

**Matthews v Carryl**

2025 NY Slip Op 30837(U)

March 13, 2025

Supreme Court, Kings County

Docket Number: Index No. 520009/2018

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 13th day of March 2025.**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

-----X  
DIANA MATTHEWS,

Plaintiff,

-against-

**DECISION & ORDER**

Index No. 520009/2018  
Mo. Seq. 4 & 5

STEPHEN S. CARRYL, M.D., STEPHEN S.  
CARRYL, M.D., P.C., and  
WYCKOFF HEIGHTS MEDICAL CENTER,

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: Seq. 4: 80 – 82, 83 – 89, 111 – 112, 113, 122  
Seq. 5: 90 – 92, 93 – 106, 114 – 115, 116, 117 – 121, 123

Defendant Wyckoff Heights Medical Center (“Wyckoff Heights” or “the hospital”) moves (Seq. No. 4) for an Order, pursuant to CPLR 3212, granting summary judgment in their favor.

Defendants Stephen S. Carryl, M.D. (“Dr. Carryl”) and Stephen S. Carryl, M.D., P.C. separately move (Seq. No. 5) for an Order, pursuant to CPLR 3212, granting summary judgment in their favor, dismissing Plaintiff’s claims against them, and removing them from the caption.

Plaintiff opposes both motions. Plaintiff’s opposition papers to Wyckoff Heights were filed one day after the February 12, 2025 deadline set by this Court when a second adjournment was permitted, and the opposition papers to Dr. Carryl’s motion were filed the following day. The expert affirmations in opposition to both motions were erroneously uploaded without a signature. Notwithstanding the delay, the Court in its discretion pursuant to CPLR 2001 and 2004 shall consider all opposition and reply papers herein, including the sworn version of the expert affirmation filed on February 24, 2025 (NYSCEF Doc. 123).

Plaintiff commenced this action on October 5, 2018, asserting claims of medical malpractice against all the defendants and asserting a cause of action for negligent hiring, retention, and supervision against Wyckoff Heights. Plaintiff's claims arise from a cosmetic surgery performed by Dr. Carryl at Wyckoff Heights on August 8, 2016.

Prior to the events at issue, Plaintiff had a medical history including HIV, diabetes, and obesity. Plaintiff began treating with Dr. Carryl at a private practice on September 4, 2014, and he consulted her about bariatric weight-loss surgery. She underwent a laparoscopic sleeve gastrectomy performed by Dr. Carryl in November 2014. She continued to follow up with Dr. Carryl, and her weight successfully declined from 205 pounds before the surgery to 155.5 pounds over the course of the following year. In September 2015, January 2016, and March 2016, he noted that her weight was stabilizing at approximately 155-157 pounds, and she had loose skin on her abdomen and arms. On May 24, 2016, he discussed surgery to remove the excess skin and fat from her abdomen and arms. She underwent pre-operative testing and clearance at Wyckoff Heights on July 14, 2016 and with her primary doctor on July 15, 2016.

On August 8, 2016, Plaintiff was admitted to Wyckoff Heights by Dr. Carryl for the surgical procedure, which included abdominoplasty ("tummy tuck"), bilateral brachioplasty (arm lift), panniculectomy (removal of skin from lower abdomen), and liposuction (transfer of fat from flanks to buttocks). She was admitted to the Post-Anesthesia Care Unit and discharged the following day after evaluation by Dr. Carryl. She was prescribed the antibiotic Keflex for ten days.

On August 18, 2016, Plaintiff saw Dr. Carryl for a follow-up evaluation and removal of the Jackson Pratt drains. He renewed her prescription for Keflex as the abdominal wound showed signs of infection, and scheduled her for a follow-up appointment in one week.

Five days later, on August 23, 2016, Plaintiff was admitted to Mount Sinai Beth Israel Medical Center with foul-smelling, clear fluid from the surgical wound and elevated white blood cell count. A washout debridement of the abdominal wall was performed, and she was discharged with a wound VAC on August 29, 2016.

Plaintiff alleges that Dr. Carryl departed from the standard of care in performing the August 8, 2016 cosmetic surgery and in his post-operative treatment and care. Plaintiff also alleges that Wyckoff Heights bears vicarious liability for Dr. Carryl and asserts additional direct claims as to Plaintiff's post-operative treatment and discharge. Plaintiff alleges these departures from the standard of care proximately caused her to develop an infection and post-surgical complications.

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]).

In support of Dr. Carryl’s motion for summary judgment (Seq. No. 5), individually and on behalf of his professional corporation, the movant submits an expert affirmation from Michael B. Grieco, M.D. (“Dr. Grieco”), a licensed physician board certified in general surgery. Dr. Grieco establishes his qualification to opine on the surgical procedures and post-operative care at issue in this case.

