

O'Grady v Noorbaksh

2025 NY Slip Op 31481(U)

February 6, 2025

Supreme Court, New York County

Docket Number: Index No. 805194/2020

Judge: Kathy J. King

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHY J. KING PART 06

Justice

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VINCENT O'GRADY,

Plaintiff,

INDEX NO. 805194/2020

MOTION DATE 06/20/2023

MOTION SEQ. NO. 001

- v -

KOUROSH R. NOORBAKSH, M.D., DAVID FURGIUELE, M.D., TISCH HOSPITAL, NYU LANGONE HOSPITALS, and NYU LANGONE HEALTH SYSTEM,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 91, 92

were read on this motion to/for DISMISSAL AND JUDGMENT - SUMMARY

Upon the foregoing documents, and oral argument having been heard, Defendants Kourosh R. Noorbaksh, M.D. (hereinafter "Dr. Noorbaksh"), David Furgieuele, M.D. (hereinafter "Dr. Furgieuele"), NYU Langone Hospitals s/h/a Tisch Hospital and NYU Langone Hospitals, and NYU Langone Health System (collectively referred to herein as "Defendants") move, pursuant to CPLR 3212, for an order granting summary judgment and dismissal of the complaint in its entirety, with prejudice, on the grounds that no material issues of fact exist, and the Defendants are entitled to summary judgment as a matter of law.

Plaintiff Vincent O'Grady (hereinafter "Plaintiff") opposes the motion.

Plaintiff brings this action against the named Defendants alleging four causes of action: medical malpractice, lack of informed consent, vicarious liability, and negligent hiring and supervision. The crux of Plaintiff's claim is that the Defendants departed from the standard of

medical care by failing to timely and properly diagnose and treat malignant hyperthermia (“MH”), a rare and severe reaction to anesthesia, at the time of Plaintiff’s surgery for a right total knee replacement (“TRKR”).¹ Plaintiff further alleges that Defendants’ departures directly and proximately caused Plaintiff to suffer severe injuries, including a 12-day coma, three weeks of inpatient rehabilitation, muscle wasting, and debilitating malaise. The underlying action was commenced by the filing of a Summons and Complaint on July 2, 2020. The Defendants joined issue by service of their Verified Answers on August 26, 2020, and now move for summary judgment pursuant to CPLR 3212 dismissing the complaint in its entirety, with prejudice, for dismissal of any claims where Plaintiff has failed to raise a triable issue of fact.

BACKGROUND

Plaintiff, a 54-year-old male at the time, underwent a TRKR surgery at NYU Hospital on November 2, 2018. His medical history included high blood pressure, type 2 diabetes, and bipolar disorder. An anesthesia evaluation confirmed that neither Plaintiff nor his immediate family members had prior significant anesthesia-related events or drug reactions. Anesthesiologist Defendant Dr. Noorbaksh discussed anesthesia options with him, and while spinal anesthesia was initially planned, it was switched to general anesthesia due to difficulties with spinal placement and patient discomfort during the TRKR surgery. During the two-hour surgery, Plaintiff’s vital signs were otherwise stable.

During the procedure, Plaintiff experienced delayed emergence from anesthesia, becoming unresponsive with a rapid heart rate, increased respiratory rate, and rising ETCO₂ levels. Defendant Dr. Noorbaksh, along with Dr. Marshall and Defendant Dr. Furgiuele, suspected MH

¹ It is undisputed that the Plaintiff developed MH during the TRKR surgical procedure.

and immediately initiated the MH protocol. Dantrolene was administered, and other supportive measures like hyperventilation, fluid management, and cooling were implemented. Plaintiff's temperature rose, confirming the MH diagnosis. His condition stabilized a few hours later, and he was transferred to the ICU. Thereafter, Plaintiff was extubated on November 14th and underwent rehabilitation when he was transferred to a sub-acute rehabilitation facility until December 4th. Ultimately, he recovered and returned to his baseline condition, able to walk, talk, and perform daily activities.

