SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. KATHY J. KING** **PART** **06**

Justice

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BARBARA FUNICELLO As Administratrix of The Estate of ROBERT J. FUNICELLO, deceased, and BARBARA FUNICELLO, individually,

Plaintiffs,

- v -

CHRISTOS I STAVROPOULOS, DARREN I ROHAN, and NORTHERN WESTCHESTER HOSPITAL ASSOCIATION,

Defendants.

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INDEX NO. 805330/2018

MOTION DATE 06/13/2022

MOTION SEQ. NO. 001 and 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 68, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 102

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 68, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 102

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 69, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 103

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 69, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 103

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing papers, and oral arguments having been heard, Mot. Seq.001 and 002, are consolidated for purposes of disposition.

In the within medical malpractice action, Defendants move for the following relief:

Defendants, Darren I. Rohan, M.D. ("Dr. Rohan"), and Northern Westchester Hospital Association ("NWH") (Mot. Seq.001), move for an Order, pursuant to CPLR 3212, granting summary judgment, and dismissing Plaintiffs' Complaint in its entirety.

Defendant, Christos I. Stavropoulos, M.D., ("Dr. Stavropoulos") (Mot. Seq.002), moves for an order, pursuant to CPLR 3212, granting partial summary judgment dismissing the Plaintiffs' complaint as to Dr. Stavropoulos, and, granting partial summary judgment, pursuant to CPLR 3211 [a][7], with respect to Plaintiffs' lack of informed consent for failure to state a cause of action.

Plaintiffs submit opposition to both motions.

BACKGROUND

In September 2017, Robert J. Funicello ('decedent") was diagnosed with localized advanced esophageal cancer after an upper endoscopy and biopsy. On September 28, 2017, decedent consulted Dr. Stavropoulos, a surgeon employed by Caremount, as a private patient regarding an esophagectomy to remove the cancer after chemo RT induction. Dr. Stavropoulos recommended surgically resecting the area of the tumor, with use of a Robotic assisted Ivor Lewis esophago-gastrostomy, if decedent's disease did not progress and after the decedent received the appropriate medical clearances. The decedent completed chemotherapy and radiation in November 2017. In December 2017, a PET/CT scan showed no progression of the disease, which indicated a positive response to treatment and showed that the decedent was a candidate for surgical resection. Dr. Stavropoulos decided to use a robotic approach for the surgery, citing benefits such as improved visualization, greater precision, reduced patient pain, and quicker post-operative recovery. He explained to decedent that the surgery involved the detachment and reattachment of the esophagus to the stomach. He further discussed the risks of the surgery with

decedent including "death, arrhythmia, pneumonia, anastomotic leak, prolonged hospital stay, prolonged tube feeding, and DVT."

On January 15, 2018, the decedent presented at NWH, at the direction of Dr. Stavropoulos, for a robotic Ivor Lewis esophago-gastrectomy to excise adenocarcinoma at the gastroesophageal junction. Prior to the surgery, the decedent signed a consent form in which Dr. Stavropoulos certified that he explained the nature, purpose, benefits, risks, and alternatives of the proposed treatment to the decedent, and believed the decedent fully understood. The consent form noted the possibility of a blood transfusion during or after the operation.

That day, the surgery commenced at 8:30 a.m. and concluded at 12:45 p.m. Dr. Stavropoulos was the led surgeon and Dr. Rohan, an attending cardiothoracic surgeon, assisted together with Physician Assistant Katie Alberti. Dr. Stavropoulos was the sole author of the operative report, the medical record indicates that Dr. Rohan neither prepared a separate report when assisting Dr. Stavropoulos, nor consulted with Dr. Stavropoulos before the operative report was signed.

During the procedure, the decedent experienced excessive bleeding, and a thoracic aortic injury occurred. Approximately 60-75 minutes into attempts to repair an aortic injury, the decedent experienced cardiopulmonary arrest. Despite extensive efforts to repair the thoracic aortic injury and resuscitate the decedent, including multiple repair attempts, and the administration of numerous blood products (i.e., units of packed red blood cells, platelets, fresh frozen plasma, and lactated ringers), the bleeding persisted. Subsequently, the decedent experienced a cardiac arrest, and died.