Dr. Grieco opines that Dr. Carryl’s performance of the August 8, 2016 procedure complied with the standard of care. Prior to the procedure, Dr. Carryl had assessed and monitored Plaintiff’s weight every 3-4 months since her November 2014 bariatric surgery. Dr. Grieco states that the standard of care is for a surgeon to recommend weight loss prior to post-bariatric skin removal surgery, and he opines that Dr. Carryl properly assessed her as a “healthy candidate for skin removal surgery” after her 50-pound weight loss and BMI reduction which remained stable for several months. The expert also opines that in addition to monitoring her weight and making sure Plaintiff achieved and maintained a healthy weight before the skin removal surgery, Dr. Carryl obtained the appropriate pre-surgical labs and medical testing to further verify that plaintiff was a healthy candidate for surgery. The expert states that based of the pre-surgical labs and medical testing in preparation for the August 2016 skin removal surgery, there were no contraindications or medical conditions to cancel the surgery.

Although she had preexisting HIV and diabetes, Dr. Grieco opines that Plaintiff’s viral load markers and glucose levels showed both conditions were “under control” and not contraindications for surgery. Dr. Grieco also opines that a panniculectomy to remove excess “apron” skin in the lower abdomen was beneficial and necessary for Plaintiff to prevent rashes and irritation, which she was prone to due to her HIV status.

The expert opines based on Dr. Carryl's operative report that he properly performed the procedure "in usual sterile fashion," avoided injury to surrounding organs, and administered an antibiotic IV. He opines that each step of the surgery was appropriately documented in the operative report and there were no deviations from the standard of care.

The day after the surgery, Dr. Grieco opines that Dr. Carryl properly evaluated Plaintiff as having no signs of "infection, necrosis or breakdown." He opines that she was stable for discharge and given proper follow-up instructions and appropriate medications for infection prevention (Keflex) and post-operative pain.

Dr. Grieco opines that on August 18, 2016, Dr. Carryl evaluated Plaintiff with a "superficial abdominal wound infection" and continued her Keflex prescription. He opines that this treatment was appropriate. He states that on her subsequent treatment at Mount Sinai Medical Center, she had only a "mildly elevated" white blood cell count and no fluid collection observed in her CT scans, which he opines is consistent with a superficial wound infection. He also states that Plaintiff was "noncompliant" with Dr. Carryl's directive to return in one week after continuing Keflex.

On the issue of proximate causation, Dr. Grieco opines that superficial infection is a well-known risk and complication of post-bariatric skin removal surgery, due to the "history of large incisions from previous surgeries and fatty tissue involved with the procedure." He opines this complication can occur in the absence of malpractice, especially in a patient with a compromised immune system. He opines that although Plaintiff's diabetes and HIV were under control, they are "volatile systemic diseases which can quickly fluctuate . . . through no fault or negligence of the physician."

Dr. Grieco further opines that the need for a surgical "washout" debridement of the abdominal wall was not proximately caused by malpractice on Dr. Carryl's part. He states that a post-operative abdominal wall infection is a known risk of this type of procedure, and that it would "manifest very rapidly within hours or days," so it would not have developed during the surgery itself or on her August 18 appointment. Additionally, he opines that Plaintiff's claims of scarring and pain were "a normal and natural course of post-operative recovery," not caused by any deviations from the standard of care.

Dr. Carryl has established prima facie entitlement to summary judgment, based on the expert submissions setting forth that all his treatment was in compliance with the standard of care and did not proximately cause injury to Plaintiff.

The burden therefore shifts to Plaintiff to raise a triable issue of fact.

In opposition, Plaintiff submits an expert affirmation from David A. Mayer, M.D. ("Dr. Mayer"), a licensed physician board certified in general surgery. He has established qualifications to counter the movant's expert and opine on

the issues herein, setting forth that he is experienced as a bariatric surgeon in recommending and referring patients to plastic surgeons for elective cosmetic surgery and assisting in such surgeries.

Dr. Mayer opines that Dr. Carryl should not have undertaken the August 8, 2016 surgery, and the performance of the procedure at all was a departure from the standard of care. He opines that Plaintiff's immunocompromised status due to her HIV and diabetes was a contraindication to the procedure, and "subjected her to an unreasonable risk of invasive surgical site infection." He opines that the surgery was unnecessary and unsafe, due to Plaintiff being "a prohibitive candidate" based on her preexisting conditions and risk factors.

Specifically, he opines that the impact of HIV, which destroys the immune system cells known as T-cells, impedes a patient's ability to fight off infections. He also opines that diabetic patients face additional risks from their compromised immune systems due to "dysfunction of neutrophils and macrophages, and dysfunction of the adaptive immune T-cell response making it harder to fight off infection." He counters the movant's expert that both conditions were controlled when she underwent pre-operative blood and viral load testing, noting that Dr. Grieco himself acknowledged that HIV and diabetes are "volatile" conditions which can "fluctuate out of control" when a patient undergoes an invasive surgery under anesthesia. Thus, he opines that the recommendation and performance of the procedure placed her at unreasonably high risk of infection.

