Index №. 805183/2017
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART 10

----------X

RICHARD H. BONANNO and PHYLLIS L. BONANNO, **Index №. 805183/2017**

Plaintiffs

-against-

DAVID J. MAYMAN, M.D., ANDY O. MILLER, M.D., PETER K. SCULCO, M.D., THOMAS P. SCULCO, M.D. and THE HOSPITAL FOR SPECIAL SURGERY,

Defendants

----------X

HON. GEORGE J. SILVER:

In this medical malpractice action, defendants DAVID J. MAYMAN, M.D. ("Dr. Mayman"), ANDY O. MILLER, M.D. ("Dr. Miller"), PETER K. SCULCO, M.D. ("Dr. P. Sculco"), THOMAS P. SCULCO, M.D. ("Dr. T. Sculco") and THE HOSPITAL FOR SPECIAL SURGERY ("HSS," collectively "defendants") move, pursuant to CPLR §3212, for summary judgment and an order dismissing the complaint of plaintiff RICHARD H. BONANNO ("plaintiff") as against them. Plaintiff opposes defendants' application.

BACKGROUND

This lawsuit arises from various allegations of negligent care and treatment received by plaintiff from defendants. Specifically, plaintiff alleges that Dr. Mayman was negligent on November 14, 2014 in improperly implanting a Smith & Nephew Genesis II[1] knee component system during left total knee replacement; that Dr. T. Sculco was negligent on May 20, 2015, August 12, 2015, May 5, 2016, February 8, 2017, March 1, 2017, and June 26, 2017 in the improper implantation of plaintiff's total knee replacement

[1] The GENESIS II Total Knee System was designed to offer orthopedic surgeons with an easy-to-use system that assists the surgeons in obtaining accurate and reproducible knee alignment. The instrumentation is said to only be used in minimally invasive or standard exposures.

with Optetrak components[2]; and that Dr. P. Sculco was negligent on June 26, 2017 by improperly implanting a Zimmer knee rotation hinge system[3] and components.

The overarching allegation of negligence with respect to all surgeries is that defendants did not properly consider whether plaintiff had an allergic reaction to the metals in the knee components implanted, and used components composed of metals that plaintiff was allergic to, thereby causing his alleged injuries. Indeed, plaintiff alleges that Dr. Mayman, Dr. T. Sculco and Dr. P Sculco failed to administer testing for potential metal allergies, ignored test reports submitted by plaintiff, and failed to revise plaintiff's left knee replacement with components that did not contain metals that he was allergic to. Plaintiff claims that Dr. T. Sculco and Dr. Mayman negligently misaligned the patella component and caused deterioration to plaintiff's patella through repeated placement and removal of patella implants. He further alleges that Dr. T. Sculco failed to diagnose the deterioration of the patella. Plaintiff alleges that Dr. Miller was negligent on dates after February 8, 2017 insofar as he in treated plaintiff's infected left knee. To be sure, plaintiff alleges that Dr. Miller improperly diagnosed and treated plaintiff's swollen left knee as an infection, rather than as an allergy, and performed improper diagnostic testing "regarding infection versus allergic reaction," in that Dr. Miller failed to perform testing for metal allergens.

Plaintiff also alleges that defendants improperly communicated with plaintiff post-operatively. Plaintiff's allegations as against HSS are that the institution was negligent in its supervision of the named physicians during performance of the surgical procedures and post-operative care. Plaintiff's alleged damages include deterioration and ultimate removal of his patella; need for further revision surgery on the left knee; pain and swelling; difficulty with ambulation; infection of the left knee; depression; and loss of enjoyment of life. His wife Phyllis Bonanno's allegations are limited to a claim for loss of consortium and services.

