

Quiles v Wyckoff Hgts. Med. Ctr.

2025 NY Slip Op 30678(U)

February 27, 2025

Supreme Court, Kings County

Docket Number: Index No. 523821/2021

Judge: Consuelo Mallafre Melendez

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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 27th day of February 2025.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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ROBERT QUILES,

Plaintiff,

-against-

DECISION & ORDER

Index No. 523821/2021

Mo. Seq. 4 & 5

WYCKOFF HEIGHTS MEDICAL CENTER, HECTOR A. DEPAZ, M.D., LEAQUE AHMED, M.D., CARINA BIGGS, M.D., ANOUCHKA COSTE, D.O., NISARG MEHTA, D.O., NADER ESTFANOUS, D.O.,

Defendants.

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

Recitation, as required by CPLR §2219 [a], of the papers considered in the review:

NYSCEF #s: Seq. 4: 113 – 115, 116 – 126, 153 – 155, 156 – 157, 164

Seq. 5: 127 – 129, 130 – 146, 158 – 160, 161 – 162, 163

Defendants Wyckoff Heights Medical Center (“Wyckoff Heights”), Anouchka Coste, D.O. (“Dr. Coste”), Nisarg Mehta, D.O. (“Dr. Mehta”), and Nader Estfanous, D.O. (“Dr. Estfanous”) move (Seq. No. 4) for an Order, pursuant to CPLR 3212, granting summary judgment in favor of the movants, and awarding costs and reasonable attorney’s fees pursuant to 22 NYCRR 130-1.1.

Defendants Hector Depaz, M.D. (“Dr. Depaz”), Leaque Ahmed, M.D. (“Dr. Ahmed”), and Carina Biggs, M.D. (“Dr. Biggs”) separately move (Seq. No. 5) for an Order, pursuant to CPLR 3212, granting summary judgment in favor of the movants and dismissing Plaintiff’s complaint against them.

Plaintiff opposes the motions only with respect to Dr. Depaz and the vicarious liability claims against Wyckoff Heights for the acts and omissions of Dr. Depaz.

Plaintiff commenced this action on September 20, 2021, asserting claims of medical malpractice against Defendants in connection with an inguinal hernia repair surgery and perforated colon.

Prior to the events at issue, Plaintiff had undergone an inguinal hernia repair at Wyckoff Heights in 2014. On June 19, 2020, he presented to Wyckoff Heights with complaints of groin pain. An abdominal and pelvic CT scan revealed a recurrent inguinal hernia. He was assessed on July 8, 2020 at the surgical clinic by Dr. Depaz, who recommended inguinal hernia repair. After pre-operative testing and clearance, the surgery was scheduled for September 9, 2020.

On September 9, 2020, Plaintiff's inguinal hernia repair was performed as an open procedure by Dr. Depaz at Wyckoff Heights, with the assistance of resident Dr. Coste. Two lipomas were removed, and a mesh plug and Prolene sutures were placed. Plaintiff was discharged the same day with no apparent complications. He was given follow-up instructions to return in two weeks or if he experienced fever, pain, or a non-healing wound.

Plaintiff testified that after his discharge, he experienced pain and a worsening fever. He testified that his partner called Dr. Depaz at the surgical clinic on September 10 and September 11, and she relayed that Dr. Depaz advised Plaintiff to take Tylenol. Dr. Depaz testified he did not recall any such calls.

On September 11, 2020, Plaintiff returned to the Wyckoff Heights emergency department with abdominal pain, constipation, fever, and an elevated white blood cell count. His CT scans indicated fluid collection, sigmoid wall thickening, and air in the abdomen from the left inguinal region. On September 12, 2020, Plaintiff underwent a diagnostic laparoscopy, which was then converted to an open exploratory laparotomy. It was discovered Plaintiff's sigmoid colon was adhered to the left lower abdominal wall and perforated by a Prolene stitch. Dr. Depaz performed the laparotomy, colon resection, and colostomy portion of the procedure. Plaintiff later underwent a colostomy reversal in January 2021.

