Hoque v Lutheran Med. Ctr.
2025 NY Slip Op 33210(U)
August 26, 2025
Supreme Court, Kings County
Docket Number: Index No. 514491/2015
Judge: Consuelo Mallafre Melendez

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 26th day of August 2025.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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MOHAMMED SHAHEDUL HOQUE,

Plaintiff,

-against-

LUTHERAN MEDICAL CENTER, JOSEPH DeMATTIA, M.D., MIKHAIL JOUTOVSKY, M.D., and MIROSLAV KOPP, D.O.,

Defendants.

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DECISION & ORDER

Index No. 514491/2015
Mo. Seq. 10, 11, 12, & 13

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

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

NYSCEF #s: Seq. 10: 325 – 329, 330 – 364, 430 – 434, 446
Seq. 11: 365 – 367, 368 – 389, 435 – 439, 447
Seq. 12: 390 – 392, 393 – 423, 440 – 444, 445
Seq. 13: 424 – 425, 426 – 429

Defendant Mikhail Joutovsky, D.O., sued herein as Mikhail Joutovsky, M.D. ("Dr. Joutovsky") moves for an Order, pursuant to CPLR 3212, granting summary judgment in his favor and dismissing Plaintiff's claims against him. (Seq. No. 10.)

Defendant Joseph DeMattia, M.D. ("Dr. DeMattia") separately moves for an Order, pursuant to CPLR 3212, granting summary judgment in his favor and dismissing Plaintiffs' claims against him. (Seq. No. 11.)

Defendants Lutheran Medical Center and Miroslav Kopp, D.O. ("Dr. Kopp") separately move for an Order, pursuant to CPLR 3212, dismissing all Plaintiffs' claims and causes of action against them. (Seq. No. 12.)

Plaintiff cross moves for an order precluding any remaining defendants from apportioning fault at the time of trial, pursuant to CPLR Art. 16, to any defendant granted summary judgment. (Seq. No. 13.)

Plaintiff opposes the defendants' motions as to Dr. Joutovsky, Dr. DeMattia, and Lutheran Medical Center only. Plaintiff does not oppose the part of the motion seeking summary judgment in favor of resident Dr. Kopp. Accordingly, summary judgment is **granted** to Dr. Kopp without opposition, and any vicarious liability claims against Lutheran Medical Center for the acts and omissions of Dr. Kopp are dismissed.

Plaintiff commenced this action on November 30, 2015, asserting claims of medical malpractice against the defendants herein, in connection to his treatment and care on July 7, 2013 following a motor vehicle accident.

Plaintiff was 23 years old at the time of the events at issue. In the early morning of July 7, 2013, he sustained injuries in a high-speed motor vehicle accident as the front seat passenger, when the vehicle went off the road and collided with a tree. The driver did not survive the accident. Plaintiff arrived at Lutheran Medical Center by ambulance at 3:11 a.m. with a cervical collar in place from the EMS team.

Dr. Joutovsky was the attending trauma surgeon at Lutheran Medical Center from the patient's arrival until the end of his shift at 7:00 a.m. He ordered a chest x-ray and CT scans of the abdomen/pelvis, chest, cervical spine, and head before 3:32 a.m.

Plaintiff's CT scan results returned at approximately 4:25 a.m. and revealed a left humerus fracture, rib fractures, and a displaced comminuted C5 fracture impinging on his spinal cord.

He was admitted as a Level 1 trauma patient. His blood pressure was recorded at 75/60 at 4:28 am. At 4:30 a.m., Plaintiff was evaluated by an orthopedic surgeon for his humerus fracture, and his arm was casted.

At approximately 5:00 a.m., an order was placed for an urgent neurosurgery consult. Neurosurgery P.A. Robert Verbuch assessed the patient, and he placed a call to the attending neurosurgeon Dr. DeMattia at 6:10 a.m., according to phone records. On examination, P.A. Verbuch noted his blood pressure was 88/65 and he was wiggling his toes bilaterally.

Resident Dr. Rybitsky ordered an MRI/MRA of the cervical spine/neck at 6:23 a.m., and ordered Levophed to treat his low blood pressure at 6:48 a.m. A note in the chart from 7:00 a.m. indicated that Plaintiff was on 10 mcg of Levophed, lowered to 8 mcg at 8:00 a.m.

Neurological nursing flowsheets from 5:00 a.m., 6:00 a.m., and 7:00 a.m., scored Plaintiff's bilateral lower extremities as 3 ("no movement"). At 6:51 a.m., Dr. Joutovsky recorded that Plaintiff was neurovascularly intact and had 5/5 power in extremities. He co-signed a note from resident Dr. Eric Johnson at 7:05 a.m. which stated his bilateral lower extremities were flaccid but positive for sensation with 2+ pulses.

Neurosurgeon Dr. DeMattia placed a call to a Stryker representative for surgical equipment at 10:36 a.m. An MRI of Plaintiff's cervical spine was performed at 11:07 a.m., showing moderate compression fracture of C5. A nurse noted at 11:15 a.m. that Plaintiff's lower extremities were flaccid and numb to sensation.

A pre-operative neurosurgery note by P.A. Hodgens at 1:00 p.m. stated that Plaintiff was flaccid in his lower extremities and they were awaiting clearance for surgery. A note from trauma resident Dr. Johnson stated Plaintiff was cleared for neurosurgery procedure at 1:50 p.m. The resident testified he was reporting to Dr. Joutovsky as the attending physician at that time, although Dr. Joutovsky testified he was off shift after 7:00 a.m.

