physician defendant must establish, prima facie, ‘either that there was no departure or that any departure was not a proximate cause of the plaintiff’s injuries.’” *Hutchinson*, 132 AD3d at 1039, citing *Lesniak v. Stockholm Obstetrics & Gynecological Servs., P.C.*, 132 AD3d 959, 960 [2d Dept. 2015]. “Expert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause [internal citations omitted].” *Navarro v. Ortiz*, 203 AD3d 834, 836 [2d Dept. 2022]. ““When experts offer conflicting opinions, a credibility question is presented requiring a jury’s resolution.”” *Stewart v. North Shore University Hospital at Syosset*, 204 AD3d 858, 860 [2d Dept. 2022] citing *Russell v. Garafalo*, 189 A.D.3d 1100, 1102, [2d Dept. 2020] [internal citations omitted]. “Any conflicts in the testimony merely raised an issue of fact for the fact-finder to resolve.” *Palmiero v. Luchs*, 202 AD3d 989, 992 [2d Dept. 2022] citing *Lavi v. NYU Hospital Ctr.*, 133 A.D.3d 830, 832 [2d Dept. 2015]. However, “expert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise a triable issue of fact [internal citations omitted].” *Wagner v. Parker*, 172 AD3d 954, 966 [2d Dept. 2019].

Defendants’ expert, Daniel S. Rich, M.D., a physician board certified in Orthopedic Surgery established that he is qualified to opine as to the care and treatment rendered to the plaintiff in this case. Defendants’ expert, Adam I. Levine, M.D., a physician board certified in Anesthesiology, also established that he is qualified to opine as to the care and treatment rendered to the plaintiff in this case. Plaintiff’s expert, a physician board certified in Orthopedic Surgery established that they are qualified to opine as to the care the plaintiff received in this case.

While defendants established their *prima facie* burden warranting summary judgment as to the claims against Dr. Tischler, Plaintiff raises an issue of fact precluding dismissal of the claims against this defendant. As discussed below, the experts’ opinions are conflicting as to the placement of the tourniquet, thereby raising an issue of fact precluding summary judgement. “General allegations that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat summary judgment.” *Salvia v. St. Catherine of Sienna Med. Ctr.*, 84 A.D.3d at 1054, citing *Heller v. Weinberg*, 77 AD3d 622, 623 [2d Dept. 2010]. Further, “[s]ummary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions ... [because] such credibility issues can only be resolved by a jury.” *Feinberg v. Feit*, 23 AD3d 517, 519 [2d Dept. 2005] [internal citations omitted]. “Once a defendant makes a *prima facie* showing, ‘the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact’ as to the

elements on which the defendant met the prima facie burden.” *Clarke v. New York City Health and Hospitals.*, 210 AD3d 631 [2d Dept. 2022] citing *Donnelly v. Parikh*, 150 A.D.3d 820, 822, [internal quotation marks omitted]. ““When experts offer conflicting opinions, a credibility question is presented requiring a jury's resolution”” *Russell v. Garafalo*, 189 AD3d 1100, 1102 [2d Dept. 2020] quoting, *Shields v. Baktidy*, 11 A.D.3d 671, 672 [2d Dept. 2004].

Plaintiff’s expert review of the records indicates that the Anesthesia Note documents that the tourniquet was placed on the right distal thigh with a pressure of 325 mmHg; the Defendant’s expert states that it had a pressure of 300 mmHg and was placed on the right upper thigh. Plaintiff’s expert opines that such placement position of the tourniquet and its applied pressure is a deviation from accepted standards of practice. Additionally, Plaintiff’s expert states that as Dr. Rich relied on the tourniquet positioned higher on the right thigh, his opinion regarding the MRI findings is faulty as Dr. Rich pointed to the wrong section of the film to dispute the nerve injury.

Plaintiff’s expert also opines that it is good and accepted medical practice to have an MRI done as early as a week after the peroneal nerve palsy is suspected in patients who have a peroneal nerve palsy of unknown etiology after a Total Knee Replacement. The expert opined that it was a departure from the standard of care to perform the study 3-4 weeks later. The expert states that in patients who have nerve injuries caused by compression, or if the nerve itself is damaged, a patient should be referred expediently for surgery to either decompress the nerve or repair the nerve. The longer the nerve is permitted to remain compressed or damaged, the less likely the nerve can regenerate appropriately. As plaintiff raises issues of fact for trial as to Dr. Tischler, summary judgment is Denied.

Issues of fact are also raised as to the sufficiency of the Informed Consent that the plaintiff received from Dr. Tischler. Although both experts mention this claim in their affirmations, the opinions are in part speculative and conclusory and, in part, conflicting. Therefore, summary judgment cannot be granted.

As the relationship between Dr. Tischler and New York-Presbyterian Brooklyn Methodist Hospital is not discussed by the movant, summary judgment is Denied as to any claim based on the hospital’s vicarious liability for the claims of malpractice relative to Dr. Tischler. Defendant’s expert does not address the claims regarding against PA Schropp and PA Hahn, as such, summary judgment is DENIED as to New York-Presbyterian Brooklyn Methodist Hospital for its vicarious liability for claims against them. Plaintiff’s expert’s opinions are conclusory with regards to the defendant hospital’s staff (other than PA Schropp and PA Hahn), thus summary judgment is Granted to New York-Presbyterian Brooklyn Methodist Hospital as limited herein.

Accordingly,

Summary Judgment is Denied as to Dr. Tischler;

Summary Judgment is Denied as to New York-Presbyterian Brooklyn Methodist Hospital for vicarious liability for claims against Dr. Tischler;

Summary Judgment is Denied as to New York-Presbyterian Brooklyn Methodist Hospital for vicarious liability for claims against PA Schropp and PA Hahn;

Summary Judgment is Granted as to New York-Presbyterian Brooklyn Methodist Hospital for vicarious liability for claims against Defendants Khaja Ahmed, D.O.; Prasanthi Sunkesula, M.D.; Victorya Gershteyn, M.D., and Park Slope Anesthesia Associates, P.C., and to these defendants, individually, as this motion is unopposed;

Summary Judgment is Granted as to New York-Presbyterian Brooklyn Methodist Hospital for vicarious liability as to staff other than PA Schropp and PA Hahn.

This constitutes the decision and order of the Court.

ENTER.

8/22/2023



Hon. Consuelo Malfre Melendez,
J.S.C.