THE INSTANT MOTION

MEDICAL MALPRACTICE AND INFORMED CONSENT

CPLR 3212 requires that “the proponent of a summary judgment motion make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact” (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). A defendant physician moving for summary judgment makes a *prima facie* showing of entitlement to judgment as a matter of law by establishing the absence of a triable issue of fact as to his or her alleged departure from accepted standards of medical practice, or by establishing that the plaintiff was not injured by such treatment (*see Alvarez*, 68 NY2d at 324; *Frye v Montefiore Med. Ctr.*, 70 AD3d 15 [1st Dept 2009]; *McGuigan v Centereach Mgt. Group, Inc.*, 94 AD3d 955 [2d Dept 2012]; *Sharp v Weber*, 77 AD3d 812 [2d Dept 2010]; *see generally Stukas v Streiter*, 83 AD3d 18 [2d Dept 2011]). To satisfy this burden, a defendant physician must present expert opinion testimony that is supported by the facts in the record, addresses the essential allegations in the complaint or the bill of particulars, and is detailed, specific, and factual in nature (*see Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Joyner-Pack v. Sykes*, 54 AD3d 727 [2d

Dept 2008]; *Koi Hou Chan v Yeung*, 66 AD3d 642 [2d Dept 2009]; *Jones v Ricciardelli*, 40 AD3d 935 [2d Dept 2007]). Furthermore, to satisfy his or her burden on a motion for summary judgment, a defendant physician must address and rebut specific allegations of malpractice set forth in the plaintiff's bill of particulars (*see Wall v Flushing Hosp. Med. Ctr.*, 78 AD3d 1043 [2d Dept 2010]; *Grant v Hudson Val. Hosp. Ctr.*, 55 AD3d 874 [2d Dept 2008]; *Terranova v Finklea*, 45 AD3d 572 [2d Dept 2007]).

In support of the motion, Defendants submit the affirmation of their expert, Christopher Wu, M.D. ("Dr. Wu"), who is board certified in Anesthesiology. Dr. Wu opines, to a reasonable degree of medical certainty, based on a review of the pleadings, bills of particulars, medical records of NYU Langone Hospitals, and the deposition transcripts of the parties and nonparty witnesses, that at all times there were no departures from the standards of care in the treatment of the Plaintiff, and that no deviation from good practice caused the Plaintiff's alleged harm or injuries. According to Dr. Wu, the objective medical records and witness testimony demonstrate that Defendant Dr. Noorbaksh obtained proper informed consent from the Plaintiff for general anesthesia, conducted a thorough medical history, and administered appropriate anesthetic care during the Plaintiff's TRKR surgery, all in accordance with the applicable standard of care.

Specifically, Dr. Wu opines that Dr. Noorbaksh appropriately obtained the Plaintiff's informed consent for both regional and general anesthesia after discussing commonly known risks and alternatives, fulfilling the standard of care, which does not require an exhaustive list of every conceivable risk. Dr. Wu explains that there were no contraindications to general anesthesia after consent was obtained, and the Plaintiff was deemed an appropriate candidate. He notes that MH is a rare, life-threatening condition triggered by agents like Sevoflurane in genetically predisposed individuals, unlike needle insertions or regional anesthetics, whose diagnosis relies primarily on

personal or family history of adverse reactions to general anesthesia, as there is no definitive predictive test.

Further, Dr. Wu opines that Dr. Noorbaksh appropriately attempted spinal anesthesia initially, and that leg movement following this attempt is common, especially in anxious or overweight patients, and did not contraindicate general anesthesia. He further opines that the Plaintiff was properly monitored during general anesthesia, with MH being timely considered and treated. Dr. Wu found no evidence of MH during Sevoflurane administration (11:35 AM - 1:42 PM), as the Plaintiff's vitals remained stable and within normal limits, with no observed muscle rigidity. He believes MH was the likely diagnosis, but the ETCO₂ fluctuations after Sevoflurane discontinuation were a normal response, not MH, as the latter would have presented with sustained ETCO₂ elevation alongside increased temperature and heart rate, which were not observed until approximately 2:00 PM. Dr. Wu notes that upon observing these later increases, Defendant Dr. Noorbaksh promptly considered MH. Dr. Wu highlights that thereafter, Defendant Dr. Noorbaksh, in collaboration with Defendant Dr. Furgiuele, implemented aggressive MH treatment within 40 minutes of anesthesia conclusion, adhering to protocols by administering Dantrolene, calling for the MH cart and hotline, demonstrating compliance with the standard of care.

Dr. Wu asserts the Plaintiff's injuries were not proximately caused by the Defendants' actions. MH, triggered by Sevoflurane, is unavoidable in susceptible individuals, and its consequences are inevitable. Dr. Wu opines that the injuries, if any, were due to genetic predisposition, not negligence, and the Defendants' timely treatment prevented more severe outcomes. Dr. Wu considers speculation about earlier intervention unfounded, as treatment began within 20 minutes of symptom onset, unlikely to significantly alter the outcome. Finally, Dr. Wu suggests that neuroleptic malignant syndrome (NMS), potentially related to the Plaintiff's Abilify

prescription, may have contributed to his complications. Both MH and NMS share similar treatments, which the Defendants promptly and appropriately implemented, adhering to the standard of care and, according to Dr. Wu, likely preventing serious injury, disability, or death.