ARGUMENTS

In support of the instant motion, defendants argue based on the medical records, deposition testimony of the parties and party witnesses, and the sworn expert affirmation of Michael Bronson, M.D. ("Dr. Bronson"), a physician board-certified in orthopedic surgery, that defendants are entitled to summary judgment in this case, because at all times and in all ways, plaintiff was treated in full accord with good and accepted standards of medical and orthopedic surgical practice and care. To be sure, it is Dr. Bronson's opinion, within a reasonable degree of medical certainty, that there was no medical malpractice, no medical negligence, and no departures or deviations from the applicable standard of care by defendants that caused or contributed in any way to plaintiff's alleged injuries. Dr. Bronson further states that defendants did not deviate from the standard of care in providing plaintiff with informed consent for every surgical procedure.

---

[2] Optetrak components are commonly used for bone preservation, proper kinematics and wear management in total knee replacement.

[3] A Zimmer knee rotation hinge system is designed for revision, difficult primary, and limb salvage surgeries in patients with significant bone loss and/or ligament deficiencies.

More specifically, Dr. Bronson explains that the deterioration of plaintiff's patella was not caused by any negligent act or omission of defendants. Rather, Dr. Bronson opines that such deterioration is a known and accepted complication of multiple surgeries that involved disruption of the blood supply to the patella. Dr. Bronson states that defendants appropriately appreciated and managed this complication, ultimately removing plaintiff's necrotic patella.

Similarly, Dr. Bronson states that the development of an infection in plaintiff's knee was a known and accepted consequence of the multiple surgical procedures that he underwent, and was not caused by any negligent act or omission of defendants. Dr. Bronson states that defendants timely and appropriately diagnosed and treated this infection, first with intravenous ("IV") antibiotics and then ultimately with a one stage removal, irrigation, and reimplantation of plaintiff's left knee components.

Dr. Bronson notes that plaintiff alleges that the primary basis of defendants' negligence rests upon their failure to properly consider, test for, and treat a hypersensitivity to the metal composition of the various knee components implanted in plaintiff's left knee. Dr. Bronson states, within a reasonable degree of medical certainty, that there is no evidence that plaintiff had or currently has a metal hypersensitivity that has caused any complications in his medical course, or that a metal hypersensitivity is the cause of any of plaintiff's chronic complaints of pain and swelling in his left knee. He further states that there is no standard of care in the field of orthopedic surgery for diagnosing or treating a presumed hypersensitivity to metals as such a hypersensitivity relates to a knee replacement. Dr. Bronson also notes that there has never been published evidence in orthopedic surgical medical literature confirming mechanical complications or joint failure in connection with a diagnosed metal allergy. Therefore, Dr. Bronson surmises that there is no accepted evidence in the community of orthopedic surgeons that metal hypersensitivity is a legitimate diagnosis in relation to knee replacement components. Dr. Bronson confirms that diagnosis of a metal hypersensitivity with regard to a knee replacement is at best a diagnosis of exclusion and can be considered only when every other possible cause of a patient's complaints has been evaluated and excluded. Even then, Dr. Bronson opines that it is a diagnosis that is based only on anecdotal data.

Dr. Bronson states that it is generally accepted in the orthopedic surgical community that hypersensitivity has no significance to treatment decisions in orthopedic surgical care, because there is no proven causal link between testing that shows a hypersensitivity to a metal and the functional outcomes for joint replacements. The mere fact of receiving an implant in any part of the body appears to result in a significant population of patients developing evidence of a metal hypersensitivity on certain types of testing, but the relevant literature has shown that this has no relationship to whether or not the patients have any complications or complaints about their joint replacement.

Dr. Bronson further opines that the two kinds of metal sensitivity testing available to identify a hypersensitivity are cutaneous patch testing and a blood test called lymphocyte transformation testing ("LTT"). Dr. Bronson explains that neither of these tests has been proven to show any medically relevant information about metal hypersensitivity related to knee components, which are exposed to the deep tissues and synovial fluid in the knee. Further, multiple studies have found that skin patch testing has no predictive value for complications in a total knee replacement when performed either before or after arthroplasty. There

is no evidence in medical literature of a causal link between use of internal metallic implants in knees and positive indications of allergy to metal on available testing, which includes both skin patch testing and blood testing (i.e, LTT).

