At an IAS Term, Part 15 of the Supreme Court of the State of NY, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 21st day of November 2024.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS
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PAULA CRISMALI,

Plaintiff,

-against-

NICHOLAS POST, M.D. and KINGSBROOK JEWISH MEDICAL CENTER.,

Defendants.
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DECISION & ORDER

Index No. 515786/2019
Mo. Seq. 3

HON. CONSUELO MALLAFRE MELENDEZ, J.S.C.
Recitation, as required by CPLR §2219 [a], of the papers considered in the review:

NYSCEF #s: 50 – 53, 54 – 62, 66, 67 – 71, 72

Defendant Nicholas Post, M.D. ("Dr. Post") moves (Seq. No. 3) for an Order, pursuant to CPLR 3212, granting summary judgment to Dr. Post and dismissing all causes of action asserted against him. Plaintiff opposes the motion.

Plaintiff commenced this action on July 18, 2019, asserting claims of medical malpractice and lack of informed consent against Dr. Post, in connection with a spinal surgery performed on August 8, 2017 and post-operative care.

Prior to the events at issue, Plaintiff was evaluated by Dr. Post at the Kingsbrook Jewish Medical Center ("Kingsbrook") neurosurgery clinic for severe neck pain radiating to the left upper extremity and back pain radiating to the left leg. Cervical and lumbar spine MRIs on May 11, 2017 revealed disc disease, cord compression, edema, and stenosis at multiple segments. She was diagnosed with cervical spine spondylosis with myelopathy (spinal cord compression).

On August 8, 2017, Plaintiff underwent a C2-T1 spinal surgery (posterior cervical laminectomy, medial facetectomy, and segmental pedicle screw stabilization) performed by Dr. Post at Kingsbrook.

Following the surgery, Plaintiff exhibited left triceps weakness and was unable to raise her left arm. A post-operative CT scan on August 9, 2017 documented "routine postoperative appearance," intact and well-positioned hardware with pedicle screws at C2, C6, C7, and T1, and on the right side at C5, and residual degenerative disc disease. An MRI on August 15, 2017 showed "small focus cord edema or gliosis at the C6 inferior endplate level within the posterior central cord" of "indeterminate age and etiology" and recommended direct comparison to an earlier MRI. Plaintiff was discharged from Kingsbrook on August 16, 2017 and followed up with Dr. Post from August 24, 2017 through June 29, 2018. She continued to have complaints of left arm weakness and hand numbness.

Plaintiff alleges that Dr. Post deviated from the standard of care in his performance of the August 8, 2017 surgery and that surgical errors in pedicle screw placement were the proximate cause of her left-sided symptoms. Plaintiff also alleges that Dr. Post deviated from the standard of care by failing to properly evaluate her or review the post-operative radiological studies. Plaintiff alleges that these departures were the proximate cause of her claimed injuries.

In evaluating a summary judgment motion in a medical malpractice case, the Court applies the burden shifting process as summarized by the Second Department:

> "The elements of a medical malpractice cause of action are a deviation or departure from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries. When moving for summary judgment, a defendant provider has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby. In order to sustain this burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff's bill of particulars. In opposition, the plaintiff must demonstrate the existence of a triable issue of fact as to the elements on which the defendant has met his or her initial burden. General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat a defendant's summary judgment motion. Although summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions, expert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise triable issues of fact" (*Barnaman v Bishop Hucles*

Episcopal Nursing Home, 213 AD3d 896, 898-899 [2d Dept 2023] [internal quotation marks and citations omitted].

In support of the motion, the defendant submits an expert affirmation from John Pollina, Jr., M.D. ("Dr. Pollina"), a licensed physician certified in neurosurgery. He affirms that he has an extensive background in spinal surgery and lays a proper foundation to opine on the issues of this case. The defendant also submits relevant deposition transcripts and medical records.

Dr. Pollina opines that neurosurgeon Dr. Post did not depart from the standard of care in performance of the August 8, 2017 surgery. Based on her complaints and the diagnosis of spondylosis with myelopathy, Dr. Pollina opines that Dr. Post performed the appropriate cervical fusion surgery to treat her symptoms. He opines that this surgery is "a common procedure to treat this patient's underlying conditions," that there is no benefit to conservative management of her degenerative condition, and that it is within good and accepted medical standards to "go slightly above and below the area of decompression." Based on the operative report, Dr. Pollina opines that all aspects of the surgery, including technique, instrumentation, and hardware placement, complied with the standard of care.

Dr. Pollina also opines, based on the August 9, 2017 report and his independent review of the radiological images, that the post-operative CT scan showed no evidence of improper screw placement, and that there was "no technical error or nerve compromise as a result of screw or hardware placement."[1] Dr. Pollina also opines that the MRI of the cervical spine from August 15, 2017 showed intact hardware and posterior stabilization. He opines that no additional imaging studies were required by the standard of care at that time.

