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| Hillstead v Schweppe |
| 2017 NY Slip Op 33140(U) |
| July 28, 2017 |
| Supreme Court, Ulster County |
| Docket Number: 15-2810 |
| Judge: Christopher E. Cahill |
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**STATE OF NEW YORK
SUPREME COURT
GARY HILLSTEAD,**

ULSTER COUNTY

Plaintiff,

-against-

**Decision & Order
Index No.: 15-2810**

**MICHAEL SCHWEPPE, M.D. and
ORTHOPEDIC ASSOCIATES OF
DUTCHESS COUNTY, P.C.,**

Defendants.

Supreme Court, Ulster County
Motion Return Date: June 28, 2017
RJI No. 55-15-02169

Present: Christopher E. Cahill, JSC

**FILED
2 H 41 M**

AUG 01 2017

Appearances: **MURPHY & LAMBIASE
Attorneys for Plaintiff
26 Scotchtown Avenue
Goshen, New York 10924
Attn: George A. Smith, Esq.**

**Nina Postupack
Ulster County Clerk**

**FELDMAN, KLEIDMAN, COFFEY, SAPPE & REGENBAUM
Attorneys for Defendants
PO Box A
Fishkill, New York 12524
By: Marsha S. Weiss, Esq.**

Cahill, J.:

In this action alleging medical malpractice, plaintiff contends that Dr. Schweppe improperly performed a total knee replacement in April 2012 by creating an excessive tibial slope and failing to diagnose the problem in a timely fashion. As a result, plaintiff

contends that he was required to undergo a further surgical procedure to have a revision knee replacement in 2016.

After the joinder of issue and the completion of discovery, defendants have made this motion for summary judgment. Proffering the deposition testimony of the parties, plaintiff's medical records, the expert opinion affirmation of Dr. Jonathan Holder, an orthopaedic surgeon, and the FDA recall of the Stryker ShapeMatch cutting guides, Dr. Schweppe contends that his decision to use a Stryker Triathlon prosthetic knee with the Stryker ShapeMatching Guides, which had FDA approval and had been in use since 2005, was not a departure from the standard of care. He recounted that since the Triathlon knee was used in conjunction with Stryker's ShapeMatch Cutting Guides, the patient's CT scan was sent to Stryker which created templates replicating plaintiff's actual anatomy so that component parts of the prosthesis could be correctly sized and the placement and angle of the cuts to the tibia and femur could be made with greater accuracy. Dr. Holder's affirmation explained that "these computer generated guides offered the benefit of superior precision and alignment and were customized to each individual patient's anatomy by the manufacturer based upon 3-D imaging and Stryker's computer technology."

Accordingly, referring to the operative report, Dr. Schweppe affixed these templates to the femur and tibia on the day of surgery and made the cuts as directed by the cutting guides. He then performed a trial reduction of the knee, tested plaintiff's range of

motion and stability and, satisfied with the results, removed the trial components to replace them with the actual components which were then cemented in place. Repeating the testing of plaintiff's range of motion before irrigating the knee and closing the incision, he contended that no complications were encountered during surgery. Post-operative x-rays confirmed that the prosthetic femoral component was properly aligned with the prosthetic tibial component and that the patella was properly aligned with the femur. Post-operative examinations revealed stability and an improved range of motion until almost one year later when plaintiff expressed frustration with the results, despite x-rays which failed to yield any evidence of an abnormality or loosening.

One year after plaintiff's surgery, the FDA issued a recall of the Stryker ShapeMatch Cutting Guides since software defects had been detected in guides manufactured between May 2011 and November 2012. As a result of these defects, it was determined that the parameters of the cutting guides, as manufactured, did not meet the surgeon's pre-operative planning parameters, resulting in cutting guide ranges that were not approved by the FDA. A second software defect resulted in displaced parameters (e.g. depth of resection, angle of cut) not matching the cutting guides produced. As a result, patients complained of joint instability, chronic pain, limited range of motion and the need for revision surgery—complaints echoed by the plaintiff herein.

Relying on the recall, the other proffered reports and Dr. Holder's opinion, defendants contend that the failure of the knee replacement was not caused by any

departure or deviation in care by Dr. Schweppe, either in his preparation or performance of the surgery, thereby justifying a dismissal of plaintiff's claims as a matter of law.