On October 10, 2018, the decedent's spouse, Barbara Funicello ("Plaintiff"), commenced this action sounding in medical malpractice and wrongful death, alleging that Defendants:

1. Improperly performed the surgical procedure of January 15, 2018, by incising, perforating and/or tearing the aorta at three separate locations;

2. Failed to timely diagnose, identify and appreciate the aorta was incised or torn at three separate locations;

3. Continued the procedure in the absence of timely recognition of a serious complication; and

4. Failed to perform a thoracotomy in a timely manner.

Due to the alleged malpractice of Defendants, Plaintiff contends that Defendants proximately caused the decedent an aortic incision; perforation and/or tears; massive hemorrhage; need for exploratory laparotomy and left lateral thoracotomy; volume depletion; hypotension; cardiac arrest; and death.

Plaintiff also asserts a lack of informed consent cause of action, and derivative claim for loss of consortium.

Defendants now move for summary judgment pursuant to CPLR 3212 dismissing Plaintiff's Complaint.

LEGAL STANDARD FOR SUMMARY JUDGMENT

A defendant physician moving for summary judgment must make 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 plaintif was not injured by such treatment (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *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

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 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]).

"Where competent evidence is presented by a defendant in support of a motion for summary judgment, the burden shifts to plaintiff to produce proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action…" (*IDX Capital, LLC v. Phoenix Partners Group LLC*, 83 AD3d 569, [1st Dept 2011], affd 19 NY3d 850, 970 [2012]; *Alvarez v Prospect Hosp.*, 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]).

"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" (*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 Elmes v Yelon*, 140 AD3d 1009 [2d Dept 2016]; *Leto v Feld*, 131 AD3d 590 [2d Dept 2015]).

SUMMARY JUDGMENT AS TO MEDICAL MALPRACTICE OF DR. ROHAN AND NWH (MOT. SEQ. 001)

In support of their motion, Dr. Rohan and NWH submit the expert affirmation of Benjamin Lee, M.D. ("Dr. Lee"), a board-certified Thoracic Surgeon, who opines to a reasonable degree of medical certainty, that Dr. Rohan did not depart from good and accepted medical standards at any time during his care and treatment of the decedent. Specifically, Dr. Lee opines that Dr. Rohan's involvement in the surgery was limited to assisting Dr. Stavropoulos, and that the procedure was exclusively performed by Dr. Stavropoulos. Dr. Lee further opines that Dr. Rohan never supervised, controlled, or directed Dr. Stavropoulos's treatment and care of the decedent.

Dr. Lee's affirmation further details that the surgery was indicated, and additional chemotherapy and radiation were not appropriate given the decedent's cancer diagnosis, preoperative cardiac clearance, and apparent medical fitness for surgery. Consequently, Dr. Lee concludes that Dr. Rohan had no obligation to halt or dissuade Dr. Stavropoulos from performing or postponing the surgery. Dr. Lee explains that the standard treatment for adenocarcinoma at the gastroesophageal junction in a patient like the decedent involves adjuvant chemotherapy and radiation to reduce tumor size, followed by surgical resection, even in the absence of a visible tumor post-treatment due to potential microscopic residual disease. He notes that while significant co-morbidities might warrant more extensive chemotherapy and radiation, the decedent did not present with such conditions. Dr. Lee also opines that the surgery's timing, approximately eight weeks after the completion of chemotherapy and radiation, fell within a reasonable timeframe, allowing inflammation to subside without excessive scar tissue formation.

Regarding the surgical procedure itself, Dr. Lee states that addressing radiation-induced scarring intraoperatively is a standard practice for thoracic surgeons. Contrary to the Plaintiff's assertions, Dr. Lee believes that scarring alone did not necessitate commencing or converting to

an open thoracotomy without evidence of complications. In fact, he suggests that an open procedure in an obese patient like the decedent carries greater risks than a robotic approach. Dr. Lee further opines that Dr. Rohan acted appropriately when he stepped into the console at Dr. Stavropoulos's request, noting that bleeding only began 10 to 15 minutes later, during which time Dr. Rohan maintained good visualization, making immediate conversion to an open procedure unnecessary. Dr. Lee also opines that the recognized bleeding was addressed promptly with standard techniques, including pressure application, laparotomy, and timely blood transfusions, and that the aortic injury is a known potential complication even with proper surgical technique. Ultimately, Dr. Lee attributes the death of the decedent to the friability of tissue exacerbated by prior treatments, a condition neither predictable nor preventable, and suggests that an earlier thoracotomy might have even contributed to the additional aortic tears observed during autopsy, potentially caused by necessary interventions to control the hemorrhage. Therefore, Dr. Lee concludes that Dr. Rohan's care did not deviate from the standard and did not proximately cause the decedent's injuries and death.