Dr. Pollina opines that Dr. Post was not required by the standard of care to personally see the patient or review her radiological studies after surgery, as she was being evaluated and treated by "experienced neurosurgery

[1] Dr. Pollina disputes the findings of non-party Amit Schwartz, M.D., who subsequently treated Plaintiff in October 2017 and interpreted this August 9 CT scan to show possible misalignment of the C6 screw toward the C7 nerve root. Dr. Pollina states that there was "no indication" of this on the image and that Dr. Schwartz's report that a screw "may be entering" that area was equivocal and flawed.

staff" at the hospital, who communicated with Dr. Post and discussed her post-operative condition (including her left arm/triceps weakness) and course of treatment. Dr. Pollina opines that Dr. Post appropriately recommended a prescription of Decadron, a pain medication.

Dr. Pollina opines that Dr. Post's outpatient evaluations beginning on August 24, 2017 complied with the standard of care, "performing serial physical examinations and noting her deficits." He opines that Dr. Post appropriately monitored her left triceps weakness, prescribed pain medication, ordered an additional CT scan on September 21, 2017, and recommended possible further surgery to treat C7 nerve apraxia. Dr. Pollina opines that all Dr. Post's assessments and treatment through June 2018 were proper, and that Plaintiff's triceps weakness showed some improvement with physical therapy.

Dr. Pollina opines that the September 21, 2017 CT scan showed the right-sided C5 screw had traversed the inferior left C5-C6 interspace. He opines that this is an "acceptable finding" only indicating the tip of the screw went beyond the margins and it does not indicate any wrongdoing, negligence, or misplacement.

On the issue of proximate causation, Dr. Pollina opines that Plaintiff's immediate post-surgery complaints were linked to compression and stenosis at the C7 segment, and this was a result of her existing degenerative condition, not any surgical error. He opines that the right C5 screw minimally traversed into the C5-C6 space, but this "would not clinically manifest as triceps weakness" and did not correlate with her symptoms. Rather, he opines the triceps is primarily connected to the C7 nerve root, and isolated nerve root dysfunction is "one of the major known and accepted risks of cervical decompression procedure." Therefore, he opines that Plaintiff's claimed injuries manifested because of her pre-existing stenosis and in the absence of any negligence on Dr. Post's part. He opines that there was "nothing more that Dr. Post could or should have done, either during the course of the procedure or in the post-operative period" that would prevent or change these deficits.

Dr. Pollina also notes that Plaintiff had subsequent surgeries on her lumbar spine in November 2018 and May 2019, which he opines had no connection to Dr. Post's treatment of her cervical to upper thoracic region.

Based on the expert's submissions, Dr. Post has established prima facie entitlement to summary judgment

on the basis that there were no departures from the standard of care. The expert also establishes, through his expert opinion, that no such departures were the proximate cause of her post-operative complaints, which he opines were related to existing deficits in the C7 nerve and known complications of a properly performed spinal surgery. The burden therefore shifts to Plaintiff to raise an issue of fact.

Additionally, the movants establish that Plaintiff was properly informed of the foreseeable risks and alternatives to the procedure by Dr. Post prior to signing a detailed consent form, based on the testimony of the parties, the medical chart, and the expert affirmation of Dr. Pollina. This is sufficient to establish prima facie entitlement to summary judgment on the issue of informed consent (*see Pirri-Logan v Pearl*, 192 AD3d 1149, 1150 [2d Dept 2021]).

In opposition to the motion, Plaintiff submits an expert affirmation from a licensed physician, (name of expert redacted), certified in neurological surgery. The Court was presented with a signed, unredacted copy of this affirmation for *in camera* inspection. Plaintiff's expert sufficiently establishes their education, training, and experience to opine on the treatment at issue, affirming that they have performed thousands of surgeries of this nature and are familiar with the standard of care. Plaintiff also submits additional medical records.

Plaintiff's expert opines that Dr. Post did not comply with the standard of care in his performance of the August 8, 2017 surgery, and that he further departed from the standard of care by failing to promptly assess and correct her spinal cord compression after the surgery. The expert notes that it is undisputed Dr. Post did not place a pedicle screw on the left side at C5. In the expert's opinion, omitting a screw in the sequence – which "anchor the rods that stabilize the spinal column" – without any explanation for doing so is a departure from good and accepted practice.

Plaintiff's expert further opines that the standard of care required Dr. Post to take a more active role and personally evaluate Plaintiff during her ten-day hospital stay following the surgery. The expert notes that Plaintiff immediately reported triceps weakness, numbness, and inability to raise her left arm, which were new and worsened symptoms indicating a surgical complication. The expert opines that it was a departure from good and

accepted surgical standards for Dr. Post not to follow up with his patient or examine her during the recovery period, especially in light of this "unusual and alarming outcome from her spinal surgery."