Dr. Mayer further opines that these alleged departures proximately caused Plaintiff to develop an abdominal surgical site infection, which required wound drainage, debridement, and prolonged hospitalization, and resulted in permanent scarring. Dr. Mayer opines that Plaintiff's post-operative infection, complications, and subsequent treatment arose directly from Dr. Carryl's alleged recommendation and performance of a surgery which was not medically necessary and was contraindicated by her risk factors for infection. Plaintiff has therefore raised issues of fact as to proximate causation, with respect to the specific claim that Dr. Carryl overlooked the patient's heightened risk and medical conditions.

Based on the submissions, Dr. Mayer raises an issue of fact as to whether the elective surgery was properly recommended and thus performed by Dr. Carryl, in light of Plaintiff's preexisting conditions and heightened risk of infection. Dr. Mayer offers a detailed and conflicting opinion as to whether Plaintiff's diabetic and HIV-positive status was a contraindication to the procedure, and whether Dr. Carryl therefore departed from the standard of care by

performing a complex elective surgery with “extensive abdominal wall surgical dissection” on a patient with high risk of infection.

However, Dr. Mayer does not render any opinion as to the actual performance and technique of the surgery. Plaintiff’s attorney affirmation references “improper surgical techniques,” including excessive tissue removal and failure to “employ proper tension-reducing techniques . . . such as layered closure,” citing to the expert affirmation. None of these allegations of specific surgical errors and improper methods are mentioned in Dr. Mayer’s affirmation.

Plaintiff’s attorney affirmation also states that Dr. Carryl’s post-operative treatment of the infection was inadequate, and that the “proper standard of care” required closer monitoring or IV antibiotics. Dr. Mayer’s affirmation contains no discussion or opinion on Plaintiff’s post-operative treatment, and he does not counter the opinion of Dr. Grieco that the oral antibiotic prescription and follow-up instructions were in accordance with the standard of care.

“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” (*Barnaman*, at 804, quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986] [emphasis added]). The defendant’s expert made a prima facie showing that the surgical technique and post-operative treatment were proper, and an issue of fact cannot be created by “unsubstantiated assertions or speculations of plaintiff’s counsel” without “some statement of expert medical opinion” (*Alvarez*, at 327).

The Court notes that the question of whether Dr. Carryl was “qualified and competent” to perform the August 8, 2016 surgery, due to the fact he was not board certified as a plastic surgeon, is a theory of liability raised for the first time in Plaintiff’s opposition papers and expert affirmation. This claim was not noticed in the Bill of Particulars or argued in the movant’s expert affirmation, and therefore it is not part of the Court’s consideration herein.

It is also noted that while Dr. Carryl’s expert rendered an opinion on the issue of informed consent, Plaintiff did not assert a separate cause of action for informed consent in the Complaint and it is not part of this action.

In sum, Dr. Carryl’s motion for summary judgment is **granted to the extent** of dismissing any claims related to the surgical technique of the procedure and post-operative treatment. The claims in this action shall be limited to the issue on which Plaintiff’s expert raised a triable issue of fact, i.e., whether it was a departure from the standard of care to recommend and perform the August 8, 2016 surgery on a patient with HIV and diabetes.

In their separate motion for summary judgment (Seq. No. 4), Wyckoff Heights seeks to dismiss all claims against them in this action. As a matter of law, they argue that Plaintiff’s medical malpractice claims arise entirely from the acts and omissions of Dr. Carryl, and that Wyckoff Heights bears no vicarious liability for Plaintiff’s private attending physician. They further argue that Plaintiff has asserted no viable independent claims of malpractice against the hospital.

It is well established that a hospital is not vicariously liable for the negligence or medical malpractice of a non-employee, private attending physician “as when the physician is retained by the plaintiff himself or herself” (*Goffredo v St. Luke’s Cornwall Hospital*, 194 AD3d 699, 700 [2d Dept 2021]; see also *Gardner v Brookdale Hosp. Medical Center*, 73 AD3d 1124, 1124 [2d Dept 2010]). An exception to the rule exists, grounded in apparent agency, when “a patient comes to the emergency room seeking treatment from the hospital and not from a particular physician of the patient’s choosing” (*Fuessel v Chin*, 179 AD3d 899, 901 [2d Dept 2020], quoting *Muslim v Horizon Med. Group, P.C.*, 118 AD3d 681, 683 [2d Dept 2014]; see also *Mduba v Benedictine Hospital*, 52 AD2d 450 [3d Dept 1976]). “Thus, in order to establish its entitlement to judgment as a matter of law defeating a claim of vicarious liability, a hospital must demonstrate that the physician alleged to have committed the malpractice was an independent contractor and not a hospital employee and that the exception to the general rule did not apply” (*Fuessel*, at 901).