Based on the expert affirmation of Dr. Lee, the Court finds that Dr. Rohan has demonstrated his prima facie entitlement to summary judgment as a matter of law by showing that he met accepted medical standards in the decedent's care and did not proximately cause his alleged injuries and death (*see Roques,* 73 AD3d at 207; *Landry v Jakubowitz*, 68 AD3d 728 [2d Dept 2009]; *Luu v Paskowski*, 57 AD3d 856 [2d Dept 2008]).

In opposition, the Plaintiff submits the expert affirmation of Michael W. Frank, M.D. ("Dr. Frank"), a board-certified Cardiothoracic Surgeon, who opines, to a reasonable degree of medical certainty, to a reasonable degree of medical certainty, that Dr. Rohan, an attending Cardiothoracic Surgeon who participated in the case as such, should not be shielded from liability despite being

designated as an assistant surgeon and not authoring a separate operative report. Contrary to the assertions of Defendant expert Dr. Lee, Dr. Frank opines that the records indicate that Dr. Rohan acted independently while manipulating the robotic instruments and, thus, would be liable for any substandard care resulting in injury, such as a lacerated aorta. Dr. Frank contends that Dr. Rohan's designated role and lack of a separate report do not negate his responsibility for his own actions as an attending surgeon. While Dr. Frank concedes the aortic injury could have occurred during instrument manipulation by either Dr. Stavropoulos or Dr. Rohan, he believes it was more likely due to the retroesophageal dissection performed by one of them, thus implicating either attending surgeon in the departure from accepted practice. Dr. Frank concludes that to the extent that the aortic injury occurred during Dr. Rohan's attempts at retroesophageal dissection, Dr. Rohan deviated from the standard of care in, *inter alia*, lacerating the aorta, which was a substantial factor in causing hemorrhage leading to the decedent's death.

The Court finds that Plaintiff's expert raises triable issues of fact regarding alleged deviations of Dr. Rohan and whether such deviations proximately caused the decedent's injuries, thus, rebutting the Defendant Dr. Rohan's prima facie entitlement to summary judgment (*see Johnson v St. Barnabas Hosp.*, 52 AD3d 286 [1st Dept 2008], appeal denied 11 NY3d 705 [2008]; *Landau v Rappaport*, 306 AD2d 446 [2d Dept 2003]; *Nabozny v Cappelletti*, 267 AD2d 623 [3d Dept 1999]; *Johnson v Jacobowitz*, 65 AD3d 610 [2d Dept 2009]. Accordingly, summary judgment as to the medical malpractice cause of action is denied as to Dr. Rohan.

Given that triable issues of fact exist as to the care and treatment by Dr. Rohan, an employee of NWH, and whether such treatment proximately caused decedent's alleged injuries, dismissal is not warranted against NWH (*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]).

The Court notes that the claims against NWH are limited to Dr. Rohan and his care and treatment of the decedent during the January 15th surgery, as the record shows that the decedent privately treated with Dr. Stavropoulos who, as a private attending surgeon, had no employment relationship with either Dr. Rohan or NWH. It is well settled that although a hospital or other medical facility is liable for the negligence or malpractice of its employees, that rule does not apply when the treatment is provided by an independent physician that is retained by the patient himself; nor is an affiliation of a doctor with a hospital or other medical facility, not amounting to employment, alone sufficient to impute the doctor's negligent conduct to the hospital or medical facility (*see Bing v Thunig*, 2 NY2d 656 [1957]; *Fiorentino v Wenger*, 19 NY2d 407, 414 [1967]; *Topel v Long Is. Jewish Med. Ctr.*, 55 NY2d 682, 683 [1981]; *see also Ruane v Niagara Falls Mem. Med. Ctr.*, 60 NY2d 908 [1983]; *McDermott v Torre*, 56 NY2d 399 [1982]).

SUMMARY JUDGMENT AS TO MEDICAL MALPRACTICE OF DR. STAVROPOULOS (MOT. SEQ. 002)

In support of his motion, Dr. Stavropoulos submits the expert affirmation of Huzaifa A. Shakir, MD ("Dr. Shakir"), a board-certified Thoracic Surgeon, who opines, within a reasonable degree of medical certainty, that Dr. Stavropoulos did not depart from the standard of medical care in the attempted Robotic Ivor Lewis esophago-gastrectomy, conversion to emergent exploratory laparotomy and emergent left thoracotomy to control hemorrhage on January 15, 2018. According to Dr. Shakir, the decedent's Robotic Ivor Lewis Esophago-Gastrectomy was appropriately indicated and timely. He emphasized that the standard of care requires performing such surgery four to six weeks following chemo RT induction, to avoid hardening of scar tissue and complicate tumor localization.