Dr. DeMattia assessed Plaintiff at 3:30 p.m. He noted that Plaintiff's bilateral lower extremities were flaccid and without response to stimuli. His upper extremities had some flexion, and the right bicep had some response to stimuli. He also noted the CT and MRI demonstrated comminuted vertebral body fracture at C5. Though he determined there was poor prognosis for recovering function in the lower extremities, he discussed the risks and benefits of spinal cord decompression surgery with Plaintiff's family.

Plaintiff was taken to the operating room at approximately 4:06 p.m. and underwent preparation for surgery and anesthesia. From 5:23 p.m. to 8:18 p.m., Dr. DeMattia performed an anterior C5 corpectomy. Plaintiff was transferred to the SICU following the surgery. Dr. DeMattia performed an additional posterior stabilization surgery the following day, July 8, at 3:40 p.m. Plaintiff was ultimately discharged from Lutheran Medical Center to Mount Sinai Spine Rehabilitation Center on August 1, 2013. He remains quadriplegic and requires a wheelchair and assistance with daily living.

Plaintiff alleges that the defendants departed from the standard of care in timely treating his spinal cord fracture and performing decompressive and stabilization surgery. Specifically, Plaintiff alleges that the defendants failed to timely obtain a neurosurgical consult, order and perform CT and MRI imaging, stabilize Plaintiff's blood pressure, clear Plaintiff for surgery, and perform the surgery. Plaintiff alleges that these delays proximately caused his loss of extremity function and quadriplegia.

In evaluating a summary judgment motion in a medical malpractice action, 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" (*Rosenzweig v Hadpawat*, 229 AD3d 650, 652 [2d Dept 2024]). "In order to sustain this prima facie burden, the

defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff's complaint and bill of particulars" (*Martinez v Orange Regional Med. Ctr.*, 203 AD3d 910, 912 [2d Dept 2022]). "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* at 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. Joutovsky's motion (Seq. No. 10), the movant submits an expert affirmation from Gregory Mazarin, M.D. ("Dr. Mazarin"), a licensed physician board certified in emergency medicine, who sets forth his qualifications to opine on the issues of this case.

Dr. Mazarin opines that all treatment from Dr. Joutovsky, as attending physician for the trauma team from approximately 3:11 a.m. through 7:05 a.m., complied with the standard of care. Dr. Mazarin notes that on his initial evaluation, he appropriately assessed Plaintiff's vital signs, airway, breathing, circulation, and mental status, and he performed an ultrasound to rule out internal bleeding in the abdomen or chest. Dr. Mazarin opines that Dr. Joutovsky properly ordered complete blood work within four minutes of his arrival, and he ordered a chest x-ray and CT scans of the abdomen/pelvis, chest, cervical spine, and head within twenty minutes of his arrival.

Dr. Mazarin opines that when Plaintiff's vital signs were continuously monitored by Dr. Joutovsky, and he was administered prophylactic antibiotics at 4:19 a.m. and a central line was placed for "rapid administration of fluids, blood products or vasopressors." He opines that when

the CT scans returned showing multiple fractures including the C5 vertebral fracture, he timely ordered an orthopedic consult at 4:30 a.m. and neurosurgery consult at 5:00 a.m. He also opines that the cervical spine MRI ordered at 6:23 a.m. was an appropriate timeframe within the standard of care.

In Dr. Mazarin's opinion, Plaintiff's hypotension and hypothermia were "closely monitored" by Dr. Joutovsky and the trauma team, and he was given supplemental oxygen and IV fluids. He notes that an order for vasopressor Phenylephrine was entered at 6:27 a.m., but changed to Levophed at 6:48 a.m., and Plaintiff's blood pressure was stabilized after Levophed was administered. He also notes that Dr. Joutovsky ordered steroids at 6:22 a.m., a "standard intervention to reduce spinal cord edema." Dr. Mazarin opines these medications and treatments were timely and within the standard of care.

Dr. Mazarin further notes that "the timing of surgical intervention was dependent on the patient's hemodynamic stability and the determination by the treating neurosurgeon." He opines that Dr. Joutovsky did not depart from the standard of care by delaying surgery clearance, because the patient remained hemodynamically unstable due to hypotension while he was treated by Dr. Joutovsky. He also opines that an MRI is also necessary prior to neurosurgery, and although this test was timely ordered during Dr. Joutovsky's shift, it could not be performed until the patient was hemodynamically stable, as this is a "time consuming procedure during which the patient is transported out of the intensive care unit." Thus, Dr. Mazarin opines that an MRI and surgical intervention were contraindicated and not possible during the entirety of Dr. Joutovsky's shift.

On the issue of proximate causation, Dr. Mazarin opines that Plaintiff's spinal cord injury and neurological deficits were caused by his traumatic spinal injury from the high-speed motor vehicle accident, not any alleged departures from the standard of care by Dr. Joutovsky.

Based on evaluation of the submissions, Dr. Joutovsky has established prima facie entitlement to summary judgment. The movant's expert offers detailed opinions as to the care and treatment rendered by Dr. Joutovsky and the trauma team to evaluate Plaintiff, order appropriate consults and diagnostic tests, and monitor and stabilize his hypotension.