Here, there is no issue of fact that Dr. Carryl was a private physician with admitting privileges at the hospital, not an employee of Wyckoff Heights. The movants have established that Dr. Carryl was an independent physician and that the *Mduba* exception does not apply. Dr. Carryl was not furnished to Plaintiff because she sought emergency treatment through the hospital or its surgical clinic. He was a physician the patient had treated with for almost two years, and she had retained his services and scheduled the surgery through his private practice. Thus, as a matter of law, Wyckoff Heights has established prima facie that they are not vicariously liable for Dr. Carryl’s alleged malpractice.

Further, an attending physician is generally held responsible for directing and supervising a patient’s treatment. A hospital resident “who does not exercise any independent medical judgment” in assisting the physician “cannot be held liable for malpractice so long as the doctor’s directions did not so greatly deviate from normal practice that the resident should be held liable for failing to intervene” (*Soto v Andaz*, 8 AD3d 470 [2d Dept 2004]). Dr. Carryl is consistently identified in the hospital records as Plaintiff’s attending physician during the procedure, pre-operatively, and post-operatively. The movants note that Dr. Carryl was responsible for all treatment decisions during Plaintiff’s admission to Wyckoff Heights, including her discharge on August 9, 2018. A hospital “may not be held vicariously liable for resulting

injuries where the hospital employees have merely carried out the private attending physician's orders" (*Tsocanos v Zaidman*, 180 AD3d 841, 842 [2d Dept 2020]). For this reason, Wyckoff Heights correctly argues that Plaintiff has asserted no claims of independent negligence or malpractice on the part of the hospital's resident physicians or other staff, and they have set forth a showing that they are entitled to dismissal of the Complaint against them in its entirety.

In opposition, Plaintiff raises no triable issues of fact as to any direct or vicarious liability claims against the hospital. "To support a viable claim based upon ostensible agency, a plaintiff must set forth facts sufficient to support the conclusion that the hospital engaged in some misleading conduct upon which the plaintiff reasonably relied when the plaintiff decided to accept medical services from the hospital" (*Muslim*, at 683). Plaintiff has made no showing that she relied on a perceived "employment relationship" between the hospital and Dr. Carryl when she sought treatment from him (*id.*). There is no question that he was a private physician of her choosing, not furnished to her as an apparent agent acting on behalf of the hospital.

Plaintiff asserts broad and generic claims regarding the hospital's post-operative infection prevention and wound care in their attorney affirmation, but they fail to cite any specific evidence of wrongdoing, nor do they make any showing that Wyckoff Heights staff exercised independent medical judgment. "General and conclusory allegations of medical malpractice . . . unsupported by competent evidence tending to establish the essential elements of medical malpractice" cannot create a genuine issue of fact to defeat a summary judgment motion (*Myers v Ferrara*, 56 AD3d 78, 84 [2d Dept 2008]). Plaintiff's argument that dismissal of these claims is premature without further discovery is meritless, as all depositions sought by the parties have been completed and the Note of Issue has been filed.

Plaintiff's expert offers opinions on Wyckoff Heights based solely on their alleged "negligent credentialing" of Dr. Carryl. This claim was discontinued and withdrawn by Plaintiff, upon the appearance of all parties before this Court on March 12, 2025.

As Plaintiff's submissions in opposition are insufficient to raise a triable issue of fact, Wyckoff Heights's motion for summary judgment is **granted** in its entirety.

The Court denies the part of Wyckoff Heights's motion seeking costs and sanctions pursuant to 10 NYCRR 130-1.1, which is not noticed in their Notice of Motion.

It is hereby:

**ORDERED** that Wyckoff Heights’s motion (Seq. No. 4) seeking summary judgment in their favor and dismissal of all Plaintiff’s claims against them is **GRANTED**; and it is further

**ORDERED** that Dr. Carryl’s motion (Seq. No. 5) seeking summary judgment in favor of Dr. Carryl and Stephen S. Carryl, M.D., P.C. is **GRANTED TO THE EXTENT** of dismissing any claims of improper surgical technique or post-operative treatment, and **DENIED** as to the claim that he recommended and performed a contraindicated procedure; and it is further

**ORDERED** that the caption shall be amended to read:

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF  
KINGS

-----X  
DIANA MATTHEWS,

Plaintiff,

-against-

STEPHEN S. CARRYL, M.D., STEPHEN S.  
CARRYL, M.D., P.C.,

Defendants.  
-----X

The Clerk shall enter judgment in favor of WYCKOFF HEIGHTS MEDICAL CENTER.

This constitutes the decision and order of this Court.

**ENTER.**

  
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**Hon. Consuelo Mallafre Melendez**  
**J.S.C.**