Dr. Bronson further explains that the medical literature is quite clear that to date, no causation has been proven between a dermal sensitivity reaction (i.e., from the skin test) and implant failure. Therefore, Dr. Bronson concludes that there is no predictive value whatsoever in performing preoperative cutaneous patch testing for metal sensitivity. Since no cause and effect can be reliably determined, Dr. Bronson states that a metal hypersensitivity as the cause of implant failure is, at best, a diagnosis of exclusion. After all other potential problems are ruled out or resolved, some researchers suggest trying hypoallergenic implants, but again, Dr. Bronson points out that this is based only on anecdotal data, and there are obstacles to this course of action. Moreover Dr. Bronson highlights that titanium is substantially more expensive than standard materials. Surgeons are not always familiar with different implant systems, and having a surgeon use an implant with which they are unfamiliar, just to use a certain metal composition in the component system, itself can lead to a higher risk of implant failure. Dr. Bronson states that revision of a total knee replacement with hypoallergenic components is not the standard of care, even in patients who have positive skin patch or LTT results for common metals.

Dr. Bronson states that in the instant case, plaintiff's metal testing confirms that the available tests are not reliable for identifying a hypersensitivity to metal, particularly as it would relate to deep tissue reaction in the synovial fluid. Plaintiff pursued allergy testing with his dermatologist, Dr. Brian Machler, on two different dates. On March 24, 2016, Dr. Machler reported the results of a weeklong skin patch test, in which plaintiff was exposed to 121 allergens against the skin of his back. Dr. Machler reported that plaintiff had mildly positive reactions to molybdenum, tobramycin, benzoic acid, and formaldehyde. Of these, only molybdenum is a metal. Importantly, plaintiff had no sensitivity reaction to nickel, cobalt, or chromium, which are the main metals that comprise standard knee components.

A year later, plaintiff pursued blood testing for allergens, called lymphocyte transformation testing (LTT), on his own in September 2017. On September 25, 2017, plaintiff had blood drawn; he testified in his deposition that this blood was drawn from his hand, not from his knee joint. On October 3, 2017, a report was generated by Orthopedic Analysis showing plaintiff had mild reactivity to nickel. This test showed plaintiff was not reactive to molybdenum. No other metals in the testing were positive for a reaction, including cobalt and chromium.

Dr. Bronson notes that it is common for patients with any metal implants to show a positive reaction to nickel with sensitivity testing. In his view, it is entirely possible for some patients to show a sensitivity to nickel simply in reaction to the test itself. Further, Dr. Bronson explains that plaintiff's testing shows inconsistent results, with a mildly positive skin reaction to molybdenum, but no reaction to molybdenum on blood testing. By contrast, plaintiff had no skin reaction to nickel, but a year later, he showed a positive reaction to nickel on blood testing. Significantly, neither of these tests involved the fluids from the deep tissue of plaintiff's knee. Dr. Bronson concludes that based upon the relevant medical literature that neither

of these sensitivity tests has any medical or surgical significance to the cause of plaintiff's physical complaints or to the appropriate standard of orthopedic and medical care that was required in plaintiff's case.

Based upon the foregoing, Dr. Bronson states that it is not the standard of care to perform testing for metal hypersensitivity prior to performance of a total knee replacement or a revision of a total knee replacement, so it was not a departure from the standard of care for defendants to omit such testing throughout their treatment of plaintiff.

