Ha v Mun Kyung Hong
2018 NY Slip Op 30969(U)
May 17, 2018
Supreme Court, New York County
Docket Number: 805177/14
Judge: Martin Shulman

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

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ANGELA HA, Administrator of the Estate of FRANCIS HA, deceased,

Plaintiff,

Index No. 805177/14

-against-

MUN KYUNG HONG, M.D., YOSHIFUMI NAKA, M.D., TAKEYOSHI OTA, M.D., JAE RO, M.D., ROBERT T. PYO, M.D., JOSEPH MICHAEL SWEENY, M.D., UNIVERSITY MEDICAL PRACTICE ASSOCIATES, NEW YORK PRESBYTERIAN HOSPITAL, CARDIOLOGY CONSULTANTS OF WESTCHESTER, CARDIOVASCULAR MEDICINE ASSOCIATES, FACULTY PRACTICE ASSOCIATES and ST. LUKE'S-ROOSEVELT HOSPITAL CENTER,

Defendants.

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Martin Shulman, J.:

In this action alleging medical malpractice and wrongful death, defendants Mun Kyung Hong, M.D. (Dr. Hong), University Medical Practice Associates (UMPA) and St. Luke's-Roosevelt Hospital Center (SLR) (collectively, the SLR defendants) move, pursuant to CPLR 3212, for summary judgment in their favor dismissing this action (motion seq. 002) and related relief.[1] Defendants Yoshifumi Naka, M.D. (Dr. Naka), Takeyoshi Ota, M.D. (Dr. Ota), Jae Ro, M.D. (Dr. Ro) and The New York and Presbyterian Hospital (NYPH) (collectively, the NYPH defendants) also move pursuant to CPLR 3212 for summary judgment and related relief (motion seq. 003). Plaintiff Angela Ha (Mrs. Ha or plaintiff),

[1] In the event this court grants summary judgment, the notice of motion also requests an order entering judgment in their favor and amending the caption to delete their names.

Administrator of the Estate of Francis Ha, deceased (Mr. Ha, patient or decedent) opposes the motions, which are consolidated for disposition.

Background

This action arises from Mr. Ha's May 7, 2012 combined aortic valve replacement (AVR) and coronary artery bypass graft (CABG) surgery. Plaintiff concedes that the AVR portion of the surgery was indicated and properly performed. This action is based solely upon the CABG portion of the procedure, which plaintiff contends was unnecessary and led to her late husband suffering a myocardial infarction and other complications which ultimately caused his death.

Mr. Ha first presented to Dr. Hong, an interventional cardiologist, on March 2, 2012. Then 65 years of age, he complained of chest pain and shortness of breath and had a prior medical history of diabetes, hypercholesteromia, COPD and a 40 year history of cigarette smoking. Dr. Hong recommended and the patient underwent a transthoracic echocardiogram (TTE) at UMPA Cardiology on March 9, 2012 which revealed aortic stenosis (blockage). Based upon the patient's age, gender, history of diabetes and high cholesterol, smoking and family history of coronary artery disease (CAD), Dr. Hong concluded Mr. Ha likely had CAD and ordered a cardiac catheterization angiogram (CCA). The CCA was performed on March 15, 2012 at SLR and upon review Dr. Hong reported proximal 75% stenosis of the right coronary artery (RCA), mild diffuse disease of the left main artery, mid 40% stenosis of the left anterior descending artery (LAD) and 80% stenosis of small D1 and D2 vessels. Dr. Hong's principal diagnosis

was severe aortic stenosis and severe two vessel CAD. Dr. Hong ultimately recommended the AVR and CABG surgery.

Mr. Ha sought a further opinion from cardiologist Dr. Ro on April 16, 2012.[2] Dr. Ro reviewed Dr. Hong's CCA report and while he testified he also reviewed the films, he did not note it in his records. Dr. Ro agreed with Dr. Hong's conclusions with the exception of Dr. Hong's finding of insignificant blockage of the left main artery, finding instead that the blockage was significant (to wit, more than 50% stenosis). Dr. Ro concluded that the patient required triple bypass surgery on his left main artery (a two vessel bypass) and on his RCA.

