Van Hook v Doak
2023 NY Slip Op 35267(U)
February 10, 2023
Supreme Court, Erie County
Docket Number: Index No. 807613/2018
Judge: John B. Licata
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At the Special Term of the Supreme Court of the State of New York, County of Erie, at 25 Delaware Avenue, Part 8, Buffalo, New York, June 1, 2022.

Justice Presiding: Hon. John B. Licata, J.S.C.
SUPREME COURT of the STATE OF NEW YORK
COUNTY OF ERIE

MYA VAN HOOK

-vs- Plaintiff,

Decision & Order

Index No. 807613/2018

JEREMY P. DOAK, M.D.,
UBMD ORTHOPAEDICS & SPORTS MEDICINE
UBMD, INC.
TYLER KENT, M.D.,
WOMEN & CHILDREN'S HOSPITAL OF BUFFALO, and
KALEIDA HEALTH, INC.,

Defendants.

Defendants having brought motions for summary judgment seeking to dismiss plaintiff's claims, with prejudice (motions #002 and #003), and plaintiff having opposed those motions [NYSCEF Doc. Nos. 31- 97, omitting Nos. 32 , 47, 74], and the papers having been reviewed by the court, and the motion having regularly come on to be heard, and

Upon oral argument of Lauren Heimer, Esq., of Eagan & Heimer, PLLC, and Kayla Drickel, Esq., of Roach Brown, McCarthy, Gruber, in support of their respective motions, and Brian Goldstein, Esq., of Cellino Law, LLP, in opposition to the motions, and due deliberation having been had, summary judgment is granted to defendant UB MD, Inc.; summary judgment is granted to all defendants on the issue of lack of informed consent, and; summary judgment on the remaining issues is denied. The court's decision and order follows:

"For a court '[t]o grant summary judgment, it must clearly appear that no material and triable issue of fact is presented' (*Glick & Dolleck, Inc. v. Tri-Pac Export Corp.*, 22 N.Y.2d 439, 441, 293 N.Y.S.2d 93, 239 N.E.2d 725 [1968]; see *Matter of New York City Asbestos Litig.*, 33 N.Y.3d 20, 25, 99 N.Y.S.3d 734, 123 N.E.3d 218 [2019]). 'Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable' (*Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 315, 786 N.Y.S.2d 382, 819 N.E.2d 998 [2004]). When reviewing a motion for summary judgment, 'facts must be viewed "in the light most favorable to the non-moving party' "(*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 503, 942 N.Y.S.2d 13, 965 N.E.2d 240 [2012]), and the proponent of the motion 'must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact' (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986])." (*Musasri v Murray*, 211 A.D.3d 1619, 1620 [4th Dept 2022].

Plaintiff, fifteen years old at the time of surgery, was diagnosed with scoliosis, a condition in which the spine has sideways curves which are atypical for a spine. Plaintiff was receiving treatment for her condition at the Orthopedic clinic of defendant Women & Children's Hospital of Buffalo (WCHOB) a facility of Kaleida Health. All of the medical care and treatment provided by defendant Doak to plaintiff happened at WCHOB orthopedic clinic. Doak suggested to plaintiff and her mother that he perform a posterior spinal fusion with instrumentation to straighten the spine and prevent further progression of scoliosis. Plaintiff claims that the scoliosis did not cause her any pain or discomfort and both parties agree that the surgery was an elective procedure. Both parties also agree that the surgery carries significant risks of injury to the spinal cord that could result in paralysis.

Defendant Kent, a fourth-year resident medical student in his pediatric orthopedic rotation, assisted defendant Doak in performing the surgery. Kent testified he had no experience or recollection having participated in a pediatric scoliosis surgery. Part of the surgery requires a surgeon to remove portions of a vertebrae that surround the spinal cord in a protective cage. The technique requires using a metal mallet to strike a surgical chisel, known as an osteotome, to chip away part of the vertebrae to be able to realign the vertebrae and remove or lessen the sideways curve. Kent used the mallet and osteotome and in the process of striking the facet "the osteotome went deep" and either the osteotome or a bone fragment struck and damaged the spinal cord, rendering plaintiff paralyzed below the waist.

Plaintiff complaint alleges defendants were negligent in failing to obtain her informed consent to a surgical procedure, failing to properly supervise and train employees, and in negligently performing the surgical procedure causing plaintiff to be paralyzed below the waist. Defendants deny these claims and aver that paralysis was a known and accepted risk of the procedure accepted by plaintiff.