Further, he opines that Dr. Stavropoulos acted within good and accepted medical practice in the performance of the Robotic Ivor Lewis Esophago-Gastrectomy on January 15, 2018, and nothing Dr. Stavropoulos did or did not do caused the decedent's injuries. Dr. Shakir opines that an aortic injury was and is a well-known complication of this procedure, and that no alleged negligent acts or omissions proximately caused the aortic injury.

Once a bleed was encountered during the surgery, Dr. Shakir opines that Dr. Stavropoulos timely and appropriately performed a laparotomy to staunch and repair the bleed, which was indicated and within the standard of care. Dr. Shakir notes that Dr. Stavropoulos spent 60 to 90 minutes attempting to repair the bleeding after it was first encountered. Dr. Shakir explains that it is difficult to evaluate when and what caused the additional injury to the aorta as lifesaving measures had to be performed after the initial injury. However, Dr. Shakir asserts that Dr. Stavropoulos's subsequent thoracotomy—performed once the decedent suffered cardiac arrest—was both timely and appropriate. Dr. Shakir explains that Dr. Stavropoulos performed a left lateral thoracotomy, which is an incision made just left of the decedent's nipple line through the left chest, in order to initiate an open cardiac massage after he went into cardiac arrest. According to Dr. Shakir, while a thoracotomy can achieve proximal control, it's not the immediate standard of care due to grave risks like organ failure, paralysis, and death. In this instance, the thoracotomy was performed for cardiac massage as a resuscitative effort, not to control the bleeding. Dr. Shakir opines that Dr. Stavropoulos performed every measure available to timely and properly attempt to repair the aortic injury to try to save the decedent's life, all of which were within acceptable standard of medical care.

Based on the expert affirmation of Dr. Shakir, the Court finds that Dr. Stavropoulos demonstrated his prima facie entitlement to summary judgment as a matter of law by showing that

he met accepted medical standards in the decedent's care and did not proximately cause his alleged injuries (*see Roques,* 73 AD3d at 207; *Landry v Jakubowitz*, 68 AD3d 728 [2d Dept 2009]; *Luu v Paskowski*, 57 AD3d 856 [2d Dept 2008]).

In opposition, the Plaintiff's Cardiothoracic expert, Dr. Frank, opines, to a reasonable degree of medical certainty, that Dr. Stavropoulos departed from acceptable medical standards while treating the decedent and said departures caused the alleged injuries, including the decedent's death. Specifically, Dr. Frank opines that Dr. Stavropoulos departed from good and accepted practice in lacerating the aorta during sharp retroesophageal dissection. Dr. Frank also opines that Dr. Stavropoulos failed to obtain proper visualization before attempting, as well as during, dissection of the hiatus utilizing the "Maryland Dissector" (a surgical instrument). In this regard, Dr. Frank directly contravening Dr. Shakir's opinion that Dr. Stavropoulos was able to visualize the tips of the "Maryland Dissector." Dr. Frank highlights that this relatively sharp and rigid dissector, often used with monopolar energy and requiring direct visualization like any rigid instrument, demands adequate visualization during dissection, regardless of whether the procedure is robotic, laparoscopic, or open**.** He highlights that the visualization challenges encountered by both Drs. Stavropoulos and Rohan should have prompted an earlier conversion to an open procedure. Dr. Frank concludes that the delay in intervention until substantial aortic bleeding occurred fell below the standard of care and significantly contributed to the decedent's injuries and, ultimately, death.

The Court finds that Plaintiff's expert raises triable issues of fact regarding alleged deviations and whether such deviations proximately caused the decedent's injuries, including the aorta injury and death; thus, rebutting Dr. Stavropoulos's prima facie entitlement to summary judgment (*see Johnson v St. Barnabas Hosp.*, 52 AD3d 286 [1st Dept 2008], appeal denied 11

NY3d 705 [2008]; *Landau v Rappaport*, 306 AD2d 446 [2d Dept 2003]; *Nabozny v Cappelletti*, 267 AD2d 623 [3d Dept 1999]; *Johnson v Jacobowitz*, 65 AD3d 610 [2d Dept 2009].

Accordingly, summary judgment is denied as to the branch of Dr. Stavropoulos's motion regarding medical malpractice.

As to Plaintiff's cause of action for loss of consortium, dismissal is precluded against all Moving Defendants since this claim is derivative of the injured spouse's right to recover damages for any injuries sustained as a result of the Defendants' alleged malpractice (*see Liff v Schildkrout*, 49 NY2d 622 [1980]).