Reviewing the allegations leveled against each defendant, Dr. Bronson concludes that each defendant had a specific working diagnosis and pursued appropriate treatment options. In Dr. Bronson's analysis, defendants' consideration of a metal hypersensitivity as the cause of plaintiff's complaints was never indicated. For instance, Dr. Bronson states that Dr. Mayman appropriately pursued plaintiff's focal lateral knee pain which was localized to a specific site with an ultrasound on March 6, 2015. In addition, Dr. Bronson states that Dr. T Sculco appropriately pursued plaintiff's complaints of lateral knee pain with surgical intervention to perform a lateral retinacular release in an attempt to align plaintiff's patella more medially. Thereafter, Dr. Bronson opines that Dr. T. Sculco appropriately diagnosed plaintiff with recurrent hemarthrosis, due to his continued use of anticoagulant Xarelto and persistent swelling with bloody fluid in the knee. Eventually after repeated surgeries and aspirations, plaintiff developed signs of infection in the left knee, and Dr. Bronson states that treatment for this was appropriately pursued by Dr. Miller and Dr. P Sculco. In each case, Dr. Bronson explains that defendants had a reasonable and known working diagnosis for plaintiff's complaints based on clinical findings, and lab results, and plaintiff's own narrative. Dr. Bronson states defendants were pursuing appropriate treatments for these diagnoses; therefore, consideration of a metal hypersensitivity as the cause of plaintiff's complaints would have been inappropriate, even according to the anecdotal medical literature that posits metal hypersensitivity as a possible diagnosis to entertain, because defendants' reasonable and demonstrable other explanations for plaintiff's complaints had not been excluded.

Defendants' motion is further supported by expert anatomical pathologist Dr. Jonathan Melamed ("Dr. Melamed") who is board-certified in the specialty of Anatomic Pathology and Clinical Pathology. Dr. Melamed's analysis posits that the there is no scientific evidence in plaintiff's case of plaintiff having any reaction whatsoever to the metal in the components in his left knee. Dr. Melamed explains that rather than a true "allergy," the mechanism of inflammatory reaction involved with hypersensitivity to metal is an autoimmune response described as a delayed hypersensitivity type IV. Dr. Melamed states that with a metal hypersensitivity in contexts other than total knee replacements, usually there are also signs of metal debris in the microscopic findings, which are also absent from all of plaintiff's pathology reports.

In light of the evidence proffered, defendants submit that they are entitled to judgment in their favor.

In opposition, plaintiff does not annex the affirmation of an expert. Instead, plaintiff posits that he can prove his case without an expert. Plaintiff reiterated this position during oral argument before the court on August 20, 2019. Despite this declaration, plaintiff's opposition provides no substantive or legal argument in opposition to defendants' motion. Indeed, plaintiff cites to no medical literature in support of his opposition. Instead, plaintiff repeatedly states that he will present proof to support his case at some future

time, without discussing what this proof will be, if not the medical records that are submitted as exhibits to defendants' motion. In addition, plaintiff asks this court to disregard defendants' expert proof because defendants' experts were paid for their testimony. Plaintiff neither addresses nor refutes any of the conclusions or opinions of orthopedic surgeon Dr. Bronson or anatomic pathologist Dr. Melamed. Finally, plaintiff asserts a claim of spoliation of evidence, although this argument appears to be based entirely upon discovery issues that were previously resolved by the court prior to filing of this motion. What's more, at oral argument plaintiff reiterated that he had presented all the evidence that he needed to submit to defeat the instant motion. Contrary to the position articulated in his papers, plaintiff did not state that any discovery was outstanding.

In reply, defendants challenge the factual assertions made in plaintiff's opposition and the conclusions drawn therefrom. Defendants highlight the absence of an expert affirmation in support of any of plaintiff's conclusions, and challenge plaintiff's assertion that defendants have altered many of the records at issue. Defendants further reiterate the arguments made in their moving papers, and renew the argument that they are entitled to judgment in their favor.