Plaintiff alleges that Dr. Depaz departed from the standard of care in performance of the September 9, 2020 surgery by failing to properly identify and protect the sigmoid colon, failing to detect and repair the injury intraoperatively, and failing to timely advise him to return to the hospital and repair the perforation post-operatively. Plaintiff further alleges these departures proximately caused his perforated colon and resulting 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: “[A] defendant must make a prima facie showing either that there was no departure from good and accepted medical practice, or that the plaintiff was not injured by any such departure. Once a defendant physician has made such a showing, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact, but only as to the elements on which the defendant met the prima facie burden. Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions.” (*Rosenzweig v Hadpawat*, 229 AD3d 650, 652 [2d Dept 2024] [internal quotation marks and citations omitted].) However, “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]).

Addressing the motion for summary judgment on behalf of Dr. Depaz (Seq. No. 5), the movant submits an expert affirmation from Dan Seth Reiner, M.D. (“Dr. Reiner”), a licensed physician board certified in surgery and surgical critical care. The expert has sufficiently laid a foundation to opine on hernia repair surgery and all relevant treatment in this case.

Dr. Reiner opines that Dr. Depaz performed the September 9, 2020 inguinal hernia repair surgery in accordance with the standard of care. He opines that this surgery was “an indicated and necessary redo” of Plaintiff’s prior 2014 surgery because of hernia recurrence, likely due to migration of the mesh plug from that procedure. He opines that Dr. Depaz used proper equipment and techniques in the performance of this surgery.

He further opines that the sigmoid colon was “not in the operative field” of this procedure, and thus Dr. Depaz had no reason to identify and protect that part of Plaintiff’s anatomy. In his expert opinion, the sigmoid colon is normally behind the abdominal wall and would not be at risk during the procedure being performed. He states that “if a suture goes through it after being sewn into the abdominal wall, it is only because the colon was adherent to the abdominal wall,” which turned out to be the case when Plaintiff’s subsequent surgery was performed on September 12. Dr. Reiner opines that this complication “could not have been known” to Dr.

Depaz before or during the surgery, and he was not required by the standard of care to identify and protect the colon during an inguinal hernia repair.

Dr. Reiner states that Dr. Depaz had no contact with Plaintiff between the initial surgery and his return to Wyckoff Heights on September 11, 2020. Additionally, he opines that Dr. Depaz did not depart from the standard of care on September 12, 2020 when he assisted Dr. Ahmed's laparoscopy before moving forward with a more invasive open procedure. Dr. Reiner opines that this was the standard of care based on Plaintiff's clinical symptoms, and even though the CT scans indicated "a colon perforation was likely . . . it was still necessary to perform a diagnostic laparoscopy to assess the totality of the situation, including the status of the hernia repair."

Dr. Reiner opines that no departures from Dr. Depaz proximately caused Plaintiff's injuries, because this type of complication "happens even in the face of proper technique" and that it "could not have been avoided" due to the colon's adherence to the abdominal wall.

Based on these submissions, Dr. Depaz has established prima facie entitlement to summary judgment as to the treatment and care rendered on September 9, 2020, supported by an expert opinion that he complied with the standard of care in his recommendation and performance of the inguinal hernia repair. He also establishes that the intraoperative colon perforation was a known and unavoidable complication, which Dr. Depaz could not have prevented or detected from the region in which he was operating. Therefore, he makes a prima facie showing that his alleged departures did not proximately cause Plaintiff's claimed injuries. The burden therefore shifts to Plaintiff to raise a triable issue of fact on these issues.

In opposition, Plaintiff submits an expert affirmation from Jeffrey Lipman., M.D. ("Dr. Lipman"), a licensed physician board certified in surgery. In addition to his board certification, he establishes a foundation to opine on the issues of this case, affirming he has performed "numerous hernia repair surgeries" and is familiar with the standard of care for pre- and post-operative treatment. Dr. Lipman also affirms that he personally treated Plaintiff and performed a surgical reconstruction of his abdominal wall on July 11, 2022 and removal of a migrated mesh plug in September 2024.