The expert also establishes prima facie that the alleged departures did not proximately cause Plaintiff's injuries. Although the movant's expert in emergency medicine does not opine in detail as to the patient's neurological status, he sufficiently explains that earlier diagnostic testing and surgical intervention would not be possible due to Plaintiff's hemodynamic instability prior to 7:00 a.m. (when Dr. Joutovsky's shift ended), and therefore, no alleged departures from the standard of care by Dr. Joutovsky proximately caused a delay in treatment. The burden therefore shifts to Plaintiff to raise a triable issue of fact.

In opposition to Dr. Joutovsky's motion, Plaintiff submits an expert affirmation from a licensed physician [name of expert redacted], board certified in surgery and surgical critical care who sets forth their qualifications to opine on the issues of this case as a trauma surgeon. The Court was presented with a signed, unredacted copy of the affirmation for *in camera* inspection.

Plaintiff's trauma care expert opines that Dr. Joutovsky departed from the standard of care during his treatment from 3:00 a.m. through 7:00 a.m. First, the expert opines that Dr. Joutovsky failed to timely address the patient's hypotension and administer Levophed or other vasopressors. As demonstrated in the medical chart, Plaintiff's blood pressure was initially low and dropped to 85/65 at 4:53 a.m. The expert opines that the standard of care for a patient with hypotension and neurogenic shock is to administer vasopressors to elevate his blood pressure "to a level sufficient to safely proceed with diagnostic imaging and timely surgical intervention." He opines that there was no reason to delay the administration of Levophed or any other medical

vasopressor until 6:48 a.m., and this delay was a deviation from the standard of care which prolonged the patient's hemodynamic instability during Dr. Joutovsky's early morning shift.

The expert also opines that Dr. Joutovsky failed to order an emergent neurosurgical consult when the CT report showing a C5 fracture returned at 4:25 a.m. Dr. Joutovsky testified that he ordered an "emergent" consult, which the expert opines "must occur immediately," but the record shows that a resident placed an order for an "urgent" consult at approximately 5:00 a.m., which must occur within six hours. Additionally, the expert notes there is a dispute between the testimony, medical record, and the defendants' phone records as to when the consult occurred. Plaintiff's expert opines that while a neurosurgical P.A. examined the patient, there is no evidence that the attending neurosurgical physician Dr. DeMattia was contacted until a phone call at 6:10 a.m., over an hour after the order and nearly two hours after the cervical spine injury was confirmed by CT scan. Therefore, Plaintiff's expert opines that Dr. Joutovsky deviated from good and accepted practice by failing to order and obtain a neurosurgical consult on an emergent, expeditated basis after the CT results returned at 4:25 a.m.

Additionally, the MRI of the cervical spine was not ordered by Dr. Joutovsky until 6:23 a.m., two hours after the CT scan revealed a C5 fracture, and this MRI was ultimately not performed until 11:07 a.m. The expert opines this delay in ordering and performing the MRI was a departure from the standard of care, which required "emergent MRI imaging" in Plaintiff's case, due to the risk of neurologic damage. The expert counters Dr. Mazarin's opinion that Plaintiff was too hemodynamically unstable for an MRI. As previously discussed, the expert opines that Plaintiff could have been stabilized sooner if Dr. Joutovsky administered Levophed prior to the 6:48 a.m. order.

Finally, the expert opines that Dr. Joutovsky failed to timely clear Plaintiff for neurosurgery. The expert opines, based on the record and testimony of the parties, that there was

a "breakdown in communication among the trauma and neurosurgical teams," resulting in the lack of surgical clearance by the trauma team until a resident's note at 1:50 p.m. As the expert notes, Dr. Joutovsky testified that "no one asked him" to clear Plaintiff for surgery and there was no indication neurosurgery wanted to operate that day, but Dr. DeMattia testified that the goal from the initial evaluation was "that he needed to go to the operating room as soon as he was medically stable." The expert opines that Dr. Joutovsky departed from the standard of care by delaying the surgical clearance, which contributed to the ultimate 14-hour delay between Plaintiff's arrival and the spinal decompression surgery.

On the issue of proximate causation, the trauma expert opines that the "cumulative" delays in surgery to treat Plaintiff's spinal cord fracture, at every stage of care, resulted in his loss of motor function. The expert opines that Dr. Joutovsky's alleged departures in administering Levophed, ordering an emergent CT scan, MRI, and neurosurgical consult, and clearing the patient for neurosurgery resulted in Plaintiff's loss of "a meaningful chance at a better neurological outcome." The expert counters the movant's opinion that his spinal cord damage was the result of the traumatic car accident, opining that he had an "incomplete" spinal cord injury and citing evidence in the record that he still had "some motor and sensory function which could have been preserved with timely surgery."

Plaintiff also submits an expert affirmation from a licensed physician [name of expert redacted], board certified in neurosurgery, who sets forth their qualifications to opine on neurosurgical management of trauma and surgical critical care patients, including those presenting with spinal injuries from motor vehicle crashes, hemodynamic instability, and C5 fractures. The Court was presented with a signed, unredacted copy of the affirmation for *in camera* inspection.

Plaintiff's neurosurgery expert opines that the standard of care required spinal surgery to be performed on an emergent, immediate basis to improve Plaintiff's chances of neurologic recovery. The expert specifically opines that MRI imaging and surgical intervention should have been done as soon as he was "hemodynamically stable," and that the standard of care required Dr. Joutovsky to administer Levophed or similar vasopressors to achieve that stability.