DISCUSSION

In an action premised upon medical malpractice, a defendant doctor or hospital establishes prima facie entitlement to summary judgment when he or she establishes that in treating the plaintiff there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged (*Roques v. Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Thurston v Interfaith Med. Ctr.*, 66 AD3d 999, 1001 [2d Dept. 2009]; *Myers v Ferrara*, 56 AD3d 78, 83 [2d Dept. 2008]; *Germaine v Yu*, 49 AD3d 685 [2d Dept 2008]; *Rebozo v Wilen*, 41 AD3d 457, 458 [2d Dept 2007]; *Williams v Sahay*, 12 AD3d 366, 368 [2d Dept 2004]). In claiming that treatment did not depart from accepted standards, the movant must provide an expert opinion that is detailed, specific and factual in nature (*see e.g., Joyner-Pack v. Sykes*, 54 AD3d 727, 729 [2d Dept2008]). The opinion must be based on facts within the record or personally known to the expert (*Roques*, 73 AD3d at 207, *supra*). Indeed, it is well settled that expert testimony must be based on facts in the record or personally known to the witness, and that an expert cannot reach a conclusion by assuming material facts not supported by record evidence (*Cassano v Hagstrom*, 5 NY2d 643, 646 [1959]; *Gomez v New York City Hous. Auth.*, 217 AD2d 110, 117 [1st Dept 1995]; *Matter of Aetna Cas. & Sur. Co. v Barile*, 86 AD2d 362, 364-365 [1st Dept 1982]). Thus, a defendant in a medical malpractice action who, in support of a motion for summary judgment, submits conclusory medical affidavits or affirmations, fails to establish prima facie entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Cregan v Sachs*, 65 AD3d 101, 108 [1st Dept 2009]; *Wasserman v Carella*, 307 AD2d 225, 226 [1st Dept 2003]). Further, medical expert affidavits or affirmations, submitted by a defendant, which fail to address the essential factual allegations in the plaintiff's complaint or bill of particulars do not establish prima facie entitlement to summary judgment as a matter of law (*Cregan*, 65 AD3d at 108, *supra*; *Wasserman*, 307 AD2d at 226, *supra*). To be sure, the defense expert's opinion should state "in what way" a patient's treatment was proper and explain the standard of care (*Ocasio-Gary v. Lawrence Hosp.*, 69 AD3d 403, 404 [1st Dept 2010]). Further, it must "explain 'what defendant did and why'" (*id. quoting Wasserman v. Carella*, 307 AD2d 225, 226 [1st Dept 2003]).

Once the defendant meets its burden of establishing prima facie entitlement to summary judgment, it is incumbent on the plaintiff, if summary judgment is to be averted, to rebut the defendant's prima facie showing (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The plaintiff must rebut defendant's prima facie showing without "[g]eneral allegations of medical malpractice, merely conclusory and unsupported by competent evidence" (*id.* at 325). Specifically, to avert summary judgment, the plaintiff must demonstrate that the defendant did in fact commit malpractice and that the malpractice was the proximate cause of the plaintiff's injuries (*Coronel v New York City Health and Hosp. Corp.*, 47 AD3d 456 [1st Dept. 2008]; *Koeppel v Park*, 228 AD2d 288, 289 [1st Dept. 1996]). To meet the required burden, the plaintiff must submit an affidavit from a medical doctor attesting that the defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged (*Thurston*, 66 AD3d at 1001, *supra*; *Myers,* 56 AD3d at 84, *supra*; *Rebozo*, 41 AD3d at 458, *supra*). Such an expert opinion must demonstrate "the requisite nexus between the malpractice allegedly committed and the harm suffered" (*see Dallas–Stephenson v. Waisman*, 39 AD3d 303, 307 [1st Dept 2007][*quoting Ferrara v. South Shore Orthopedic Assoc.*, 178 AD2d 364 [1st Dept 1991]).

Here, defendants' submission of deposition transcripts, medical records and expert affirmations based upon the same established a prima facie defense entitling them to summary judgment (*Balzola v Giese*, 107 AD3d 587 [1st Dept 2013]). To be sure, Dr. Bronson opines that defendants satisfied the standard of care in all aspects of the surgical and medical treatment provided to plaintiff. Precisely, Dr. Bronson states that each surgical intervention performed by defendants was indicated and appropriately performed, and that no act or omission of defendants caused any of plaintiff's alleged injuries.

Moreover, both Dr. Bronson and Dr. Melamed provide the opinion that plaintiff's complaints and symptoms were not caused by a reaction to the metal composition of his knee components, which is the primary allegation plaintiff is making in this case. Not only does Dr. Bronson explain that there has never been published evidence of a metal hypersensitivity resulting in a mechanical failure of any joint replacement, but pathologist Dr. Melamed provides ample proof that there is no evidence on any of plaintiff's many pathology results from November 2014 through June 2017 of any of the expected cellular findings that would show he was having a delayed hypersensitivity type IV reaction, which is the kind of reaction that would be seen with a sensitivity to a metal. As Dr. Bronson states in his expert affirmation, there is no support within the orthopedic surgery community that metal hypersensitivity can cause the injuries alleged by plaintiff, and therefore defendants did not deviate from the standard of care in omitting testing for metal sensitivity, in interpreting the results of metal sensitivity testing that was performed on plaintiff as unremarkable to their surgical decision making, or in using knee components made of cobalt- chromium alloy despite the results of this testing. Further, Dr. Bronson explains that fracture and deterioration of the patella is a known risk of any surgery that requires displacement of the patella. To be sure, Dr. Bronson explains, with reference to the relevant records, that in a lateral release during surgery, the blood supply to the patella can be compromised, leading to an avascular patella which then deteriorates. Dr. Bronson notes that the occurrence of this complication is not a deviation from the standard of care.

Dr. Bronson also notes that a review of the hospital records indicates that plaintiff did undergo a lateral release of the patella in more than one of the many surgeries involving his patella. Further, his patella

was revised several times, so the repeated unavoidable trauma to the tissues increased the risk of compromise to the blood supply.

Dr. Bronson reviewed each of the surgical procedures performed by defendants in his affirmation, and concluded that each one was indicated, properly performed, and there was no negligent act or omission by defendants during any of these surgeries that resulted in an alleged injury to plaintiff.

Dr. Bronson further states in his affirmation that plaintiff's infection to the left knee was a known and accepted complication of the many surgeries performed on his left knee. Dr. Bronson also indicates that plaintiff's cause of action for lack of informed consent cannot survive insofar as the records reveal informed consents forms signed by plaintiff, which in and of themselves confirm that plaintiff was furnished with sufficient information about the risks, benefits, and alternatives of the procedures. Dr. Bronson specifically notes that it is not a departure to omit giving plaintiff informed consent about his alleged concerns about the metal composition of the knee components used, because there is no scientific support for plaintiffs' theory that the metal composition of his knee components caused his alleged injuries, and therefore no need for defendants to have warned him about this. As Dr. Bronson and Dr. Melamed's opinions are predicated upon ample support within the record, defendants have set forth a prima facie showing in favor of dismissal.

In opposition to defendant's prima facie showing, plaintiff does not raise triable issues of fact sufficient to preclude summary judgment. Most glaringly, plaintiff does not annex an expert affirmation challenging the conclusions drawn by Dr. Bronson and Dr. Melamed. Plaintiff's failure to submit a competent expert affirmation in opposition to defendants' prima facie showing is fatal to his case, necessitating dismissal (*Thurston*, 66 AD3d at 1001, *supra*; *Myers,* 56 AD3d at 84, *supra*; *Rebozo*, 41 AD3d at 458, *supra*). Plaintiff's assertion that he is not required to submit certificate of merit is inapposite, and a deflection from the long-established rule that a plaintiff who brings a medical malpractice action must prove the claims related to the alleged deviations from the standards of care by proffering a competent and sufficient expert medical opinion (*Alvarez*, 68 NY2d at 324, *supra*). There is no exception to this rule, and plaintiff's insistence on disregarding it requires dismissal. To be sure, as defendants' motion, which includes the proffered expert testimony of two physicians, is inadequately opposed by plaintiff, the court finds that summary judgment in favor of defendants is warranted.

Among the causes of action for which dismissal is warranted are plaintiff's claims of a lack of informed consent and loss of consortium. It is well settled that "[t]o succeed in a medical malpractice cause of action premised on lack of informed consent, a plaintiff must demonstrate that (1) the practitioner failed to disclose the risks, benefits and alternatives to the procedure or treatment that a reasonable practitioner would have disclosed, and (2) a reasonable person in the plaintiff's position, fully informed, would have elected not to undergo the procedure or treatment" (*see* Public Health Law §2805 (d) [1], [3]). Expert medical testimony is required to prove the insufficiency of the information disclosed to the plaintiff (CPLR §4401-1; *see, e.g., Orphan v Pilnik*, 15 NY3d 907, 908 [2010]). Furthermore, expert testimony is necessary to show that the procedure's risk was material and that lack of informed consent proximately caused the injury (*see e.g., Balzola v. Giese*, 107 AD3d 587, 588-589 [1st Dept. 2013]).

Here, the affirmation provided by Dr. Bronson, as supplemented by defendants' office notes and records of informed consent forms signed by plaintiff, confirms that plaintiff was provided with enough information about the risks, benefits, and alternatives of the procedures he underwent. Moreover, Dr. Bronson notes that it was not a departure to omit giving plaintiff informed consent about his alleged concerns about the metal composition of the knee components used, because there is no scientific support for the plaintiff's theory that the metal composition of his knee components caused his alleged injuries, and therefore no need for defendants to have warned him about this. As such, there is no basis for a lack of informed consent claim.

Likewise, because of the foregoing, plaintiff's cause of action for loss of consortium must also be dismissed. Although a loss of consortium claim is a separate and distinct cause of action, New York courts have never characterized the loss of consortium as a claim independent from the underlying action instituted on behalf of the injured spouse (*see Buckley v. National Freight, Inc.*, 220 AD2d 155, 157 [2d Dept 1996]). To be sure, where substantive claims are properly dismissed, a derivative loss of consortium claim asserted fails to state a claim, and must also be dismissed (*Kornicki v. Shur*, 132 AD3d 403, 404 [1st Dept 2015], *citing, Kaisman v. Hernandez*, 61 AD3d 565, 566 [1st Dept 2009]). Accordingly, with plaintiff's underlying claims dismissed, his wife cannot advance a claim for loss of consortium.

In addition, plaintiff's cross-motion premised on spoliation of evidence is denied, as plaintiff's motion merely seeks to revisit discovery issues that were priorly resolved by this court prior to the filing of this motion. Illustratively, at oral argument before the court, plaintiff could not identify a single tangible piece of discovery that he was missing for purposes of opposing this motion or proving his claims at trial.

Finally, as ample grounds exist warranting the dismissal of this action in its entirety, the court need not entertain preclusion of plaintiff's theory of causation as not accepted within the scientific community of orthopedic surgeons.

Accordingly, it is hereby

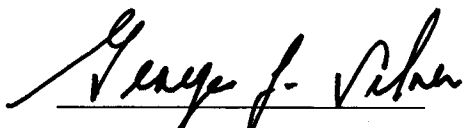
ORDERED that defendants' motion for summary judgment is granted in its entirety; and it is further

ORDERED that plaintiff's cross-motion for spoliation of evidence is denied; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of defendants DAVID J. MAYMAN, M.D., ANDY O. MILLER, M.D., PETER K. SCULCO, M.D., THOMAS P. SCULCO, M.D. and THE HOSPITAL FOR SPECIAL SURGERY and dismissing this case in its entirety.

This constitutes the decision and order of the court.

Dated: November 4, 2019



10

HON. GEORGE J. SILVER