Dr. Naka, a cardiothoracic surgeon, evaluated Mr. Ha on May 1, 2012 for a surgical consultation and after reviewing the March 15, 2012 CCA imaging,[3] found that the RCA showed 70% stenosis and the left main artery showed more than 50% stenosis. He ultimately recommended AVR and triple CABG surgery. Mr. Ha signed a surgical consent form on that date.

On May 7, 2012 Dr. Naka performed the surgery at NYPH with Dr. Ota's[4] assistance. The CABG involved bypasses from the right internal mammary

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[2] In April, 2012, Mr. Ha obtained second opinions from cardiologists Drs. Robert Pyo, M.D. (Dr. Pyo) and Joseph Sweeny, M.D. (Dr. Sweeny). Plaintiff ultimately discontinued this action as to these physicians, as well as Cardiovascular Medicine Associates and Faculty Practice Associates.

[3] Like Dr. Ro, Dr. Naka testified that he reviewed the CCA films but did not note such review in his records.

[4] At that time Dr. Ota was a fellow in advanced cardiac surgery.

artery (RIMA) to the LAD artery, the left internal mammary artery (LIMA) to an obtuse marginal vessel and a saphenous vein graft (SVG) to the RCA.

After the surgery Mr. Ha was taken to the cardiothoracic intensive care unit. Unfortunately, his condition began to deteriorate as early as the day after the surgery. On May 10, 2012 Dr. Ro performed a CCA study which indicated no significant stenosis in either the left main artery (LMA) or the RCA. At some point Mr. Ha suffered a myocardial infarction and developed an infection. After encountering multiple complications and undergoing numerous other procedures, all to no avail, the decedent died on June 8, 2012, having never been discharged from NYPH.

Based upon the results of the May 10, 2012 CCA, plaintiff's experts conclude that the CABG procedure was unnecessary. Drs. Ro & Naka conceded this in hindsight and concluded that the perceived blockages from the March 15, 2012 CCA were likely due to a spasm occurring during that procedure.

After autopsy the cause of death was found to be "[m]ultiple complications following coronary artery bypass grafts for treatment of hypertensive and atherosclerotic cardiovascular disease." The autopsy report also found a left cerebral infarct with hemorrhage, pneumonia, splenic infarcts and heart disease. Contrary to the May 10, 2012 CCA, a separate cardiac pathology consultation found "70% lesions in the mid-LAD, mid and distal left circumflex artery; 80% stenosis in the mid portion of the RCA, 50% in the proximal portion of the RCA and 30% stenosis in the distal portion of the RCA."

Mrs. Ha commenced this action on June 5, 2014. The amended complaint asserts causes of action for medical malpractice[5] and wrongful death. The amended complaint, bills of particulars and plaintiff's experts identify *inter alia* the following alleged departures from accepted standards of care:

Dr. Hong: improperly performed and/or interpreted the March 15, 2012 coronary angiography; utilized a catheter during the CCA procedure that was too large; caused spasm; failed to rule out spasm; incorrectly found CAD where none existed; failed to perform a fractional flow reserve test (FFR) or intravascular ultrasound; and improperly recommended unnecessary CABG surgery.

UMPA: vicarious liability for Dr. Hong's alleged negligence.

SLR: vicarious liability for its employees and agents' alleged negligence.

Drs. Naka and Ota: failed to review the March 15, 2012 CCA angiography and/or improperly interpreted it; misdiagnosed two vessel CAD, leading to the recommendation for CABG surgery; performed unnecessary CABG surgery; and failed to obtain informed consent by not advising Mr. Ha that the CABG portion of the surgery was unnecessary.

Dr. Ro: plaintiff alleges that Dr. Ro departed from the standard of care for the same reasons as Drs. Naka and Ota, except makes no claims against him regarding performing the CABG.

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[5] In addition to alleging defendants departed from the standard of care, the medical malpractice cause of action also alleges lack of informed consent. The bills of particulars also include claims against NYPH for failure to follow and/or enforce proper policies, procedures and protocols with respect to the review of coronary angiography.

NYPH: plaintiff alleges NYPH is vicariously liable for its employees and agents' alleged negligence; and failed to follow and/or enforce proper policies, procedures and protocols with respect to the review of coronary angiography.