Dr. Lipman opines that Dr. Depaz departed from the standard of care in preventing and timely detecting an intraoperative injury to Plaintiff's colon. First, he opines that the September 9, 2020 procedure was performed as an open repair rather than the "preferred" method of laparoscopic surgery for a recurrent inguinal hernia. He notes that "scar tissue and distortion from a previous surgery . . . can be avoided" and laparoscopic repair is recommended to "facilitate dissection through tissue planes that had not been previously dissected."

He opines that Dr. Depaz failed to comply with the standard of care for an open procedure, which requires the surgeon to "perform a complete dissection and exposure of the entire groin to visualize all sites of the herniation." Specifically, he opines that when an indirect hernia sac is identified, it is required by the standard of care to dissect and reduce the sac and identify possible structures within it (e.g., the bowel/colon) in the abdominal cavity. Dr. Lipman notes that there is a factual dispute in the testimonies of Dr. Depaz and Dr. Coste, the resident who assisted in the surgery, as to whether a hernia sac was seen and identified. Dr. Depaz testified that no hernia sac was encountered in his operative field, but Dr. Coste testified that she identified and manually palpated a hernia sac. In Dr. Lipman's opinion, it was a departure from the standard of care to not further "evaluate or protect potential structures within the hernia sac." He opines that dissection or reduction of the sac and identification of the bowel was required by the standard of care to minimize risk of injury and to detect any injury intraoperatively.

Dr. Lipman further opines that it was a departure from the accepted standard of care to use only a medium-sized mesh plug and not apply an additional flat mesh to cover the groin area.

On the issue of proximate causation, Dr. Lipman counters the movants' expert opinion that the colon perforation was a known and unavoidable risk. The expert states that the risk of injury would be minimized if the bowel had been properly identified. The expert notes that during the subsequent surgery on September 12, it became clear a Prolene stitch had perforated the sigmoid colon and created a 2 cm hole with feculent drainage. The expert opines that the colon "was either within or closely associated to the hernia sac that was not dissected or protected" and the suture "passed too deeply through the abdominal wall," and thus the injury was a direct result of malpractice.

Further, he opines that if Dr. Depaz had properly identified and inspected the colon during the procedure, the perforation could have been immediately detected and repaired intraoperatively. He opines that the failure to do so resulted in further injury to Plaintiff, including feculent drainage, peritonitis (inflammation), sepsis, and the need for additional colostomy surgeries.

Based on these submissions, Plaintiff's expert has sufficiently raised issues of fact as to Dr. Depaz's alleged departures from the standard of care in performance of the September 9, 2020 surgery. The expert addressed specific aspects of the procedure in detail, including the alleged failure to perform a dissection of the hernia sac and identification of the bowel, and opined that Dr. Depaz did not take appropriate steps to prevent injury to the colon or to detect and repair the injury intraoperatively. The expert therefore raised issues of fact and credibility as to whether Dr. Depaz departed from the standard of care which must be resolved by a jury.

The expert also presented a conflicting opinion that these departures proximately caused the perforation of the sigmoid colon, as well as the delayed detection and repair of that injury which resulted in further complications and surgeries. "When experts offer conflicting opinions, a credibility question is presented requiring a jury's resolution" (*Stewart v. N. 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]). Thus, summary judgment cannot be granted as a matter of law, and the part of the motion seeking summary judgment in Dr. Depaz's favor is **denied**.

It is noted that Plaintiff's claims that Dr. Depaz failed to timely diagnose and recognize his signs and symptoms of a perforation, based on alleged phone calls from Plaintiff's partner to Dr. Depaz, are not addressed by the movant's expert. The movant merely states that Dr. Depaz was never contacted between Plaintiff's discharge from Wyckoff Heights and his return to the hospital on September 11. As there is conflicting testimony on whether these calls took place and what advice was relayed to Plaintiff, any opinions by the experts would be speculative, and therefore issues of fact remain on this claim.