The medical record shows that Plaintiff's blood pressure was consistently low at 88/65 from 4:53 a.m. through 6:30 a.m., with a MAP (mean arterial pressure) in the 50s. His blood pressure was then raised to normal range with MAP of 65 or higher from 7:00 a.m. through 11:00 a.m. after Levophed was administered. Thus, the expert states that hemodynamic stability was achieved "at latest" by 7:00 a.m., the end of Dr. Joutovsky's shift. Dr. Joutovsky testified that at that time, Plaintiff's blood pressure was normalized and there was no evidence of internal bleeding. Based on the medical chart, the expert opines that Dr. Joutovsky's delayed administration of Levophed was a proximate cause of his prolonged hypotension and hemodynamic instability before 7:00 a.m., and therefore contributed to the delay in MRI imaging and neurosurgery.

Plaintiff's neurosurgery expert emphasizes that based on their review of the record, Plaintiff had an *incomplete* spinal cord injury involving "partial damage to the spinal cord at the C5 level." The expert opines that Plaintiff still maintained a degree of motor and sensory function, "clearly indicating that the spinal cord had not been fully transected and there was preserved neurological function." The expert also bases their opinion on Plaintiff's positive pulses and the fact he exhibited some motor and sensory responsiveness at 5:00 a.m. and 7:00 a.m., "with progressive neurological decline thereafter." Plaintiff's expert opines this is "entirely consistent with an incomplete spinal cord injury that is not timely decompressed." In the expert's

opinion, his "flaccid" lower extremities with no touch sensation, first documented in a nursing note from 11:15 a.m., indicated "a marked deterioration in neurologic status."

The expert opines that in the case of an incomplete spinal cord injury, prompt surgical intervention "can significantly improve motor outcomes, reduce permanent deficits, and increase the likelihood of regaining functional independence." The expert therefore opines, in contrast to the movant's expert, that Plaintiff's permanent deficits were not unavoidable from the initial C5 fracture, but instead were proximately caused by the delay in treatment which "significantly diminished" his prognosis for recovery.

Based on these submissions, Plaintiff's experts have raised triable issues of fact as to the alleged departures from the standard of care by Dr. Joutovsky, including the timeliness of the administration of Levophed/vasopressors, as well as issues of fact regarding the timing of the neurosurgical consult, CT, MRI, and eventual "clearance" for surgery which did not occur until 1:50 p.m. although Dr. Joutovsky testified he was stable by 7:00 a.m.

Plaintiff's neurosurgical and trauma experts also raise issues of fact as to whether these alleged delays in treatment substantially contributed to Plaintiff's worsened outcome, opining that he maintained motor and sensory function from his incomplete spinal cord injury which could have been preserved or recovered with earlier surgical intervention. As these conflicting expert opinions raise triable issues of fact and credibility, Dr. Joutovsky's motion for summary judgment is **denied.**

Turning to the motion of Dr. DeMattia (Seq. No. 11), the movant submits an expert affirmation from John Pollina, Jr., M.D. ("Dr. Pollina"), a licensed physician who is board certified in neurosurgery and set forth his qualifications to opine on neurological/spinal assessment and surgery.

Dr. Pollina opines that all treatment and care rendered by Dr. DeMattia met the standard of care from a neurosurgical perspective. Prior to Dr. DeMattia's involvement, he notes that the patient was examined by P.A. Verbuch at approximately 5:00 a.m. P.A. Verbuch recorded that he had wiggling in his toes, he could not move other parts of his leg, and he had 3/5 strength in his right arm and 2/5 in the left arm. Nursing flowsheets from 5:00 a.m. through 6:00 a.m. also recorded that he was hypotensive, and that he had "no movement" in his lower extremities. The expert addresses the fact that Plaintiff's family members testified they witnessed some movement of his toes or legs between 5:00 a.m. and 7:00 a.m. In his expert opinion, Dr. Pollina opines that Plaintiff only had involuntary movement of the ankle and toes. He opines this movement may occur following severe spinal trauma, but it is not "voluntary" or responsive to stimuli.

Dr. Pollina states that Dr. DeMattia, the attending neurosurgeon, was first contacted by the hospital at 6:10 a.m. and consulted about Plaintiff's condition, as noted by his phone records. At that time, the patient was still hypotensive and hemodynamically unstable. Dr. Pollina opines that Plaintiff's low blood pressure and low MAP was "indicative of neurogenic shock, which is also known as spinal shock," and the standard of care for a patient in that condition is to be "medically stabilized and remain stabilized for *several hours before radiological testing can safely be done*," and "longer before the patient can undergo surgery." Thus, he opines that it was within the standard of care to perform the MRI at 11:07 a.m., after Plaintiff's blood pressure was stable for approximately three hours.

Dr. Pollina further states that after Dr. DeMattia reviewed the MRI images – at approximately 11:54 a.m. – it was within the standard of care to wait several more hours to perform the surgery itself, to ensure his vital signs and blood pressure remained stabilized. He opines that "it was unsafe and extremely risky for Dr. DeMattia to operate immediately after the

MRI, because the plaintiff was not hemodynamically stable for a long enough period of time and could have died on the table." He further opines that the standard of care for a patient with a "severe spinal injury" is to perform surgery within 24-72 hours, and therefore the timeframe of the surgery within 14 hours of the accident was not a deviation from the standard of care.

The expert opines that throughout this time, Dr. DeMattia was maintaining "appropriate contact with the hospital" and with Stryker, a company which provided surgical hardware, to prepare for surgery. Although he did not arrive at the hospital until the afternoon, the expert opines based on his phone records and testimony that he provided proper monitoring and assessment by telephone and review of the neurosurgery team's electronic records. He opines that no departure from the standard of care by Dr. DeMattia delayed the surgery, because "plaintiff was not cleared for surgery due to his hemodynamic instability and the spinal surgery hardware from Stryker [was] being prepared."

Dr. Pollina notes that the trauma team cleared Plaintiff for surgery at 1:50 p.m., and that "this was the first opportunity Dr. DeMattia had to safely perform surgery." However, by that time, the expert opines that Plaintiff consistently showed no movement in his lower extremities, the standard of care did not require emergent surgery, and it was appropriate to continue to monitor his condition before he underwent anesthesia. Dr. Pollina opines that the timeframe of Dr. DeMattia's pre-operative evaluation of Plaintiff at 3:30 p.m. and taking him to the operating room within the hour complied with the standard of care.

Dr. Pollina also opines in detail that the performance of the July 7 and July 8 surgeries and all post-surgical care rendered by Dr. DeMattia complied with the standard of care.

On the issue of proximate causation, Dr. Pollina opines that the cervical CT scan from 4:25 a.m. showed a comminuted displaced fracture of C5, with 45% narrowing of the spinal canal in its anteroposterior diameter. The MRI from 11:07 a.m. showed moderate compression of

the spinal cord with cord edema and "burst fracture at the C5 vertebra with retropulsed bone into the spinal cord and severe spial compression with signal change." Based on these MRI findings, the expert opines that "surgical intervention would not have changed his outcome regardless of when the surgery was performed," and the traumatic injury from the car crash was so severe that "his outcome could not have been medically prevented."

The expert also opines that Plaintiff wiggling his toes, as documented in his 5:00 a.m. neurological examination by P.A. Verbuch, was a "spinal reflex movement" rather than voluntary, based on "the extent of the plaintiff's spinal injury" and the fact he could not move other parts of his leg. Thus, the expert opines that even if surgery had been performed earlier, Plaintiff would not have regained any function in his legs, and therefore no alleged delays in surgical intervention from Dr. DeMattia proximately caused his injuries.

Based on these submissions, Dr. DeMattia's expert has established prima facie entitlement to summary judgment. The expert opines that it was not a departure from the standard of care to delay the MRI and surgical intervention until Plaintiff was hemodynamically stable for several hours, and that the timing of the surgery within 24 hours of the injury was appropriate.

The movant also establishes prima facie that the alleged delays in treatment did not proximately cause Plaintiff's injuries or quadriplegia, offering an expert opinion that Plaintiff had lost total function of his lower extremities, any movement he exhibited in the initial hours was involuntary, and there was no evidence of any movement at all after 7:00 a.m. Thus, they establish prima facie that Plaintiff's outcome would not have been improved by earlier surgery, regardless of the alleged delays in the MRI at 11:07 a.m., surgical clearance at 1:50 p.m., and surgery at 5:23 p.m. The burden therefore shifts to Plaintiff to raise an issue of fact on both the standard of care and proximate causation.

In opposition, Plaintiff submits the same aforementioned expert affirmations from a trauma care expert and neurosurgery expert, whose names were redacted and provided to the Court for *in camera* inspection. Plaintiff's expert affirmations are limited to pre-operative care and alleged delays in the performance of the MRI and surgery.

In relevant part, Plaintiff's trauma expert disagrees with the movant's contention that Plaintiff was too hemodynamically unstable to undergo an MRI or neurosurgery. While the expert opines that he could have been stabilized sooner with vasopressors, the expert also opines that by 7:00 a.m., Plaintiff was "stable, with consistent MAP and BP readings, a functioning chest tube, and no internal bleeding," and there was no reason to delay the MRI until 11:07 a.m.

The expert further opines that once Plaintiff was deemed "stable enough for MRI at 11:07 a.m., he was likewise stable enough for surgery at that time," and contrary to the opinion of movant's expert, it was a deviation from the standard of care to wait an additional six hours before the surgery was commenced.

Plaintiff's neurosurgery expert opines that Dr. DeMattia "unreasonably" delayed surgical intervention for Plaintiff's incomplete C5 cervical spine fracture. As previously stated, the expert opines that Plaintiff presented to the emergency department with an incomplete C5 spinal cord injury, "which typically results in varying degrees of motor and sensory impairment below the level of injury, while preserving some neurological function." In the expert's opinion, it was a departure from the standard of care for Dr. DeMattia to call the Stryker representative for surgical equipment at 10:36 a.m., rather than "as soon as surgery was indicated" by the CT scan results, which he viewed at 6:10 a.m. or earlier. The expert also opines that Dr. DeMattia deviated from the standard of care by "failing to document or communicate the plan for surgery on the morning of July 7," as P.A. Hodgens initially noted that surgery would be planned for the

following day, and the first reference to awaiting clearance for same-day surgery in the chart appeared at approximately 1:00 p.m.

The expert disagrees with Dr. Pollina that it was appropriate within the standard of care to perform surgery within 24 hours, stating that this opinion does not distinguish between a complete and incomplete spinal cord injury. Plaintiff's expert counters the opinion of the movant's expert that Plaintiff was in a state of neurogenic or spinal shock, requiring "several hours of stable blood pressure," and that it was the standard of care to perform surgery within 24 hours. The expert opines that while the patient was experiencing neurogenic shock (which may cause hypotension, bradycardia, and hypothermia), he did not initially exhibit *spinal* shock symptoms of flaccid paralysis, loss of bowel and bladder control, and loss of reflex activity.

The expert opines that the fact Plaintiff retained sensory and motor function in his lower extremities upon arrival indicated that the spinal cord was not fully transected, neurological function could be preserved, and *emergent* surgical intervention was required by the standard of care as soon as the patient was hemodynamically stable.

The expert disagrees with the opinion of the movant's expert that Plaintiff was not hemodynamically stable for MRI imaging or surgery due to his hypotension, and that it was appropriate to maintain stability for a period of "hours" before risking transport to the MRI or operating room. The expert opines that Plaintiff had no internal bleeding and consistent MAP and blood pressure readings as early as 7:00 a.m., and there was no reason to delay the MRI until 11:07 a.m. The expert further opines that neurosurgery should have been commenced immediately after the MRI, not hours later. Because he sustained an "incomplete" spinal cord injury, the expert opines that the standard of care required immediate decompression surgery once his blood pressure was stabilized, rather than an hours-long period of stability.

On the issue of proximate cause, Plaintiff's neurology expert counters the opinions of the movant's expert that his loss of neurologic function was unpreventable regardless of the surgery's timing. The expert opines, contrary to the movant's expert, that the wiggling of Plaintiff's toes was not reflexive and involuntary, and the assumption that he had no voluntary movement is directly contradicted by the medical record. The expert opines that based on the chart, Plaintiff had motor and sensory function in both lower extremities at various times from 3:00 a.m. through 7:00 a.m., and there was a "progressive" decline from 11:15 a.m. onward with flaccid lower extremities and inability to feel touch. The expert opines that his bilateral functionality could have been preserved, and "the sooner the spine is decompressed, the better the prognosis." Thus, the expert opines that the delay in decompressive and stabilization surgery was a substantial contributing factor to his permanent neurological injuries.

Based on the evaluation of the parties' submissions, there remain issues of fact as to Dr. DeMattia's departures from the standard of care, and whether the alleged delays in surgical intervention proximately caused Plaintiff's permanent injuries. Specifically, the parties' neurosurgical experts present wholly conflicting opinions as to the nature of the cervical spine fracture, whether the standard of care required emergent surgery or surgery within 24 hours, and whether it was appropriate for him to prepare and perform the MRI and surgery shortly after 7:00 a.m. (when the patient's blood pressure was stabilized) or after additional hours of monitoring.

While the movants argue that the patient was not officially cleared for Dr. DeMattia to proceed with surgery until 1:50 p.m. at earliest, Dr. Joutovsky testified that he was never asked for surgery clearance. The record is not clear as to when Dr. DeMattia and the neurosurgical team communicated that they were waiting for clearance or that he intended to perform surgery that day. Thus, Plaintiff raises issues of fact as to Dr. DeMattia's role in that alleged delay in

clearance, and the further delay between the 1:50 p.m. trauma resident's note and the 5:23 p.m. start of the surgery.

Additionally, the parties have proffered conflicting expert opinions as to whether an earlier MRI and surgical intervention would have improved Plaintiff's chances of maintaining neurologic function. "A plaintiff's evidence of proximate cause may be found legally sufficient, even if his or her expert is unable to quantify the extent to which the defendant's act or omission decreased the plaintiff's chance of a better outcome or increased the injury, as long as evidence is presented from which the jury may infer that the defendant's conduct diminished the plaintiff's chance of a better outcome or increased the injury" (*see Molina v Goldberg*, 231 AD3d 46, 50 [2d Dept 2024]; *Goldberg v Horowitz*, 73 AD3d 691 [2d Dept 2010]). Plaintiff's neurosurgical expert has opined in detail, sufficient to counter the movant's expert, that Plaintiff had signs of bilateral functionality in his lower extremities which could still be preserved, and that the delay in performance of the surgery diminished Plaintiff's chance of a better outcome.

In sum, the parties have presented conflicting expert opinions as to whether the timing of Dr. DeMattia's neurosurgical evaluation and surgery constituted a departure from the standard of care. There also remain triable issues of fact, based on the record and the opinions of the parties' experts, as to whether Plaintiff's initial presentation, sensory function, and possible voluntary movement demonstrate that commencing the surgery before 7:00 a.m., or any time before his eventual procedure at 5:23 p.m., proximately caused his condition to worsen. Accordingly, Dr. DeMattia's motion for summary judgment is **denied.**

Next, the Court turns to Lutheran Medical Center's motion (Seq. No. 12) for summary judgment. Though the part of the motion seeking summary judgment on behalf of Dr. Kopp is unopposed, the hospital also seeks summary judgment as to other direct claims on behalf of the hospital and its staff.

In support of the motion, Lutheran Medical Center submits an expert affirmation from Peter J. Fagenholz, M.D. ("Dr. Fagenholz"), a licensed physician board certified in surgery and surgical critical care.

Dr. Fagenholz opines that Plaintiff's allegation that Lutheran was not properly staffed or equipped as a Level 1 trauma center is without merit. The expert notes that they had attending physicians and consults on call for orthopedic surgery, neurosurgery, emergency medicine, and critical care, and that the standard of care does not require such specialists to be "physically present in the hospital on a 24/7 basis," but to be available within the hour if contacted. He opines that Dr. DeMattia was available to review radiological films from home, was in contact with the neurosurgery P.A. and staff, and lived a half hour away.

The expert also opines that radiological images (CT scans) of the cervical spine were timely ordered within 15 minutes of the patient's arrival, and the results were available by 4:25 a.m. He opines that reporting these results within 90 minutes is within the standard of care for a critical care patient in Plaintiff's circumstances, as it may take over two hours to evaluate multiple severe injuries. The expert opines that the evaluation of P.A. Verbuch at 5:00 a.m., "just slightly more than half an hour after the results of the CT scan," was also timely. The expert opines the designation of the patient's condition as "urgent," requiring neurosurgical evaluation within six hours, was appropriate.

Dr. Fagenholz concurs with the opinion of Dr. DeMattia's expert that the patient was not yet hemodynamically stable for an MRI, and it was first necessary to stabilize him with fluids and vasopressor support. He opines that it was appropriately determined he would require cervical decompression and fusion, but he could not undergo an MRI and surgery until he was "medically stable." Dr. Fagenholz states that he was able to undergo an MRI which was completed at approximately 11:30 a.m., and "shortly thereafter" he was cleared for surgery by

trauma resident Dr. Johnson at 1:50 p.m., "as instructed by Dr. Joutovsky." The expert opines that this clearance was not untimely, as the patient was still on vasopressor support which increased his risk of intraoperative complications and death.

Dr. Fagenholz also opines that no delay in the surgery was a proximate cause of Plaintiff's injuries, stating that "a spinal cord injury occurs at the time of the accident" and there were "a number of processes occurring on a molecular level" as a result of the direct impact. Therefore, he opines that earlier treatment and surgery "would not necessarily reduce the likelihood" of a long-term or permanent injury.

Lutheran Medical Center also submits an expert affirmation from Phillip S. Dickey, M.D. ("Dr. Dickey"), a licensed physician board certified in neurological surgery.

Dr. Dickey renders similar opinions as Dr. Fagenholz as to the appropriateness and timeliness of Plaintiff's trauma center care and diagnostic testing. He also opines that "the standard of care dictates that surgery be performed for a spinal cord injury as soon as practicable, which takes into account a patient's workup and stability," and in this case "the surgery was appropriately delayed until the patient was stabilized."

Dr. Dickey also opines that Dr. DeMattia had appropriate and timely conversations with a Stryker representative to discuss the surgical equipment required for the surgery, and this ensured "that the necessary hardware would be delivered to the hospital and sterilized well in advance of the scheduled surgery." Dr. Dickey opines that it is within the standard of care for a neurosurgeon to order spinal surgery hardware from such companies, and it is not necessary for the hospital to maintain that equipment as long as it is readily available from the outside company.

Dr. Dickey also opines, as to proximate causation, that because Plaintiff's "neck was stabilized with a C-collar up until the time of the surgery," no delay in treatment caused or

exacerbated his injury. He also opines that although there were nursing notes indicating he had "normal" motor responses upon arrival or toe-wiggling, it is more likely than not that any movement observed was "involuntary and not purposeful." He opines that "cell death and subsequently motor and sensory deficits" was an "absolute consequence" of his severe C5 fracture caused by the high-speed collision, and his condition could not have been improved by earlier surgery. He further opines that his MRI revealed spinal cord edema, and thus he was experiencing compression from outside forces (fracture fragments) and within the cord (swelling). In his expert opinion, there is "no medical standard or theory" which supports whether earlier intervention would have altered his outcome, and there is no evidence that "surgery performed within a certain amount of time (i.e. 24 hours) provides better outcomes."

Based on these submissions, Lutheran Medical Center's experts have established prima facie entitlement to summary judgment as to whether the hospital and staff complied with the standard of care in the timing of the patient's diagnostic testing or surgery. The burden shifts to Plaintiff to raise an issue of fact on the alleged departures.

Lutheran's experts also set forth opinions establishing that the delays in surgery did not proximately cause a worsening of Plaintiff's condition, and that due to the severity of his spinal injury, it is purely speculative that earlier intervention would have improved his chances. As discussed in the motions above, Plaintiff's neurosurgical expert countered this opinion and raised issues of fact as to the incomplete nature of his spinal cord injury and whether bilateral functionality could have been preserved with earlier treatment.

In opposition, Plaintiff submits the previously mentioned expert affirmations from their trauma care and neurosurgical experts, [names redacted].

As to the direct departures against Lutheran Medical Center, Plaintiff's trauma care expert opines that the hospital's physicians and staff failed to timely obtain proper radiological

images. As the movants' expert notes, orders were placed for a CT scan of the head, pelvis/abdomen, and cervical spine by Dr. Joutovsky within twenty minutes of Plaintiff's arrival. However, Plaintiff's expert opines these tests should have been *performed* within 30 minutes of arrival, particularly because the patient was suspected to have cervical spine injuries, as demonstrated by his placement in a neck collar by EMS. The expert notes that the cervical CT results were obtained at 4:25 a.m., and all CT tests were not completed until 4:57 a.m., 90 minutes after they were ordered. The expert opines that this was a departure from the standard of care.

There is a dispute over whether an order was placed for an "urgent" neurosurgical consult (within six hours), rather than "emergent" as Dr. Joutovsky testified. The expert opines that the standard of care required an emergent consult, and although Plaintiff was examined by a neurosurgical P.A. shortly after the order, the attending was not consulted for another hour.

Additionally, the MRI of the cervical spine was ordered at 6:23 a.m., two hours after the CT scan revealed a C5 fracture, and this MRI was ultimately not performed until 11:07 a.m. The expert opines this delay was a departure from the standard of care, which required "emergent MRI imaging" in Plaintiff's case, due to the risk of neurologic damage. As discussed in the other parties' motions, the expert disputes the opinion that the patient needed to be stabilized for a period of hours, and instead opines that he was stable for MRI imaging by 7:00 a.m. at latest, and there was "no medically sound reason" to delay his MRI or surgical clearance.

The neurosurgery expert also opines that Lutheran Medical Center's Level 1 trauma center departed from the standard of care by failing to have "necessary equipment for spinal decompression surgery on-site or readily available." The expert counters the movant's opinion that it was within the standard of care to call an outside company, Stryker, for the necessary hardware. The expert opines that a Level 1 trauma center is "specifically designated and

resourced" to treat injuries such as cervical spinal fractures from motor vehicle accidents, and the hospital was not adequately equipped, which contributed to the delay in performing the surgery.

Regarding the actions of specific employees and agents, the experts note that P.A. Verbuch examined the patient around 5:00 a.m., but there is no record of a call between the hospital and the attending neurosurgeon Dr. DeMattia until 6:10 a.m. The plan of care to admit to SICU and obtain an MRI/MRA was documented, but no plan for emergency surgery. At 8:00 a.m., another neurosurgical P.A. Hodgens documented that the plan was to perform surgery the following day. The trauma care expert opines that "significant and avoidable delays" resulted from a lack of communication between the neurosurgical and trauma staff that the neurosurgeon was waiting for "clearance" to take him to the operating room.

Additionally, while the movant's expert states that resident Dr. Johnson officially cleared the patient for surgery at 1:50 p.m. under the direction of attending Dr. Joutovsky, the attending physician contends that his shift and involvement in the patient's treatment had ended at 7:00 a.m.

Based on evaluation of these submissions, Plaintiff has raised issues of fact as to their claims against Lutheran Medical Center. Plaintiff's experts opine that his initial CT scans should have been completed "on an emergency basis, typically within 30 minutes," while the movant's expert opines that it is within the standard of care to take 90 minutes or up to two and a half hours for a patient with extensive injuries. The experts also offer conflicting opinions regarding the alleged delays in communication between the neurosurgical and trauma teams, whether the necessary equipment and hardware was readily available, and whether his clearance for surgery was delayed without medical justification.

As previously discussed, Plaintiff's expert also counters the movants' experts regarding proximate causation. Plaintiff's neurosurgical expert opines, grounded in evidence from the

record, that Plaintiff sustained an incomplete spinal cord injury, that he maintained bilateral functionality, voluntary movement, and sensory function following the accident, and that the delay in stabilization and surgical intervention diminished his chance of a better outcome. Although the movant argues this is speculative, their experts also acknowledge that decompressive and fusion surgery should be performed "as soon as practicable" to treat a spinal cord injury. There is a genuine issue of fact and credibility between the experts as to whether such surgery in Plaintiff's case was highly time-sensitive or whether his long-term injury was inevitable regardless of the timing. Plaintiff need only establish sufficient evidence "from which the jury may infer that the defendant's conduct diminished the plaintiff's chance of a better outcome or increased the injury" in order to raise a triable issue of fact (*Molina* at 50). For these reasons, the motion of Lutheran Medical Center for summary judgment is **denied**.

In their opposition papers, Plaintiff also addressed the issue of vicarious liability of Lutheran Medical Center for the acts and omissions of co-defendants Dr. Joutovsky and Dr. DeMattia, on the basis a hospital is liable "where 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]; *Mduba v Benedictine Hosp.*, 52 AD2d 450 [3d Dept 1976]). This issue was raised for the first time in opposition and not addressed in the movant's papers, and it is not part of the Court's consideration in this motion.

Lastly, Plaintiff cross moves (Seq. No. 13) to preclude any remaining defendants in this action from apportioning liability, pursuant to CPLR Art. 16, against a defendant who has been awarded summary judgment. "[S]ince summary judgment is the 'functional equivalent' of a trial, it follows that the limited liability benefits for defendants under CPLR article 16 are forfeited as to any codefendant who has been awarded summary judgment in its favor" (*Angieri v Musso*,

225 AD3d 43, 48-49 [2d Dept 2024], quoting *Hendrickson v Philbor Motors, Inc.*, 102 AD3d 251, 255 [2d Dept 2012]).

The defendants do not oppose Plaintiff's cross motion. Accordingly, the cross motion is **granted** without opposition, and the remaining defendants are precluded from apportioning liability to Dr. Kopp at trial.

It is hereby:

ORDERED that Defendant Dr. Joutovsky's motion (Seq. No. 10) for summary judgment is **denied;** and it is further

ORDERED that Defendant Dr. DeMattia's motion (Seq. No. 11) for summary judgment is **denied;** and it is further

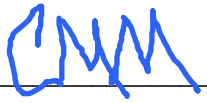
ORDERED that Defendants Lutheran Medical Center and Dr. Kopp's motion (Seq. No. 12) for summary judgment is **granted to the extent** of dismissing Plaintiff's claims against Dr. Kopp and any vicarious liability claims against Lutheran Medical Center on behalf of Dr. Kopp, and the motion is otherwise **denied;** and it is further

ORDERED that Plaintiff's cross motion (Seq. No. 13) to preclude the remaining defendants from apportioning liability to any co-defendant awarded summary judgment is **granted** without opposition, and the remaining defendants are precluded from apportioning liability to Dr. Kopp under CPLR Art. 16; and it is further

ORDERED that counsel for all parties shall appear for a Settlement Conference on September 30, 2025 at 11:00 a.m., in person at 360 Adams St., Brooklyn, NY, Courtroom 561.

This constitutes the decision and order of this Court.

ENTER.



Hon. Consuelo Mallafre Melendez
J.S.C.