THE SLR DEFENDANTS' EXPERT

In support of their motion for summary judgment dismissing the complaint, the SLR defendants submit an expert affirmation from James Slater, M.D. (Dr. Slater). Dr. Slater is board certified in internal medicine, cardiovascular disease and interventional cardiology (Motion at Exh. A). Dr. Slater offers the following opinions within a reasonable degree of medical certainty as to the treatment Dr. Hong rendered to Mr. Ha:

- the March 15, 2012 CCA Dr. Hong recommended was appropriate and was performed within the standard of care;
- Dr. Hong's use of a 6 French sheath for insertion and performance of the CCA using JL4 and WR4 catheters was within the standard of care;
- Dr. Hong properly injected Mr. Ha with contrast at appropriate points and obtained appropriate angles and views to assess and formulate the CCA findings;
- Dr. Hong's angiography findings were appropriate and all arteries were fully and properly evaluated;
- Dr. Hong's conclusions regarding calcification of the left coronary arteries and aortic valve, as well as severe two vessel CAD, were appropriate;
- Dr. Hong correctly considered the possibility of coronary spasm but determined none was present during the March 15, 2012 CCA;
- Dr. Hong appropriately determined that the patient not be given intracoronary vasodilators due to his severe stenosis, thus it was appropriate not to perform an FFR or intravascular ultrasound, which would require vasodilators, during the CCA;

- Dr. Hong appropriately recommended AVR surgery with CABG based upon Mr. Ha's history, physical exams and results from the TTE and CCA;
- UMPA staff acted appropriately at all times and within the standard of care with regard to the decedent's office visits and TTE; and
- SLR staff acted appropriately at all times and within the standard of care with regard to decedent's presentation and CCA.

THE NYPH DEFENDANTS' EXPERT

In support of their motion for summary judgment dismissing the complaint, the NYPH defendants submit an expert affirmation from Eugene A. Grossi, M.D. (Dr. Grossi). Dr. Grossi is board certified in thoracic surgery and is actively engaged in the clinical practice of cardiothoracic surgery (Motion at Exh. A). Among other procedures, Dr. Grossi avers that he has routinely performed CABG surgery. Dr. Grossi offers the following opinions within a reasonable degree of medical certainty as to the treatment the NYPH defendants rendered to Mr. Ha:

- CABG surgery was indicated and the patient's post-operative complications were not proximately caused by the CABG portion of the surgery;
- Dr. Grossi independently reviewed the March 15, 2012 CCA images and discerned the presence of stenosis in Mr. Ha's coronary arteries including the LMA, LAD, RCA and circumflex arteries;
- during the surgery, Dr. Naka palpated the diseased arteries and verified the presence of occlusions in the LAD, RCA and obtuse marginal vessels;
- the June 7, 2012 autopsy further confirms Drs. Hong, Ro and Naka's opinions regarding the significance and extent of the decedent's stenosis, further justifying performing CABG surgery;

- Mr. Ha could not have experienced competitive flow[6] only two days post-operatively, as plaintiff's experts opine;

- as evidenced by the May 10, 2012 CCA, competitive flow did not cause Mr. Ha's deterioration, since blood was flowing well through the native arteries and all three grafts, thus plaintiff's experts' conclusion that competitive flow caused decreased flow to any portions of the heart targeted during the surgery is speculative and without factual basis;

- findings from multiple electrocardiograms (EKGs) performed on May 9, 2012 "are consistent with post-operative changes that may occur in the setting of surgery and are not reflective of an acute ischemic event due to an obstructed graft or native vessel";

- post-operatively, testing indicated the patient had biventricular dysfunction consistent with small vessel disease/spasm and/or myocardial edema, which in conjunction with a post-operative infection led to his eventual death, as confirmed by autopsy (i.e., testing did not suggest any ischemic event due to an obstructed graft or native vessel);

- informed consent is established by Dr. Naka's testimony, his detailed notes, Mr. Ha's signature on the consent form and the consent form's language indicating that a potential alternative was to not have the procedure performed;

- even if Mr. Ha had not elected to have the CABG surgery, the complications he suffered were also known risks of the AVR portion of the surgery;

- Dr. Ota had no role in recommending CABG to the patient as Dr. Naka decided it was indicated, and as a surgical assistant and fellow his role was to comply with Dr. Naka's directives; and

- as to NYPH's alleged failure to enforce policies, protocols and procedures regarding pre-operative review of CCA films, hospitals generally do not promulgate treatment protocols, leaving such to the expertise and

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[6] Plaintiff's experts conclude that the phenomenon of "competitive flow" led to a myocardial infarction and the decedent's ultimate death. Dr. Grossi explains that competitive flow occurs after CABG surgery where blood still flows through a native vessel (to wit, the vessel that was bypassed), thereby "compet[ing]" with blood flow through the new graft. Over time, this may cause the graft to atrophy or collapse.

judgment of the physicians to whom they extend privileges and, in any event, Drs. Ro, Naka and Ota testified they reviewed the CCA films.

PLAINTIFF'S EXPERTS' OPINIONS

In opposition to defendants' motions plaintiff submits an affirmation from John C. Brock, M.D. (Dr. Brock) and affidavits from Abram Charles Rabinowitz, M.D. (Dr. Rabinowitz) and William L. Manion, M.D. (Dr. Manion).

A. Dr. Brock

Dr. Brock is board certified in thoracic surgery and states that he currently practices cardiothoracic and vascular surgery (Lynch Aff. in Opp., Exh. A). Dr. Brock avers within a reasonable degree of medical certainty that the NYPH defendants departed from the standard of care in the following ways:

- Drs. Ro, Ota and Naka did not independently review the March 15, 2012 coronary angiography prior to recommending CABG to Mr. Ha, as evidenced by their failure to include this detail in their notes;
- the March 15, 2012 angiogram did not indicate critical stenosis sufficient to warrant CABG;
- Drs. Naka and Ota misdiagnosed the patient as having two vessel coronary artery disease requiring bypass;
- as a fellow, Dr. Ota was required to participate in the decision to perform the CABG surgery;
- the patient received insufficient information to provide an informed consent in that he was not told that the CABG procedure was optional;
- due to the lack of critical stenosis competitive flow from the native artery and the bypass compromised the flow of blood beyond the bypass, causing a myocardial infarction (significant native flow caused an immediate turbulence at the junction of the bypass, resulting in the diminished flow);
- "The autopsy . . . supports competitive flow resulting in a reduced downstream flow in that Mr. Ha was proven to have suffered a myocardial

infarct in the left ventricle and septum", which was caused by reduced blood flow rather than an ischemic event caused by an obstructed graft or native vessel; and

- NYPH staff failed to follow and/or disseminate policies, procedures and protocols with respect to pre-operative review of coronary angiography films.

B. Dr. Rabinowitz

Dr. Rabinowitz is board certified in internal medicine, cardiovascular disease and interventional cardiology and has over 35 years of training and experience (Lynch Aff. in Opp., Exh. B). Dr. Rabinowitz expresses his opinions regarding the care Drs. Hong, Ro and Naka rendered to Mr. Ha, averring within a reasonable degree of medical certainty that:

- Dr. Hong incorrectly interpreted the March 15, 2012 angiogram as showing multi-vessel disease when the RCA and LMA actually had no significant disease;
- Dr. Hong produced spasm of the RCA, which may have caused the appearance of a fixed stenosis or a false positive reading for CAD, and failed to rule out such catheter induced spasm;
- the LMA was not fully evaluated as it should have been viewed from a different position, and further evaluation could have been performed with intravascular ultrasound or FFR which "in all medical probability would have demonstrated no significant disease", as demonstrated in the post-operative angiography;
- the only significant disease was in the diagonal branch of the LAD, which was not bypassed;
- Dr. Ro incorrectly interpreted the March 15, 2012 CCA report and recommended bypass surgery;
- Dr. Naka also incorrectly interpreted the CCA report and performed the unnecessary CABG surgery; and

- had Mr. Ha been correctly informed of his true condition he would not have elected to have the CABG procedure, and the incorrect information he was given led to a deficient informed consent.

C. Dr. Manion

Dr. Manion is board certified in pathology (Lynch Aff. in Opp., Exh. C). With respect to the autopsy findings, Dr. Manion avers within a reasonable degree of medical certainty that:

- studies show that the degree or percentage of coronary artery stenosis reported in the postmortem examination may be of limited use since the examination is conducted on depressurized vessels which are collapsed, thus distorting the actual degree of CAD the patient had prior to death; and

- specialized methods of assessing CAD at autopsy can overcome the foregoing limitation, yet no such methods were performed here.

SUMMARY JUDGMENT

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*.

1. Medical Malpractice

"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, the parties' experts have either a cardiology and/or surgical background, and in the case of Dr. Manion, a pathology background, and based their opinions on their review of the decedent's medical records, as well as the pleadings and deposition transcripts herein. Accordingly, this court finds that all parties' experts are qualified to proffer their 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").

Dr. Hong

An issue of fact exists as to whether Dr. Hong properly performed and/or interpreted Mr. Ha's cardiac angiography upon which the NYPH defendants relied. Dr. Hong's expert's affirmation is mostly conclusory, offering no explanation or support for most of the proffered opinions. For example, Dr. Slater only summarily states that Dr. Hong properly performed the CCA and used the correct sized catheter.

These foundationally unsupported statements are insufficient to shift the burden of proof on summary judgment to plaintiff. Regardless, plaintiff's expert, Dr. Rabinowitz, plausibly explains that Dr. Hong produced spasm of the RCA, as evidenced by damping of the arterial pressure recorded during the CCA. Such catheter induced spasm may have caused the appearance of a fixed stenosis or a false positive reading for CAD. Dr. Rabinowitz also opines that Dr. Hong deviated from the standard of care by not administering intracoronary nitroglycerin to rule out coronary vasospasm.

No issue of fact is created concerning plaintiff's allegation that Dr. Hong should have performed an intraoperative FFR or intravascular ultrasound. Although Dr. Rabinowitz opines that these procedures should have been performed, he does not dispute Dr. Slater's statement that these tests required the use of vasodilators which were contraindicated. Accordingly, to the extent

Mrs. Ha's claims are based on Dr. Hong's failure to perform the foregoing tests, such theories of liability are not viable and must be dismissed.

More significantly, no issue of fact is created by Dr. Hong's recommendation that the patient undergo CABG surgery. This decision ultimately rested with surgeon Dr. Naka, thus, Dr. Hong's recommendation cannot be said to have proximately cause the decedent's injuries.

Finally, although the SLR defendants address informed consent in the context of obtaining same for the TTE and CCA, plaintiff does not claim that informed consent was not obtained for these procedures. With respect to the May 7, 2012 surgery, the responsibility for obtaining informed consent lay with Dr. Naka. Accordingly, any claims against Dr. Hong and the remaining SLR defendants alleging lack of informed consent are dismissed. For the foregoing reasons, partial summary judgment is granted in Dr. Hong's favor and denied in part as set forth above.

UMPA and SLR

Dr. Hong was employed by SLR during the relevant time period and plaintiff alleges SLR is vicariously liable for any malpractice on his part. As this court found that certain issues of fact exist with respect to the manner in which Dr. Hong performed the CCA, summary judgment must be granted in part and denied in part as to SLR for the same reasons applicable to Dr. Hong.

It is unclear whether Dr. Hong was an employee of UMPA. However, UMPA was only involved in Mr. Ha's care with respect to the TTE. Plaintiff does not claim that the TTE was performed negligently nor does she make any direct

claims against UMPA. Finally, plaintiff's opposition does not refute that UMPA was not negligent. For the foregoing reasons, this action is dismissed with prejudice as to UMPA.

Dr. Naka

No issue of fact exists with regard to Mrs. Ha's claim that Dr. Naka departed from acceptable standards of care by failing to review the March 15, 2012 coronary angiography. Plaintiff concludes that Dr. Naka never reviewed the CCA images prior to recommending CABG surgery because the medical records lack any notation to that effect. However, Dr. Naka testified that he reviewed same independently of Drs. Hong and Ro and plaintiff's speculative claim to the contrary is insufficient to refute such testimony.

Similarly, no issue of fact exists with respect to the allegation that Dr. Naka failed to obtain informed consent by not advising Mr. Ha that the CABG portion of the surgery was unnecessary. 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). Here, plaintiff fails to refute the clear language of the consent form Mr. Ha signed, which specifically states that not performing the surgery at all was an option available to the decedent, as well as Dr. Naka's detailed documentation of his discussions with the patient.

Mrs. Ha raises issues of fact with respect to whether Dr. Naka properly interpreted the March 15, 2012 angiography and recommended the CABG procedure, or whether it was unnecessary and resulted in competitive flow. As plaintiff notes, based upon the post-operative CCA Dr. Ro performed, which showed insignificant stenosis, Drs. Hong, Ro and Naka testified that CABG surgery may have been unnecessary and the appearance of stenosis may have been due to spasm.

A further factual issue is created with respect to the autopsy findings. While the autopsy report contradicts the May 10, 2012 CCA findings of insignificant stenosis, as does Dr. Naka's testimony that he palpated the arteries intra-operatively and verified the presence of occlusions in the LAD, RCA and obtuse marginal vessels, plaintiff's expert opines that the degree or percentage of coronary artery stenosis reported in postmortem examinations is inconclusive

since the vessels are typically depressurized and collapsed, thereby distorting the actual degree of CAD the patient had prior to death.

For the foregoing reasons, the motion is granted in part and denied in part as to Dr. Naka, as stated herein above.

Dr. Ota

Mrs. Ha's claims against Dr. Ota are identical to those she interposes against Dr. Naka. It is undisputed that Dr. Ota, a fellow, assisted Dr. Naka in performing the May 7, 2012 surgery. As held in *Poter v Adams*, 104 AD3d 925, 927 (2d Dept 2013):

> A resident or fellow who is supervised by a doctor during a medical procedure, and who does not exercise any independent medical judgment, cannot be held liable for medical malpractice unless the resident or fellow knows that the supervising doctor's orders are so clearly contraindicated by normal practice that ordinary prudence requires inquiry into the correctness of the orders, or the resident or fellow commits an independent act that constitutes a departure from accepted medical practice (citations omitted).

Here, plaintiff fails to allege that Dr. Ota exercised independent medical judgment during the surgical procedure or that Dr. Naka's orders were so clearly contraindicated by normal practice that ordinary prudence required Dr. Ota to inquire into their correctness. Nor does plaintiff allege that Dr. Ota committed an independent act that constituted a departure from accepted standards of care.

Plaintiff's expert's conclusory allegations as to the duty of care Dr. Ota owed as a fellow are flatly contradicted by the foregoing case law, and plaintiff's deficient factual allegations fail to establish any basis to impose liability against

Dr. Ota for malpractice. Accordingly, summary judgment is granted in Dr. Ota's favor dismissing this action against him with prejudice.

Dr. Ro

Plaintiff alleges that Dr. Ro departed from the standard of care for the same reasons as Drs. Naka and Ota, except makes no claims against him regarding performing the allegedly unnecessary CABG. With respect to lack of informed consent, as previously discussed, the responsibility for obtaining same rested with Dr. Naka, who obtained Mr. Ha's informed consent. As to failure to review the March 15, 2012 angiography films, plaintiff fails to establish this allegation for the same reasons stated above as to Dr. Naka.

While a potential factual issue exists as to Dr. Ro's interpretation of the March 15, 2012 coronary angiogram and his recommendation that the patient undergo the CABG procedure, the final decision to perform the CABG rested with surgeon Dr. Naka. Thus, even assuming Dr. Ro made his recommendation in error, such error did not proximately cause the injuries plaintiff alleges. Accordingly, summary judgment is granted in Dr. Ro's favor dismissing the complaint against him with prejudice.

NYPH

As held in *Suits v Wyckoff Hghts. Med. Ctr.*, 84 AD3d 487, 488 (1st Dept 2011):

> [A] hospital cannot ordinarily be held vicariously liable for the malpractice of a private attending physician who is not its employee

> unless a patient comes to the emergency room seeking treatment from the hospital, and not from a particular physician of the patient's choosing, and there is created an apparent or ostensible agency by estoppel (citations omitted).

Here, it is undisputed that Drs. Ro and Naka are not employed by NYPH and Mr. Ha was a private patient of both physicians. As such, NYPH cannot be held vicariously liable for any malpractice on their parts unless an apparent or ostensible agency by estoppel is created.

Plaintiff's opposition contains a footnote citing case law in an attempt to establish vicarious liability based upon a purported agency relationship between Drs. Ro and/or Naka and NYPH. Mrs. Ha argues that the decedent sought medical care from NYPH itself rather than from any individual physician, therefore NYPH is liable for any potential malpractice of these physicians who treated Mr. Ha at NYPH.

This assertion is not borne out by the record. First, plaintiff cites deposition testimony from former defendant Dr. Pyo to support the claim that Mr. Ha sought treatment from NYPH rather than Drs. Ro and Naka. However, Dr. Pyo actually testified that, in speaking to Mr. Ha regarding percutaneous procedures (i.e., rather than open heart surgery), he advised Mr. Ha "that the institution that has the highest experience for doing this sort of thing in 2012 was Columbia[-Presbyterian]" and that they might be able to "advise him better."

Contrarily, Mrs. Ha testified that a friend referred her late husband to Dr. Ro, who in turn referred him to Dr. Naka.[7]

Turning to plaintiff's direct claim against NYPH, plaintiff's expert, Dr. Brock, only summarily states that "the staff of [NYPH] deviated from the accepted standards of care by failing to follow and/or disseminate policies, procedures, and protocols with respect to pre-operative review of coronary angiography films." This conclusory statement is insufficient to overcome Dr. Grossi's assertion, which Dr. Brock does not address, that hospitals generally do not promulgate treatment protocols because they rely upon the expertise and judgment of the physicians to whom they extend privileges and such physicians must be free to devise appropriate treatments on a case by case basis. In any event, plaintiff's claim that the NYPH defendants did not review Mr. Ha's angiogram studies pre-operatively is merely based on supposition and does not refute these defendants' testimony to the contrary. For the foregoing reasons, this action is dismissed as to NYPH.

2. Wrongful Death

As held in *Chong v New York City Trans. Auth.*, 83 AD2d 546, 547 (2d Dept 1981):

> The elements of a cause of action to recover damages for wrongful death are (1) the death of a human being, (2) the wrongful act, neglect or default

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[7] Parenthetically, plaintiff's allegations in support of this theory of liability are insufficient to establish an agency relationship. See *Dragotta v Southampton Hosp.*, 39 AD3d 697, 698-699 (2d Dept 2007).

> of the defendant by which the decedent's death was caused, (3) the survival of distributees who suffered pecuniary loss by reason of the death of decedent and (4) the appointment of a personal representative of the decedent (citation omitted).

Having concluded plaintiff raised issues of fact as to certain theories of liability against Drs. Hong and Naka, but failed to raise any issues of fact as to certain other theories of liability, the wrongful death cause of action must accordingly be granted in part and denied in part.

For all of the foregoing reasons it is hereby

ORDERED that the motion for summary judgment (motion seq. 002) is granted in part and denied in part with respect to defendants Mun Kyung Hong, M.D. and St. Luke's-Roosevelt Hospital Center, as delineated above; and it is further

ORDERED that the motion for summary judgment (motion seq. 003) is granted in part and denied in part with respect to defendant Yoshifumi Naka, M.D., as delineated above; and it is further

ORDERED that summary judgment dismissing the complaint is granted and the Clerk is directed to enter judgment in favor of defendants University Medical Practice Associates, Jae Ro, M.D., Takeyoshi Ota, M.D. and The New York and Presbyterian Hospital, dismissing this action with prejudice, together with costs and disbursements as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the caption in the above action is hereby amended to reflect the dismissal of this action as to defendants University Medical Practice Associates, Jae Ro, M.D., Takeyoshi Ota, M.D. and The New York and Presbyterian Hospital; and it is further

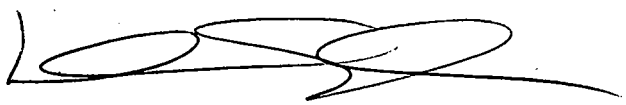
ORDERED that all papers, pleadings and proceedings in the above entitled action be deemed amended accordingly, without prejudice to the proceedings heretofore had herein; and it is further

ORDERED that counsel for said defendants are directed to serve a copy of this decision and order by e-mail upon the Clerk of the Court (cc-nyef@nycourts.gov), and upon the Trial Support Office (trialsupport-nyef@nycourts.gov), who are directed to amend their records to reflect such change in the caption herein; and it is further

Counsel for the remaining parties are directed to appear for a pre-trial conference at Part 1 MMSP, 60 Centre St., Room 325, New York, New York on June 5, 2018 at 9:30 a.m. In the event that no settlement can be reached, counsel shall be prepared on that date to stipulate to a firm trial date in Part 40 TR.

The foregoing constitutes this court's decision and order.

Dated: New York, New York
May 17, 2018



HON. MARTIN SHULMAN, J.S.C