Defendants submit the affidavits of James Molinari, M.D., and A. James Fessler III, M.D., in support of their motion for summary judgment on the issues of negligence and informed consent [NYSCEF Doc. Nos. 67 & 69]. Both Molinari and Fessler reviewed the pleadings, medical records, and deposition transcripts in this action to provide a foundation for the proffered opinions. Their opinions are based on facts in the record and not speculative or conclusory. Molinari concludes that the consent obtained by defendants was appropriate and need not include any disclosure that defendant Kent would be performing part of the procedure and not defendant Doak. Molinari further concludes that the manner in which Kent employed the mallet and osteotome were under the direct supervision of Doak and within the applicable standard of care. Molinari opines that the

injury to plaintiff's spine was a known and accepted complication of the procedure. Molinari opines that Doak's supervision was at all times within the accepted standard of medical care.

Defendant UB MD, Inc., submitted the affidavit of Brian D. White, Esq., counsel for UB MD, Inc. The affidavit is detailed and establishes that UB MD, Inc., does not provide healthcare services, played no role in providing medical services to plaintiff, and has never employed Doak. UB MD, Inc. is entitled to summary judgment. Plaintiff offered no proof in opposition to this aspect of the motion and so any claim and cross-claim against UB MD, Inc., is dismissed.

Defendants' expert Fessler addressed allegations that the neuromonitoring performed during the surgery fell below the standard of care and caused or contributed to plaintiff's injuries. Fessler provided a detailed affidavit setting forth that the neuromonitoring complied with the standard of care and that no action or inaction by the neuromonitoring caused or contributed to the spinal injury. Fessler identified the role of the neuromonitoring functioned as expected by "confirming that a spinal cord injury had in fact occurred after the osteotome unintentionally went deep and caused injury." [NYSCEF Doc. No. 69, p. 11]. Plaintiff's expert affidavit does not address the issue of neuromonitoring as a proximate cause of any injury and to the extent that there is a theory of liability for negligent neuromonitoring it has not been presented or preserved.

Plaintiff submitted its expert affidavit in which the expert reviewed the pleadings, medical records, deposition transcripts, and defendant expert affidavits, as a whole they sufficiently provide a foundation for the expert's opinion. The expert affidavit is silent regarding the claim for lack of informed consent and as such, defendants' motion is granted on that cause of action (*see Thompson v Hall*, 191 A.D.3d 1265, 1267 [4th Dept 2021]).

Plaintiff's papers support that plaintiff presented to defendants WCHOB and Kaleida for medical care and treatment through its orthopedic clinic and not for medical treatment a specific physician. Her chart contains references to "follow up with Orthopedics" which is consistent with

plaintiff's position that she believed she was being followed by the orthopedic clinic for care of her spine. Plaintiff has established a triable issue of fact respecting whether her treatment was being rendered under the apparent authority of defendants WCHOB and Kaleida Health, raising the question of whether they may be held vicariously liable for the alleged malpractice of Doak under theory of ostensible agency (*see Goffredo v St. Luke's Cornwall Hosp*, 194 A.D.3d 699, 700 [2d Dept 2021]; *Czeladzinksi v County of Erie,* 291 A.D.2d 883, 884 [4th Dept 2002]).

Defendant Kent was a fourth-year resident for which WCHOB and Kaleida were responsible for any negligence attributable to Kent. It is well-established that a hospital is liable for the acts of a medical resident providing medical care and treatment to a patient. An exception is that the hospital and resident are not liable if the resident is providing medical care under the direct supervision of a physician unless the resident exercises independent judgment in providing medical care and treatment (*see Blendowski v Wiese,* 158 A.D.3d 1284 [4th Dept 2018]).

Doak acknowledges that as the supervisory physician he was responsible for the acts and omissions of Kent. Plaintiff's expert submits the opinion that it was incumbent upon Doak to inquire of Kent regarding the extent of Kent's experience in performing the surgical procedure. Doak, through his affidavit, offers a contradictory position that he appropriately supervised Kent in performing the procedure but had no duty to inquire of Kent regarding the extent of his experience in using an osteotome in spinal surgery. Doak based his decision to permit Kent to participate in the surgery on Kent's status as a fourth-year orthopedic resident who had completed rotations in spinal care and pediatrics [NYSCEF Doc. No. 34].

Defendants cite *Blendowski v Wiese,* 158 A.D.3d 1284 [4th Dept 2018], in which the defendant surgeon directed and supervised a resident in use of a drill during a knee operation. The surgeon averred that he selected "the location and angle of the drill, and that he made the decision to stop drilling" (*Blendowski v Wiese,* 158 A.D.3d at 1285). Plaintiff's expert in that action opined that the

supervisor physician was in control of the angle, that the physician failed to monitor the angle and depth of the drill-bit, which resulted in nerve damage to the patient. Under those facts, the court held that the resident did not exercise independent judgment given the extent of direction provided by the surgeon, justifying dismissal of the actions against the resident and hospital.