Annexing the affidavit of Dr. Richard Matza, who specializes in orthopedic and reconstructive surgery, plaintiff has opposed the application by detailing numerous departures from acceptable standards of medical care by Dr. Schweppe. Dr. Matza averred that the Stryker Cutting Guide is only used to "assist" a surgeon in making the cuts and that the malpositioning and misplacement of plaintiff's prosthesis was not attributable to the ShapeMatching Guide but rather to the failure by Dr. Schweppe to observe and correct, intraoperatively, the malpositioning. Moreover, he contends that only a small percentage of the cutting guides were improperly sculpted. Based upon such opinion and the failure to preserve the cutting guide used in this instance, plaintiff contends that the fact that there was a recall of such guides is not dispositive.

Defendants challenged the opinion rendered by Dr. Matza as conclusory and unsupported by competent evidence. They contend that he not only failed to detail his familiarity with the Stryker system and cutting guides, but also failed to provide a basis for his opinion that only a small percentage of the cutting guides were improperly sculpted. Moreover, they contend that Dr. Matza's opinion that Dr. Schweppe departed from the standard of care when he installed the tibial component of the knee prosthesis at an 11-12 degree slope, when the operative report stated it was approximately 10 degrees, coupled with Dr. Holder's opinion that a 7 - 10 degree angle would be difficult,

intraoperatively, to observe, rendered his opinion as speculative. Finally, they challenge Dr. Matza's opinion that the cutting guides are used only to "assist" the surgeon and not replace his/her judgment by reliance upon such guides as to where to make a cut.

Recognizing that the court's role, on a motion of this kind, is "'issue-finding rather than issue-determination'" (Sillman v Twentieth Century Fox Corp., 3 NY2d 395, 404 [1957] quoting Esteve v. Abad, 271 App Div 725, 727 [1st Dept. 1947]), this court must deny defendants' motion. Dr. Schweppe testified that the guides created custom-built plans, in accordance with the patient's anatomy, which he used during the surgery, along with both visual and physical checks, to ensure that the angle of the cuts will and have been made in the proper fashion. In light of this testimony undercutting his claim that his complete reliance upon such recalled guides was proper at such time, coupled with the competing expert opinions as to whether Dr. Schweppe could have visually observed any such deviation, whether it was a 10 or 11 degree slope, was sufficient to create an issue of fact as to whether it is within the standard of care for a surgeon to solely rely upon the cutting guide, as opposed to merely using it for assistance. As to the other challenges to Dr. Matza's affidavit, this court must agree that the statements by Dr. Matza that only a small percentage of the cutting guides were improperly sculpted, or that there was a deviation from accepted standards of medical care by failing to inform plaintiff post-operatively of the improper positioning and the suggestion of appropriate remedies, are conclusory and unsupported by any competent evidence (see Brinkley v. Nassau Health

Care Corp., 120 AD3d 1287 [2nd Dept. 2014]; Hoffman v. Pelletier, 6 AD3d 889 [2004]).

As to any remaining challenges to the Matza affidavit, this court has reviewed them and finds them to be without merit.

This shall constitute the Decision and Order of the court. The original Decision and Order and all other papers are being delivered to the Supreme Court Clerk for transmission to the Ulster County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR § 2220. Counsel is not relieved from the applicable provisions of that rule regarding notice of entry.

SO ORDERED.

Dated: Kingston, New York

July 28, 2017

FILED
2 H 41 M

AUG 01 2017

Nina Postupack
Ulster County Clerk

ENTER,

Christopher E. Cahill
CHRISTOPHER E. CAHILL, JSC

Papers considered: Motion dated April 21, 2017 with affirmation in support by Marsha S. Weiss, Esq., dated April 24, 2017, with exhibits; affirmation of Jonathan Holder, M.D., dated April 21, 2017; affirmation in opposition by George A. Smith, Esq., dated June 7, 2017; affidavit of Richard Matza, M.D., dated June 1, 2017; reply affirmation by Craig Burgess, Esq., dated June 26, 2017 with exhibits.