Based on Dr. Wu's expert affirmation, the Court finds that Defendants Dr. Noorbaksh and Dr. Furgiuele have established a prima facie entitlement to summary judgment, demonstrating as a matter of law that informed consent was obtained prior to the TRKR surgery and their care and treatment of the Plaintiff did not deviate from accepted medical standards, and that the Plaintiff's alleged injuries were not proximately caused by any act or omission on their part (*see Steinberg v Lenox Hill Hosp.*, 148 AD3D 612 [1st Dept 2017]; *Camacho v Pintauro*, 210 AD3d 578 [1st Dept 2022]).

Once the proponent of a summary judgment motion makes a showing of entitlement to dismissal by tendering evidence sufficient to demonstrate the absence of material issues of fact, the burden shifts to the opposing party "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez*, 68 NY2d at 324; *see also Menzel v Plotnick*, 202 AD2d 558 [2d Dept 1994]; *Salamone v Rehman*, 178 AD2d 638 [2d Dept 1991]; *Zuckerman v City of New York*, 49 NY2d 557, 558-59 [1980]).

In opposition, Plaintiff submits the expert affirmation of Mark A. Lovich, M.D., ("Dr. Lovich"), who is certified by the American Board of Anesthesiology. Dr. Lovich opines to a reasonable degree of medical certainty based on the same records reviewed by Defendants' expert together with minute by minute anesthesiology records, and the affirmation of Defendants' expert Dr. Wu, opines with a reasonable degree of medical certainty that the Defendants departed from good and accepted standards of medical care and these departures were a substantial factor in causing the Plaintiff's alleged injuries. In this regard, Dr. Lovich asserts that Defendants departed

from the standard of care by delaying and untimely diagnosing the Plaintiff's MH resulting in injury and the untimely diagnosis of MH was a direct departure from the standard of care in monitoring the Plaintiff and appreciating the significance of events that occurred thereto.

Dr. Lovich further contends that these departures primarily concerned, but were not limited to, the abnormalities related to ETCO₂ levels relative to minute ventilation as well as Plaintiff's tachycardia commencing at 1:45 PM and a failure to timely replace the Plaintiff's temperature probe during the ongoing abnormal readings. According to Dr. Lovich, such departures significantly delayed a timely diagnosis of MH and the administration of Dantrolene, resulting in the alleged injuries. Dr. Lovich also concurs with the Defendants' expert's distinction between MH and MNS, however, Dr. Lovich emphasizes that this distinction should have prompted the Defendants to speed up the administration of Dantrolene well before four minutes in the present matter. Dr. Lovich opines that the Defendants failed to reinitiate a temperature probe when the Plaintiff started to show signs of tachycardia and massive hyperventilation, which was a departure from the standard of care. According to Dr. Lovich, reinsertion of a temperature probe would have been a useful and important diagnostic tool given the events at issue and the nature of Plaintiff's MH. Dr. Lovich concludes that these departures greatly increased the Plaintiff's chance of injury and were substantial factors in the injuries sustained to the Plaintiff.

As to Plaintiff's claim for lack of informed consent, Plaintiff has raised a triable issue of fact through the expert affirmation of Dr. Lovich who points to Plaintiff having no recollection of any discussions concerning the surgery and was not aware of the possibility that an alternative anesthesia may have been chosen. According to Dr. Lovich's review of the applicable consent form, the forms omit information about MH, and even MNS. It is well settled that a defendant moving for summary judgment on a lack of informed consent claim must demonstrate that the

plaintiff was informed of the alternatives to and the reasonably foreseeable risks and benefits of the treatment (*Henry v Bezalel Rehabilitation & Nursing Ctr.*, 2020 NY Slip Op30369(U) [Sup Ct, NY County 2020]; *Koi Hou Chan v. Yeung*, 66 AD3d 642, 643 [2d Dept 2009]).

Based on the foregoing, the Court finds that the Plaintiff's expert affirmation rebuts the Defendants' prima facie showing and raises triable issues of fact regarding, *inter alia*, whether the Defendants 1) failed to appreciate the significance of the Plaintiff's vitals during his TRKR procedure; 2) failed to timely diagnose and treat the MH; 3) failed to timely and expediently administer Dantrolene; 4) failed to disclose the risks associated with the TRKR procedure, and, specifically, the use of general anesthesia; and 5) failed to reinitiate a temperature probe as part of the Plaintiff's vital monitoring. "Summary judgment is not appropriate . . . [when] the parties [submit] conflicting medical expert opinions because [s]uch conflicting expert opinions will raise credibility issues which can only be resolved by a jury" (*see Cummings v Brooklyn Hosp. Ctr.*, 147 AD3d 902, 904 [2d Dept 2017], quoting *DiGeronimo v Fuchs*, 101 AD3d 933 [2d Dept 2012] [internal quotation marks omitted]; *see also Elmes v Yelon*, 140 AD3d 1009 [2d Dept 2016]; *Leto v Feld*, 131 AD3d 590 [2d Dept 2015]). "[C]onflicting expert opinions raise credibility issues which are to be resolved by the factfinder" or factfinders (*see Stucchio v Bikvan*, 155 AD3d 666, 667 [2017]).