In this action, both Doak and Kent's testimony were vague on pre-operative instructions though they agreed that Doak rendered a drawing of the facet and location of where the cuts should be made. Doak further testified that the procedure is to "just gently tap until you feel the crack" of the bone. Doak also provided the familiar bromide "to be careful," which Doak stated "I think I said that about everything." Doak testified that he did not handle the osteotome or the mallet during plaintiff's surgery nor did he offer any description of placing his hands on Kent's hands or otherwise guiding the placement or angle of the osteotome. Kent testified before the surgery he reviewed surgical technique guides in a textbook but he could not recall which surgical guides, the specific textbook, nor whether there was any discussion regarding the aspects of the surgery to be undertaken by Doak and Kent. Kent did not recall who performed the incision but did recall that regarding the placement of the drill he was under the "direct visualization [of Doak], and he would adjust our hands as needed to [ensure] the correct position and angle." [NYSCEF Doc. No. 53, p. 41]. Kent testified that Doak instructed Kent regarding the placement and angle of the osteotome and to use "many small, gentle taps" in striking the facet [NYSCEF Doc. No 53, p. 44]. Doak testified about the facetectomy " - - it was definitely abnormal in that the crack was different, I guess, if that makes any sense. Like it just - - it broke way easier than general and didn't require so much to perform . . . but something about it happening made me stop. So it could have been the first time, it could have just been - - there's not - - when you do the facetectomy it's not like one you're done, it's not like ch ch ch ch ch until you're done." [NYSCEF Doc. No 52, p. 61-62].

Viewing plaintiff's expert's opinion in the light most favorable to plaintiff that during the surgery Kent improperly placed the osteotome, used the wrong angle, and used excessive for force to strike the osteotome such that it "went deep" and caused direct injury to plaintiff's spinal cord, does that raise a triable issue of material fact whether Kent was negligent in not following the instructions of Doak to use many small, gentle taps of the osteotome to cut the bone? The court has wrestled with this issue and the meaning of this testimony within the context of the allegations, the scope of instructions, and whether Kent exercised judgment in the amount of force necessary when striking an osteotome with a mallet. Caselaw does not seem to provide a bright-line standard. In *Burnett-Joseph v McGrath,* 158 A.D.3d 526, 527 [1st Dept 2018] a triable issue of fact existed whether a resident exercised independent medical judgment in deciding the amount and type of sedation to administer to a patient. In *Soto v Andaz,* 8 A.D.3d 470 [2d Dept 2004], where a resident allegedly failed to properly clip plaintiff's cystic duct during a surgical procedure, it was found plaintiff did not raise a triable issue of fact whether a resident exercised independent judgment and neither resident nor hospital could be held liable.

Plaintiff's expert also opined that under proper technique an osteotome is never permitted to strike the spinal cord and that such event, whether by direct contact or by forcing bone fragments into the spinal cord, is not an accepted risk or accepted complication of the procedure. Plaintiff's expert opines that under proper technique the bone fragment is removed without making contact with the spinal cord. It is unclear from the record how many times Kent struck the osteotome before injuring the spinal cord, a fact which, if known, would either support plaintiff's claim of excessive force or defendants' assertion of compliance with instructions of Doak. This opinion is in direct opposition to that submitted by defendants, raising triable questions of material fact for a jury to resolve (*See Fargnoli v Warfel,* 183 A.D.3d 1004, 1005 [4th Dept 2020]).

With such an unclear presentation and close question the court believes the issue is best resolved by a jury as a question of fact and not as a matter of law whether Kent used independent judgment and employed excessive force contrary to the instructions provided by Doak.

There are two theories upon which plaintiff has made claims against WCHOB and Kaleida. One is the ostensible agency theory which has been addressed above and the other is *respondeat superior* for the negligence of Kent, a fourth-year resident and employee of the hospital. Having addressed both these claims in plaintiff's favor that they present a triable issue of fact, the respective motions are denied.

Regarding the techniques employed by Doak and Kent during the surgical procedure, the submissions of the experts for all parties creates a battle of experts on the causes of action for medical malpractice that cannot be resolved on a motion for summary judgment and must await a jury verdict. (*see Gburek v Cobler*, 199 A.D.3d 1372 [4th Dept 2021]).

ORDERED, defendants' motion to dismiss plaintiff's claim for lack of informed consent is granted as against all defendants, it is further

ORDERED, defendants Doak and UBMD Orthopaedics & Sports Medicine's motion for summary judgment is denied, and it is further

ORDERED, defendant UB MD, Inc.'s motion for summary judgment is granted, and it is further

ORDERED, defendants Kent, WCHOB, and Kaleida's motion for summary judgment is denied,

All motions are denied with prejudice and without costs to either party.

Enter:

February 10, 2023

Hon. John B. Licata, J.S.C.