Plaintiff does not oppose the part of the motion seeking summary judgment in favor of Dr. Ahmed and Dr. Biggs, and that part of the motion is **granted** without opposition.

In their separate motion for summary judgment (Seq. No. 4), Wyckoff Heights does not dispute their vicarious liability for any acts and omissions on which co-defendant Dr. Depaz is found liable. Although they do not concede that Dr. Depaz was an employee of Wyckoff Heights, they acknowledge he was furnished to Plaintiff by the hospital when Plaintiff presented to the surgical clinic, rather than treating Plaintiff as a private physician of his own choosing (*see Vargas v Lee*, 207 AD3d 684, 686 [2d Dept 2022]; *Mduba v Benedictine Hospital*, 52 AD2d 450 [3d Dept 1976]). They state in their reply papers that they “freely acknowledge” and have “never denied” their vicarious liability for Dr. Depaz. Their motion focuses on dismissing direct claims against the hospital and its residents, Dr. Coste, Dr. Mehta, and Dr. Estfanous.

Plaintiff does not oppose the motion for summary judgment in favor of Dr. Coste, Dr. Mehta, and Dr. Estfanous, and has voluntarily discontinued the action against them during the appearance of all parties’ counsel at oral argument on February 19, 2025. Summary judgment is therefore **granted** to those defendants and Plaintiff’s complaint against them is dismissed without opposition.

Summary judgment is also granted to Wyckoff Heights to the extent of any direct claims against them, and any vicarious liability claims on behalf of Dr. Coste, Dr. Mehta, Dr. Estfanous, Dr. Ahmed, or Dr. Biggs, without opposition. Wyckoff Heights remains in this action solely on the basis of their vicarious liability in connection to Dr. Depaz.

The Court denies the part of Wyckoff Heights’s motion seeking costs and sanctions pursuant to 10 NYCRR 130-1.1.

Accordingly, it is hereby:

ORDERED that the part of Wyckoff Heights, Dr. Coste, Dr. Mehta, and Dr. Estfanous’s motion (Seq. No. 4) seeking summary judgment on behalf of Dr. Coste, Dr. Mehta, and Dr. Estfanous is **GRANTED** without opposition; and it is further

ORDERED that the part of Wyckoff Heights’s motion (Seq. No. 4) seeking summary judgment on behalf of Wyckoff Heights is **GRANTED TO THE EXTENT** of dismissing any direct claims against them,

and any claims based on vicarious liability for Dr. Coste, Dr. Mehta, Dr. Estfanous, Dr. Ahmed, or Dr. Biggs,

and **DENIED** as to Wyckoff Heights’s vicarious liability for Dr. Depaz; and it is further

ORDRED that the part of Wyckoff Heights’s motion (Seq. No. 4) seeking costs and reasonable attorney’s fees pursuant to 22 NYCRR 130-1.1 is **DENIED**; and it is further

ORDERED that the part of Dr. Ahmed, Dr. Biggs, and Dr. Depaz’s motion (Seq. No. 5) seeking summary judgment for Dr. Ahmed and Dr. Biggs is **GRANTED** without opposition; and it is further

ORDERED that the part of Dr. Ahmed, Dr. Biggs, and Dr. Depaz’s motion (Seq. No. 5) seeking summary judgment in favor of Dr. Depaz is **DENIED**; and it is further

ORDERED that the caption shall be amended to read:

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF
KINGS

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ROBERT QUILES,

Plaintiff,

-against-

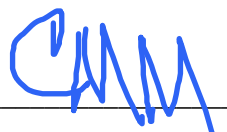
WYCKOFF HEIGHTS MEDICAL CENTER and HECTOR A.
DEPAZ, M.D.,

Defendants.
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The Clerk shall enter judgment in favor of LEAQUE AHMED, M.D., CARINA BIGGS, M.D., ANOUCHKA COSTE, D.O., NISARG MEHTA, D.O., and NADAR ESTFANOUS, D.O.

This constitutes the decision and order of this Court.

ENTER.



Hon. Consuelo Mallatre Melendez

J.S.C.