Accordingly, the Defendants' motion for summary judgment must be denied regarding Plaintiff's medical malpractice and lack of informed consent causes of action.

VICARIOUS LIABILITY

With regard to the branch of the Defendants' motion regarding vicarious liability, given that triable issues of fact exist as to the care and treatment by Defendant Drs. Noorbaksh and Furgiuele, employees of NYU Langone Hospitals, and whether such treatment proximately

caused Plaintiff's alleged injuries, dismissal is not warranted against Tisch Hospital and NYU Langone Hospitals, under the doctrine of respondeat superior (*see Sessa v Peconic Bay Medical Center*, 200 AD3d 1085 [2d Dept 2021]; *Klippel v Rubinstein*, 300 AD2d 448 [2d Dept 2002]; *Rivera v County of Suffolk*, 290 AD2d 430 [2d Dept 2002]; *Mduba v Benedictine Hosp.*, 52 AD2d 450 [3d Dept 1976]).

However, dismissal is warranted on behalf of NYU Langone Health System, which is a non-profit domestic corporation and does not provide healthcare services and neither employed nor supervised any defendant or clinician involved in the Plaintiff's treatment and care. Thus, the NYU Langone Health System cannot be liable under a medical malpractice theory, since there is no physician-patient relationship between NYU Langone Health Systems and the Plaintiff (*see Yovich v Montefiore Nyack Hosp.* 212 AD3d 425 [1st Dept 2023]; *Thomas v. Hermoso*, 110 AD3d 984 [2d Dept 2013]; *Marrero v. Bestcare, Inc.*, 2020 NY Slip Op 31154[U] [Sup Ct, Bronx County 2020]). Consequently, the Court finds no legal basis for the NYU Langone Health Systems to be a party to this action and dismissal is warranted.

NEGLIGENT HIRING AND SUPERVISION

With regard to the branch of the Defendants' motion regarding negligent hiring and supervision, generally, where an employee is acting within the scope of his or her employment, the employer is liable under the theory of vicarious liability, and the plaintiff may not proceed with a claim to recover damages for negligent hiring, retention, supervision, or training (*see Saretto v Panos*, 120 AD3d 786 (2d Dept 2014); *Quiroz v Zottola*, 96 AD3d 1035 (2d Dept 2012)). A claim for negligent hiring and supervision may only be made simultaneously with claims of vicarious liability when the Plaintiff pleads gross negligence and punitive damages (*Talavera v Arbit*, 18

AD3d 738 [2d Dept 2005]). However, no such exception fits here, as the Plaintiff neither plead gross negligence nor punitive damages in his Complaint and Bill of Particulars,

Accordingly, Plaintiff's cause of action for negligent hiring, training, and supervision must be dismissed (*see Holland v City of Poughkeepsie*, 90 AD3D 841 [2d Dept 2011]; *Ashley v City of New York*, 7 AD3d 742 [2d Dept 2004]).

Accordingly, it is hereby,

ORDERED, that the Defendants' motion for summary judgement is granted to the extent of dismissing the complaint as to the Defendant NYU Langone Health Systems, and dismissing Plaintiff's negligent hiring and supervision cause of action, and in all other respects, Defendants' motion is denied; and it is further

ORDERED, that the Defendants are directed to serve a copy of this order upon the Plaintiff by first class regular mail at his last known address within 20 days of entry of this order; and it is further

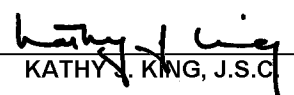
ORDERED, that within twenty (20) days of entry of this order, counsel for Defendants shall serve a copy of this order with notice of entry upon all parties and the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to enter judgment in accordance with this order; and it is further

ORDERED, that service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED, that the parties are directed to appear for a settlement conference on May 27,

2025, at 10:30 am, at 60 Centre Street, Room #351, New York, NY.

This constitutes the Decision and Order of the Court.

<u>2/6/2025</u> DATE		 KATHY J. KING, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
	<input type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
		<input type="checkbox"/> REFERENCE