The expert also opines that it is "standard neurosurgical practice for the operating neurosurgeon to immediately order and personally view imaging studies after spinal surgery, and not rely on an off-site or in-hospital radiology service to interpret those images." Therefore, the expert opines that Dr. Post should not have relied on Kingsbrook staff to order and interpret post-operative radiological images, and that he should have reviewed the August 9, 2017 CT scan and August 15, 2017 MRI. The expert also opines that Dr. Post's recommendation of Decadron, a pain and inflammation medication, was "wholly inadequate" and did not address Plaintiff's motor deficits and triceps weakness.

Plaintiff's expert reviewed and interpreted the August 9, 2017 CT scan and opines that not only is there an omitted left C5 screw, but the left C6 screw "improperly traverses the left C6-C7 neural foramen and compresses the left C7 nerve root." The expert opines that this compression from the surgical hardware should have been immediately identified and corrected by returning Plaintiff to the operating room to decompress and release the C7 nerve.

Plaintiff's expert also reviewed and interpreted the August 15, 2017 MRI, which they note was taken one week after the surgery due to Plaintiff's persistent left arm deficits. The expert opines that this MRI also demonstrates the absence of the left C5 pedicle screw and the fact the left C6 screw is traversing the C6-C7 neural foramen and compressing the C7 nerve.

Plaintiff's expert opines that Dr. Post's assessment and treatment on August 24, 2017 inadequately addressed her post-operative complications with pain medication and physical therapy. The expert opines this treatment was "unlikely to improve her left arm function due to the duration of nerve root compression." The expert also opines it was a departure from the standard of care to wait an additional month before scheduling Plaintiff for another CT scan and follow-up appointment, in light of her symptoms. Plaintiff's expert opines again that the nerve compression from the C6 screw could be seen on the September 21, 2017 CT scan.

On the issue of proximate causation, the expert opines that Plaintiff sustained a nerve root compression injury directly connected to the August 8, 2017 surgery, which manifested in left arm weakness and motor deficits. Countering the opinion of the movant's expert that Plaintiff's left arm weakness was unrelated to the pedicle screws placed during the surgery, Plaintiff's expert opines that the left C6 screw traversed into the C6-C7 space and compressed the nerve root.

The expert also opines that "the longer a nerve root remains compressed, the more unlikely it is that functionality can be restored," and therefore the alleged failure of Dr. Post to timely diagnose and correct this issue with a revision surgery led to a worsening of her condition. The expert notes that Plaintiff was referred to an electromyography and nerve conduction study on October 20, 2017 and diagnosed with radiculopathy and "severe dysfunction of the C7 nerve root." Plaintiff's expert opines that this condition was proximately caused by the August 8, 2017 surgery and Dr. Post's alleged failure to correct the nerve compression from the hardware as soon as possible.

"When experts offer conflicting opinions, a credibility question is presented requiring a jury's resolution" (*Stewart v. North Shore Univ. Hosp. at Syosset*, 204 AD3d 858, 860 [2d Dept. 2022] citing *Russell v. Garafalo*, 189 A.D.3d 1100, 1102 [2d Dept. 2020]). Here, there is a clear conflict between the experts as to whether Dr. Post departed from the standard of care with respect to the placement of the screws/hardware and proper post-surgical evaluation and treatment. The experts also offer conflicting interpretations of the radiological studies, based on their personal review of the images from a neurosurgery standpoint, and they disagree on whether those studies showed nerve compression from the C6 pedicle screw.

Plaintiff's expert also counters the movant's expert in detail as to whether Plaintiff's C7 nerve damage was proximately caused by Dr. Post's alleged departures from the standard of care, rather than an unrelated condition or known risk of surgery. Based on these submissions, Plaintiff has raised issues of fact which preclude summary judgment as a matter of law.

Plaintiffs do not raise an issue or fact or any opposition to the branch of the motion seeking dismissal of the informed consent claim. Accordingly, Dr. Post's motion for summary judgment is granted on the issue of informed consent only. The Court will not entertain dismissal of specific claims and theories of medical malpractice, as sought by the movants in reply.

It is hereby:

ORDERED that Dr. Post's motion (Seq. No. 3) for an Order, pursuant to CPLR 3212, granting summary judgment to Dr. Post and dismissing all causes of action asserted against him, is **GRANTED TO THE EXTENT** of dismissing the cause of action for lack of informed consent against Dr. Post, only, and the motion is otherwise **DENIED.**

This constitutes the decision and order of this Court.

ENTER.

Hon. Consuelo Mallafre Melendez

J.S.C.