SUMMARY JUDGMENT AS TO WRONGFUL DEATH

As to Plaintiff's wrongful death cause of action, the Court finds that since Drs. Rohan and Stavropoulos have established entitlement to summary judgment on Plaintiff's medical malpractice cause of action, summary judgment is also warranted (*see Roques v Noble*, 73 AD3d at 206, quoting *Obregon v NY & Presbyt. Hosp.*, 2012 NY Slip Op 30681[U] [Sup Ct, NY County 2012], citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "When medical malpractice forms the basis of a wrongful death action, a defendant establishes prima facie entitlement to summary judgment as to the wrongful death action . . ." (*Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010]).

Plaintiff, however, rebuts the prime facie showing of the Moving Defendants through the expert affirmation of Dr. Frank and Dr. Shakir which show the existence of material issues of fact requiring a trial.

SUMMARY JUDGMENT AS TO LACK OF INFORMED CONSENT

A defendant moving for summary judgment on a lack of informed consent claim must demonstrate that the plaintiff was informed of the reasonably foreseeable risks, benefits and

alternatives 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]. A defendant may satisfy his or her burden of demonstrating a prima facie entitlement to judgment as a matter of law in connection with such a cause of action where a patient signs a consent form indicating his or her understanding of the possible risks of the procedure along with corroborating medical records (*see Bamberg-Taylor v Strauch*, 192 AD3d 401, 401-402 [1st Dept 2021]).

In the case at bar, Dr. Shakir opines that Dr. Stavropoulos had an extensive conversation with the decedent at his office regarding the risks of the surgery including "death, arrhythmia, pneumonia, anastomotic leak, prolonged hospital stays, prolonged tube feeding, DVT, etc." Additionally, Dr. Shakir cites Dr. Stavropoulos' notes which indicate that he spent approximately 50 minutes with decedent with 50% of that time dedicated to counseling and coordinating care. Dr. Stavropoulos also notes in his operative report that all medical clearances were obtained Further, Dr. Shakir emphasized that the decedent signed a consent form on January 15th which also listed the risks, benefits, and alternatives. As to Dr. Rohan, Dr. Lee opines that the lead surgeon, Dr. Stavropoulos, is responsible for obtaining informed consent, and not Dr. Rohan since the decedent was his private patient.

Based on both of the expert affirmations, the Court finds that Dr. Rohan, NWH and Dr. Stavropoulos, have met their burden as to the lack of informed consent claim.

In opposition, the Plaintiff's expert contends that Dr. Stavropoulos failed to obtain informed consent. According to Dr. Frank lacerating the aorta, a sensitive structure which is located within an entirely distinct tissue plane from the intended operative field, is neither an accepted nor known risk of this procedure. Further, according to Dr. Frank, the risk associated

with consenting to receive blood transfusion products does not equate with disclosure of the risk of aortic injury, a critical, major artery which lies in a distinct tissue plane, outside the operative field. Dr. Frank also opines that Dr. Stavropoulos failed to inform the decedent that another surgeon, Dr. Rohan, might act as the primary surgeon during the procedure, which falls outside of acceptable medical practice. According to Dr. Frank, Dr. Stavropoulos's belief that the decedent "understood" Dr. Rohan's potential role in the upcoming surgery is pure speculation, without evidentiary foundation. In sum, Dr. Frank concludes that Dr. Stavropoulos failed to obtain an appropriate, informed consent from the decedent.

The Court finds that Plaintiff has raised a triable issue of fact regarding the lack of informed consent claim against Dr. Stavropoulos, only (*Rosario v Our Lady of Consolation Nursing & Rehab. Care Ctr.*, 186 AD3d 1426 [2d Dept 2020]; *Boston v Weissbart*, 62 AD3d 517 [1st Dept 2009]), warranting denial of this branch of Dr. Stavropoulos's motion. The Court notes that Plaintiff's opposition papers and expert affirmation fail to address the informed consent claim as to Dr. Rohan and NWH.

Accordingly, it is hereby

ORDERED that Defendants Dr. Rohan and NWH's motion (Mot Seq 001) is granted to the extent of dismissing the lack of informed consent cause of action, and in all other respects the motion is denied; and it is further

ORDERED that Defendant Dr. Stavropoulos's motion (Mot Seq 002) is denied in its entirety; and it is further

ORDERED that the Defendants Dr. Rohan and NWH's are to serve a copy of this order upon the Plaintiff with notice of entry within twenty (20) days of entry of this order; and it is further

ORDERED, that the parties are directed to appear for a settlement conference on January 20th, 2026, at 11:30am, at 60 Centre Street, Room #351, New York, NY.

This constitutes the decision and order of the Court.

8/22/2025
DATE

KATHY J. KING, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE