Nahigian v Kaplitt
2017 NY Slip Op 31436(U)
July 6, 2017
Supreme Court, New York County
Docket Number: 805122/12
Judge: Martin Shulman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

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DANA NAHIGIAN, Index No. 805122/12

Plaintiff, **DECISION**

- against -

MICHAEL G. KAPLITT and NEW YORK PRESBYTERIAN HOSPITAL/WEILL CORNELL MEDICAL CENTER,

Defendants.

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In this medical malpractice action, defendants Michael G. Kaplitt, M.D. (Dr. Kaplitt) and The New York and Presbyterian s/h/a New York Presbyterian Hospital/ Weill Cornell Medical Center (NYPH) (collectively defendants) move pursuant to CPLR 3212 for summary judgment dismissing the complaint. Plaintiff Dana Nahigian (plaintiff or Nahigian) opposes the motion.

BACKGROUND

This action arises from plaintiff's spinal cord stimulator placement surgery (SPS)[1] which Dr. Kaplitt performed at NYPH on September 7, 2010. Plaintiff alleges in relevant part that: she was not a proper candidate for SPS; the surgery was improperly performed, resulting in spinal cord injury; she was not properly informed of the risks of the procedure; and her post-operative care was deficient. Among the injuries listed in

[1] "Spinal cord stimulation is a procedure that delivers low-level electrical signals to the spinal cord or to specific nerves to block pain signals from reaching the brain." See **http://www.webmd.com/back-pain/spinal-cord-stimulation**. Plaintiff's expert, whose name has been redacted, elaborates that the "electrical impulses are delivered via an electrode(s) implanted in the spinal column and resting on the dura covering the spinal cord." See Opp. at Exh. A, ¶8. Defendants' expert, Dr. Konstantin Slavin (Dr. Slavin), describes the procedure as "standard treatment for patients with chronic pain in their back and or limbs who have not found pain relief from other treatments." See Motion at Exh. A, fn 1.

plaintiff's bill of particulars are cervical spinal cord injury, impaired functioning of right upper and lower extremities, right sided hemiplegia, right sided hemiparesis, neurogenic bladder and bowel, depression and continued pain.

Plaintiff first met with Dr. Kaplitt on August 11, 2010. Her pain management physician, Dr. Seth Waldman, referred her to him for evaluation to determine if she was a candidate for SPS. Dr. Kaplitt's notes from this first visit indicate that plaintiff's chief complaints were neck and right arm pain and reflex sympathetic dystrophy.

Nahigian had previously undergone a myriad of other spinal surgeries stemming from a head injury she sustained in 2005 which resulted in a herniated cervical disc. These prior surgeries included an anterior cervical discectomy and fusion at the fifth and sixth cervical (C5-C6) vertebrae in 2006, a double fusion surgery at C4-C5 and C5-C6 with placement of hardware in 2007, a further spinal fusion surgery with instrumentation at C4-C6 in 2008, and surgery to remove the hardware at C4-C6 in 2009. In addition to multiple surgeries, plaintiff has attempted to manage her pain through physical therapy, pain medication, botulinum toxin (Botox) injections, and epidural injections, none of which has alleviated her chronic pain.

Dr. Kaplitt obtained Nahigian's prior medical records and a recent MRI report prior to her first visit. After he examined plaintiff and evaluated her history, including the fact that all prior pain treatments had failed, Dr. Kaplitt determined that plaintiff was an excellent candidate for SPS.

Dr. Kaplitt's notes indicate that, of this ninety minute long consultation, seventy minutes were spent counseling plaintiff. The records reflect that he went over the two-

part procedure[2] with Nahigian in detail and specifically explained the procedure's risks, including: difficulty in placing the electrodes if adhesions (scar tissue) from prior surgeries were present; spinal cord injury; dural tear; hematoma; infection; cervical spinal instability; lead migration; hardware disconnection and malfunction; and failure to improve her pain. Dr. Kaplitt's notes from that day further indicate that plaintiff understood the risks and appeared enthusiastic to proceed with surgery. Following these discussions, Nahigian agreed to undergo the surgery and signed a surgical consent form that day. Plaintiff denies that Dr. Kaplitt explained any of the risks SPS potentially entails.

The first part of the surgery took place on September 7, 2010 at NYPH. The operative report indicates that Dr. Kaplitt first performed a cervical laminotomy at C5 and C6 to create space for placing the electrical leads in the epidural space. At C4, Dr. Kaplitt encountered resistance from an obstruction of either bone or scar tissue which did not allow the leads to pass upward through the spinal canal to C2 and C3, where the leads were intended to be placed. Despite several attempts to place the paddle electrode, it consistently deviated to the left. As a result, Dr. Kaplitt extended the laminotomy to allow the electrode to pass, then ultimately decided that the best option for plaintiff to receive neck and arm stimulation was to place two percutaneous leads instead of the paddle electrodes, which are thinner and more flexible. He placed them on either side of midline, manually through the laminotomy, then guided these leads

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[2] Dr. Slavin describes the surgery in lay terms as "consist[ing] of stimulating electrodes, implanted in the epidural space, an electric pulse generator, implanted in the lower abdominal area or gluteal region, conducting wires connecting the electrodes to the generator, and the generator remote control." See Motion at Exh. A, fn 1.

around the obstruction at C4 that prevented the paddle electrode's placement. He then guided the leads back toward a parasaggital location without complication or resistance until the leads reached their final point, with the tip of the left lead at the bottom of C3 and the lead just to the left of the midline, and the other lead just to the right of the midline, with the tip at the bottom of C2.

During the surgery, Dr. Kaplitt awakened plaintiff and performed an intraoperative test stimulation. Nahigian complained of shoulder pain, which Dr. Kaplitt attributed to the manner in which she was positioned for the surgery. He believes that he wrote in his notes that it was "positional" probably because it was a part of her body resting on the cushions. According to Dr. Kaplitt, plaintiff said that she was satisfied with the stimulation and that all areas of pain were covered.

Nahigian's description of when she was awakened during the surgery vastly differs from that of Dr. Kaplitt. Plaintiff testified that she recalls waking three times during surgery. According to her, the first time she awoke she heard Dr. Kaplitt yelling and complaining about the unexpected level of scar tissue he was encountering when trying to insert the lead wire. She reports being awakened a second time to test the placement of the leads, at which time she told Dr. Kaplitt that her arm and shoulder were in great pain and asked how much longer the procedure would take. She then reports being awakened a third time to test the electrode and that she again complained of shoulder pain.

Dr. Kaplitt's operative report states that plaintiff was initially able to move all motor groups of her upper and lower extremities and had no neurosensory deficits. However, in the recovery room Nahigian complained of extremely severe bilateral upper

extremity pain with very severe allodynia[3] and hyperpathia,[4] and right upper extremity weakness. Two hours later when plaintiff complained of weakness in her right lower extremity Dr. Kaplitt ordered a fluroscopically-guided lumbar puncture with myelogram and a CT myelogram which showed no spinal cord compression and no evidence of hemorrhage or spinal cord injury. The CT myelogram further revealed that both electrodes were in excellent position. Dr. Roger Hartl, a spine trauma expert, reviewed plaintiff's films. Dr. Kaplitt also called in pain management to assist Nahigian with pain control.

Plaintiff remembers waking up in the recovery room in excruciating pain, as the operative report confirms. She reports that her arm was four times the size it was before the surgery and that she could not move her arm, toes or right leg. She remembers screaming and hysterically crying.

On September 11, 2010 Dr. Kaplitt and plaintiff discussed whether or not she should proceed with the second phase of the surgery or remove the leads. On September 15, 2010 Nahigian elected to continue with the second part of the procedure and her wife signed the consent form. The surgery took place on September 16, 2010 and involved placing a battery and wiring the stimulator. Plaintiff testified that Dr. Kaplitt urged her to complete the last phase of the surgery and she felt that she had no choice in the matter. The second phase of the procedure was performed without complications and on September 18, 2010, Nahigian was discharged to a rehabilitation facility.

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[3] Sensitivity to touch.

[4] Increased sensitivity to sensation.

Co-defendant NYPH denies vicarious liability, contending that Dr. Kaplitt is not an NYPH employee. Rather, he testified that he is employed by Weill Cornell Medical College.

EXPERT'S CONTENTIONS

In support of their motion for summary judgment dismissing the complaint, defendants argue that they did not depart from accepted medical standards in treating plaintiff. They submit an expert affirmation from Dr. Slavin, a neurosurgeon with almost 25 years of experience, who is board certified by the American Board of Neurologic Surgery (Motion at Exh. A). Like Dr. Kaplitt, Dr. Slavin specializes in the neurosurgery subspecialty of stereotactic and functional neurosurgery. Currently a professor of neurosurgery, Dr. Slavin sets forth within a reasonable degree of medical certainty that defendants followed accepted standards of care in treating Nahigian. He states in relevant part that:

- plaintiff was an appropriate candidate for SPS given her prior history and that extensive prior treatment had failed;
- Dr. Kaplitt fully apprised Nahigian of the risks to the procedure;
- there were no intra-operative deviations from the applicable medical and surgical standards of care; and
- the post-operative care defendants rendered to plaintiff was timely and appropriate under the circumstances.

In opposition, Nahigian submits an affidavit from a physician who has been board certified by the American Board of Neurological Surgery for 20 years. This expert specializes in cranial base and cerebrovascular surgery. Plaintiff's expert avers within a reasonable degree of medical certainty that the care defendants rendered to Nahigian

before, during and after her surgery deviated from the applicable standards of good and accepted medical and surgical care. He/she concludes the following:

- plaintiff was not an appropriate candidate for SPS due to her prior cervical surgeries;
- plaintiff's deposition testimony conflicts with Dr. Kaplitt's consult note and his deposition testimony regarding whether informed consent for SPS was obtained;
- the surgery was performed improperly in that Dr. Kaplitt caused an iatrogenic spinal cord injury by exerting excessive force while attempting to place a paddle electrode and by performing a laminotomy rather than a laminectomy,[5] which would have created more space in which to manoeuver the electrodes around scar tissue; and
- the post-operative care rendered to Nahigian was deficient in that the CT myelogram was inconclusive as to whether plaintiff's spinal cord sustained an injury,[6] and given plaintiff's symptoms, Dr. Kaplitt should have had a spine trauma specialist examine and evaluate her, which may have mitigated the effects of any potential spinal cord injury.

In reply, defendants submit a further affidavit from Dr. Slavin, arguing *inter alia* that plaintiff's expert, as a cerebrovascular surgeon, is unqualified to offer opinions as to the surgery performed here.

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[5] A laminectomy entails "a surgeon remov[ing] parts of the bone, bone spurs, or ligaments in [the patient's] back. This relieves pressure on spinal nerves and can ease pain or weakness." See **http://www.webmd.com/back-pain/back-surgery-types** (bracketed matter added). In reply, Dr. Slavin explains that a laminectomy entails "the removal of the entire lamina on either side of the vertebrae", while a laminotomy entails "the removal of a portion of the lamina." See Reply Aff. at Exh. P, ¶ 3.

[6] Plaintiff's expert states that an MRI would have yielded more conclusive results, but acknowledges that it could not be performed due to the presence of metallic instrumentation and the electrodes.

DISCUSSION

An award of summary judgment is appropriate when no issues of fact exist. *See* CPLR 3212(b); *Sun Yau Ko v Lincoln Sav. Bank*, 99 AD2d 943 (1st Dept), *aff'd* 62 NY2d 938 (1984); *Andrea v Pomeroy*, 35 NY2d 361 (1974). In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law by providing sufficient evidence to eliminate any material issues of fact. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). Indeed, the moving party has the burden to present evidentiary facts to establish his cause sufficiently to entitle him to judgment as a matter of law. *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065 (1979).

In deciding the motion, the court views the evidence in the light most favorable to the nonmoving party and gives him the benefit of all reasonable inferences that can be drawn from the evidence. *See Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 (1985). Moreover, the court should not pass on issues of credibility. *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 521 (1st Dept 1989). While the moving party has the initial burden of proving entitlement to summary judgment (*Winegrad*, *supra*), once such proof has been offered, in order to defend the summary judgment motion, the opposing party must "show facts sufficient to require a trial of any issue of fact." CPLR 3212(b); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Freedman v Chemical Constr. Corp.*, 43 NY2d 260 (1977); see also, *Friends of Animals, Inc.*, *supra*.

Here, Nahigian denies that defendants met their burden of proof, citing Dr. Slavin's affidavit as deficient in that "it offers nothing more than conclusory and

speculative opinions" and "cherry picks facts, and summarily concludes that the defendants [sic] actions were within accepted standards of care." Opp. Aff. at ¶45. Plaintiff's counsel further characterizes Dr. Slavin's opinions as being "largely unsupported by any explanation or stated basis whatsoever", as well as contrary to the medical records and deposition testimony. *Id.* While plaintiff claims defendants' showing is insufficient to shift the burden of proof to her and warrants denial of their summary judgment motion, nonetheless, in the event this court determines otherwise, Nahigian argues that her expert's affidavit raises issues of fact as to whether defendants departed from the applicable standard of care, thus warranting a trial.

I. Plaintiff's Expert's Qualifications

"To sustain a cause of action for medical malpractice, a plaintiff must prove two essential elements: (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of plaintiff's injury." *Frye v Montefiore Med. Ctr.*, 70 AD3d 15, 24 (1st Dept 2009) (citation omitted). A defendant physician seeking summary judgment must make a prima facie showing establishing the absence of a triable issue of fact as to the alleged departure from accepted standards of medical practice (*id*).

In opposition, "a plaintiff must produce expert testimony regarding specific acts of malpractice, and not just testimony that alleges '[g]eneral allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice'." *Id.*, citing *Alvarez v Prospect Hosp.*, 68 NY2d at 325. "In most instances, the opinion of a qualified expert that the plaintiff's injuries resulted from a deviation from relevant industry or medical standards

is sufficient to preclude a grant of summary judgment in a defendant's favor (citation omitted)." *Id.* However, where an expert's ultimate assertions are speculative or unsupported by any evidentiary foundation, the opinion should be given no probative force and is insufficient to withstand summary judgment. *Id.*, citing *Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 (2002).

"To establish the reliability of an expert's opinion, the party offering that opinion must demonstrate that the expert possesses the requisite skill, training, education, knowledge, or experience to render the opinion [citations omitted]" (*Hofmann v Toys "R" Us-NY Ltd. Partnership,* 272 AD2d 296, 296 [2d Dept 2000]). An expert "need not be a specialist in a particular field" in order to render an expert opinion "if he [or she] nevertheless possesses the requisite knowledge necessary to make a determination on the issues presented" (*see Joswick v Lenox Hill Hosp.,* 161 AD2d 352, 355 [1st Dept 1990]).

In this case, both parties' experts are neurosurgeons. Both experts based their opinions on their review of plaintiff's medical records, as well as the pleadings and deposition transcripts herein. Therefore, it appears that both experts are qualified to provide expert opinions. *See Frye v Montefiore Med. Ctr.,* 70 AD3d at 24-25; *Guzman v 4030 Bronx Blvd. Assoc. L.L.C.*, 54 AD3d 42, 49 (1st Dept 2008) ("whether a witness is qualified to give expert testimony is entrusted to the sound discretion of the trial court").

Defendants question plaintiff's expert's qualifications as compared to those of Dr. Slavin due to his specialty in cerebrovascular surgery, rather than stereotactic and functional neurosurgery, which was involved here. They contend that the affidavit lacks any indication that he/she is familiar with SPS.

However, having reviewed plaintiff's expert's affidavit, this court finds that he/she has sufficient professional experience to provide an expert opinion on the facts underlying this action. The affidavit refers to this physician's many years as a neurosurgeon and it is apparent that his/her expertise in this subject matter is adequate.

II. Indications for the Surgery

On defendants' behalf, Dr. Slavin opines that Nahigian was a proper candidate for SPS because she had a long history of pain and had obtained no relief from prior surgeries and pain management. He also notes that Dr. Kaplitt had obtained her prior treatment records, including an MRI report, prior to their first consultation and he appropriately examined her mental status, motor strength and sensory function. Dr. Slavin thus concludes that Dr. Kaplitt had sufficient information to determine if Nahigian was a candidate for SPS. He concurs with plaintiff's pain management physician that SPS carried fewer risks compared to placement of an intrathecal morphine pump. Finally, in support of his determination that the surgery was warranted and successful, Dr. Slavin observes that the stimulator still remains in place and plaintiff has no plans to have it removed.

Plaintiff's expert disputes that SPS was a reasonable option because of Nahigian's prior cervical surgeries and the fact that two of those surgeries were performed from a posterior approach. He/she emphasizes that scarring and adhesions from plaintiff's prior surgeries were foreseeable and increased her risk of spinal cord injury. He/she opines that the fact that the spinal stimulator remains in place is of no moment since it effectively masks pain and its removal would entail risks.

Dr. Slavin's affidavit sufficiently establishes that no issue of fact exists with respect to whether SPS was indicated for Nahigian. In response, plaintiff's expert fails to rebut this showing. Glaringly, he/she merely states that the surgery would be more risky and complicated due to Nahigian's prior surgeries, without affirmatively stating that SPS was contraindicated for Nahigian.

Plaintiff's expert fails to address the sufficiency of Dr. Kaplitt's initial examination of plaintiff or his knowledge of her prior medical history. Furthermore, he/she offers no explanation as to the relevance of the fact that two of her prior surgeries were performed from a posterior approach, and how that made SPS more risky for her. While plaintiff's expert appears to imply that Dr. Kaplitt did not appreciate and/or did not consider the likelihood that he would encounter scar tissue from plaintiff's prior procedures, Nahigian herself acknowledged that Dr. Kaplitt pointed out this risk during the first visit (Opp. Aff. at Exh. B, p 115, lines 21-25).

Accordingly, plaintiff fails to rebut defendants' showing that Dr. Kaplitt properly evaluated her and concluded she was a candidate for SPS. Summary judgment is thus granted in defendants' favor dismissing all negligence and medical malpractice claims based upon this allegation.

III. Intra-Operative Care

Plaintiff's claims pertaining to the manner in which Dr. Kaplitt performed the SPS focus on the first phase of the procedure which took place on September 7, 2010. Plaintiff's expert found that Dr. Kaplitt departed from accepted medical standards, causing injury to Nahigian's spinal cord, in the following ways:

- in initially attempting to place the paddle electrode Dr. Kaplitt caused spinal trauma by putting undue pressure on the spinal cord over an excessively long period of time,[7] repeatedly attempting to force the paddle electrode through scar tissue before finally resorting to placing two percutaneous leads; and

- given plaintiff's prior surgical history, Dr. Kaplitt should have performed a laminectomy rather than a laminotomy due to the likelihood of encountering scar tissue, thus creating a larger opening in which to safely navigate the electrode through the adhesions.

Dr. Slavin unequivocally states within a reasonable degree of medical certainty that Dr. Kaplitt performed the surgery herein in accordance with the applicable standard of care. With respect to plaintiff's expert's claim that Dr. Kaplitt should have performed a laminectomy, he responds that:

- a laminotomy is preferable to a laminectomy because it is less invasive and carries fewer risks of complication and injury;[8] and

- in this case, the difficulty passing the paddle electrode due to scar tissue was encountered at C4, above the C5-C6 laminotomy opening, yet plaintiff's expert fails to explain how a laminectomy at C5-C6 would have allowed Dr. Kaplitt to pass the paddle electrodes past the obstruction at C4.

After he successfully accessed the epidural space, Dr. Kaplitt encountered the obstruction at C4 which prevented the leads from being advanced further up the spinal canal. This court agrees with Dr. Slavin's assessment that, given the location of the obstruction, the laminotomy Dr. Kaplitt performed, and later extended, was sufficient to introduce the electrical leads into the spinal canal for advancement to C2 and C3 levels.

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[7] Plaintiff's expert emphasizes that the surgery should have taken one and a half hours but instead took almost five hours.

[8] According to Dr. Slavin, plaintiff's expert's conclusion that it was a departure for Dr. Kaplitt to perform a laminotomy "clearly evidences a lack of experience and understanding of [SPS]" (Reply Aff. at Exh. P, ¶4).

Thus, there was no departure from the accepted standard of care with respect to Dr. Kaplitt's decision to perform a laminotomy. Summary judgment is thus granted in defendants' favor dismissing all negligence and medical malpractice claims based upon this allegation.

Addressing plaintiff's expert's claim that Dr. Kaplitt used excessive force in attempting to place the paddle electrodes, Dr. Slavin concludes that this allegation is speculative, conclusory and unsupported by the medical record. He cites Dr. Kaplitt's note in his operative report that at no time was excess force used in advancing the electrode wires. Plaintiff dismisses this notation as self serving and likely included in the report because plaintiff complained of extreme pain when she was awakened intra-operatively. Moreover, Dr. Slavin notes that plaintiff's expert's conclusion that the amount of time required to perform the surgery indicates that Dr. Kaplitt spent an excessive amount of time trying to force the paddle electrode is also speculative and unsupported.

This court agrees that plaintiff's expert's opinions are largely based upon speculation. Nothing in the record suggests that the operation took far longer than expected because Dr. Kaplitt spent hours using excessive force in his attempts to manoeuver the paddle electrode through scar tissue. This is merely a guess on plaintiff's expert's part.

Plaintiff's expert thus fails to rebut Dr. Slavin's opinion that there was no departure from the accepted standard of care with respect to Dr. Kaplitt's attempts to place the paddle electrode. Summary judgment is thus granted in defendants' favor

dismissing all negligence and medical malpractice claims as to Nahigian's intra-operative care.

IV. Post-Operative Care

Post-operatively, Nahigian urges that defendants further departed from the standard of care by failing to timely diagnose and treat the alleged intra-operative injury to her spinal cord. First, plaintiff argues that reliance on the CT myelogram to rule out spinal cord injury was misguided and a deviation from good and accepted standards of neurosurgical care.

Plaintiff's expert explains that a CT myelogram is a sub-optimal study which "will only show a significant hemorrhage, disc herniation, gross swelling causing ongoing pressure on the cord." Opp. at Exh. A, ¶24 (emphasis in original). However, it will not reveal damage to the cord due to transient pressure or compression of the spinal cord that occurred intra-operatively, nor will it reveal a discrete hemorrhage that could still be significant enough to injure the spinal cord. *Id.* Finally, as the CT myelogram report indicates, the quality of this study was limited due to the presence of metallic instrumentation and the electrodes. In particular, it was improper for Dr. Kaplitt to rely on the CT myelogram given Nahigian's "significant clinical signs and symptoms" experienced post-operatively and intra-operatively. *Id.* at ¶25.

Although Dr. Slavin does not address plaintiff's expert's claims regarding post-operative testing, nonetheless, his/her opinion is unavailing. Plaintiff's expert acknowledges that an MRI could not be performed then glaringly fails to state what, if any, other testing would have been preferable. This fails to rebut defendants' prima facie showing that the testing performed after plaintiff's surgery did not deviate from the

accepted standard of care. Accordingly, Nahigian's medical malpractice cause of action is dismissed to the extent it is based upon post-operative testing.

Plaintiff's expert also faults Dr. Kaplitt for not having plaintiff examined and evaluated by any other specialist such as a spine trauma specialist or neurologist. In sum, plaintiff's expert maintains there was excessive delay in providing Nahigian "the proper care that would likely have reduced and/or mitigated the effects of the spinal cord injury." *Id.* at ¶27.

Dr. Slavin characterizes plaintiff's expert's opinion as lacking specificity, conclusory and unsupported. This court agrees. With respect to Dr. Kaplitt's alleged failure to seek further evaluations of Nahigian from a spine trauma specialist or neurologist, Dr. Slavin correctly observes that plaintiff's expert fails to indicate what the appropriate care and evaluation would have entailed; what a spine trauma specialist would have done that Dr. Kaplitt did not do; when such care should have been rendered; and how such unspecified care "would likely" mitigate the claimed injury.[9] Again, this fails to rebut defendants' prima facie showing that the post-operative care plaintiff received did not deviate from the accepted standard of care. Accordingly, Nahigian's medical malpractice cause of action is dismissed to the extent it is based upon the failure to consult with other specialists.

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[9] As previously stated, Dr. Kaplitt had Dr. Roger Hartl, a spine trauma expert, review plaintiff's post-surgical films. He reportedly advised that the absence of clinical upper motor neuron signs was inconsistent with spinal cord injury.

V. Vicarious Liability

Noting that there are no specific claims against it, NYPH seeks summary judgment of dismissal. NYPH denies any vicarious liability for Dr. Kaplitt's actions based upon his testimony that he was employed by Weill Cornell Medical College at the time he treated Nahigian and she was his private patient.

In response, plaintiff's counsel claims that Dr. Kaplitt testified that NYPH and Weill Cornell Medical College are the same institution and that "NYPH" is a general phrase referring to the facilities. He further notes that Dr. Kaplitt's malpractice insurance is provided through NYPH and that he is payed a flat salary for services he renders at NYPH, without earning additional income from his care of any particular patient. Finally, NYPH billed for all services rendered to Nahigian. Based upon all of the foregoing, plaintiff claims NYPH cannot disclaim vicarious liability.

In reply, defense counsel denies that NYPH and Weill Cornell Medical College are the same institution and contends that plaintiff's counsel misrepresents Dr. Kaplitt's testimony. In fact, the deposition testimony plaintiff's counsel cites makes no mention of NYPH; rather, this portion of Dr. Kaplitt's testimony responds to questions regarding Weill Cornel Medical College's relation to Weill Cornell Medical Center.

As NYPH is not Dr. Kaplitt's employer, all claims against it must be dismissed. That NYPH provides his malpractice insurance is of no consequence.

VI. Informed Consent

As stated in *Colarusso v Lo*, 42 Misc3d 1210(A), 2013 WL 6985388, [*5] (Sup Ct, NY County, Schlesinger, J.S.C.):

> Claims of lack of informed consent are statutorily defined. Pub. Health § 2805–d. The law requires persons providing professional treatment or diagnosis to disclose alternatives and reasonably foreseeable risks and benefits involved to the patient to permit the patient to make a knowing evaluation. *Id.* § 2805–d(1).

To prevail on a lack of informed consent cause of action a plaintiff must establish the following:

> (1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury. The third element is construed to mean that the actual procedure performed for which there was no informed consent must have been a proximate cause of the injury (citations omitted).

Figueroa-Burgos v Bieniewicz, 135 AD3d 810, 811-812 (2016).

Based upon his review of Dr. Kaplitt's medical records, Dr. Slavin concludes that Dr. Kaplitt appropriately informed plaintiff of SPS's risks in accordance with the applicable standard of care. While the specific risks claimed to have been disclosed are enumerated in the records, the consent form Nahigian signed does not refer to any specific risks (Motion at Exh. N).

In contrast, plaintiff and her spouse both testified that Dr. Kaplitt did not disclose any of SPS's risks during plaintiff's first visit. Dr. Kaplitt testified that he explained the procedure's risks to Nahigian, but recalled few specifics other than what he documented in his record of the August 11, 2010 visit.

Although this conflicting testimony raises an issue of fact, plaintiff's second cause of action alleging lack of informed consent must nonetheless be dismissed. Nahigian's attorney's affirmation and her expert's affidavit submitted in opposition to defendants' motion fail to allege that a reasonably prudent patient in the same position as plaintiff would not have undergone the treatment if he or she had been fully informed of the potential risks. Accordingly, defendants' motion for summary judgment is granted as to the second cause of action.

For the foregoing reasons, it is

ORDERED that defendants' motion is granted in its entirety and the action is dismissed.

The Clerk is directed to enter judgment in defendants' favor accordingly. The foregoing is this court's decision and order.

Dated: New York, New York
July 6, 2017

Hon. Martin Shulman, J.S.C.