

**Harris v Distler**

2021 NY Slip Op 31903(U)

June 1, 2021

Supreme Court, New York County

Docket Number: 805194/2018

Judge: Judith N. McMahon

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDITH REEVES MCMAHON PART IAS MOTION 30

Justice

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SHARON HARRIS,

Plaintiff,

- v -

PETER DISTLER, WEST SIDE GI, LLC

Defendant.

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INDEX NO. 805194/2018

MOTION DATE 05/19/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48

were read on this motion to/for JUDGMENT - SUMMARY.

Defendants Peter Distler, M.D. ("Dr. Distler") and Westside GI, LLC d/b/a Westside GI ("Westside GI") (collectively "Defendants") move this Court for an Order pursuant to CPLR §3212 granting them summary judgment and dismissing the Complaint against them. The motion is hereby granted in part and denied in part, as detailed below.

FACTS

Plaintiff Sharon Harris ("Plaintiff") commenced this Action on June 14, 2018 alleging medical malpractice, lack of informed consent and negligent hiring and employment. On December 18, 2017, Plaintiff presented to Dr. Distler's office with complaints of difficulty swallowing solids and liquids. Plaintiff's medical history included chronic renal insufficiency, systemic lupus erythematosus and hypertension. Dr. Distler formed a treatment plan that included an upper GI endoscopy. On December 19, 2017, Plaintiff underwent an upper GI endoscopy at Westside GI with no complications. After consulting with Plaintiff's primary care physician, Dr. Distler scheduled Plaintiff for a colonoscopy. On March 30, 2018, Plaintiff

presented at Westside GI to undergo the colonoscopy and represented that she stopped taking Metoprolol and Amlodipine for her hypertension one day prior. The record shows that Plaintiff was diagnosed with bilateral kidney failure and was undergoing the colonoscopy to determine if she was a viable candidate for a kidney transplant. Dr. Distler represents that he discussed the risks of the colonoscopy prior to the procedure, including irritation of the colon, perforation and bleeding. The record also shows that Plaintiff signed a consent form titled “Informed Consent for Gastrointestinal Endoscopy” prior to undergoing the procedure.

Prior to the procedure, Plaintiff’s blood pressure (“BP”) measured 175/87 and her heart rate measured 64 beats per minute (“bpm”). During the colonoscopy, Dr. Distler used carbon dioxide to insufflate the colon and performed the procedure with an ongoing live video feed for visualization. Dr. Distler removed a polyp and noted that there was no blood loss. Anesthesia was stopped at 2:45 PM and Plaintiff was brought into the recovery room at 2:47 PM. Dr. Distler testified that patients are typically brought to the recovery room following the procedure and are monitored by the recovery room team consisting of the anesthesiologist and a nurse. Plaintiff’s BP was recorded as 130/77 at 2:48 PM, 142/94 at 2:58 PM and 164/88 at 3:19 PM. During her last BP measurement at 3:29 PM, Plaintiff’s BP read 203/143 with a heart rate of 55 bpm. Plaintiff was seen and assessed by the anesthesiologist in the recovery room at 3:48 PM before being discharged with instructions to call her physician or go to the emergency room if any medical issues occurred. Defendants represent that the Westside GI records show that when asked, Plaintiff had no complaints of pain. Plaintiff then drove herself home with her cousin as her escort.

According to Plaintiff’s testimony, she experienced pain when she got home and tried to call Dr. Distler at Westside GI, but the office was closed. Plaintiff then presented to Mount Sinai

Emergency Department (“Mt. Sinai”) on her own at approximately 5:52 PM with complaints of abdominal cramping pain after she received a “colonic.” Plaintiff’s BP was 161/75 upon arrival and a review of systems was significant for abdominal distention, abdominal pain, nausea and vomiting. Plaintiff’s physical examination was also significant for diffuse guarding and rebound. Plaintiff underwent a surgical consult with Dr. Sue Hahn and her abdominal CT scan, which was completed at 9:50 PM, showed a suspected perforation. At 10:39 PM, the Plaintiff underwent an exploratory laparotomy, ileocolic resection, end ileostomy and extensive washout. Plaintiff’s post-operative diagnosis was a right colon perforation and she was admitted to Mt. Sinai for one week before being discharged on April 7, 2018. On October 19, 2018, Plaintiff underwent an exploratory laparotomy, ileostomy take down and new ileocolonic anastomosis creation without any noted complications. Plaintiff then underwent another exploratory laparotomy, lysis of adhesion and resection of the previous anastomosis on November 28, 2018.

#### Defendants’ Motion for Summary Judgment

In support of their motion for summary judgment, Defendants submit the affidavit of Matthew J. McKinley, M.D. (“Dr. McKinley”), who states that the colonoscopy was indicated for the Plaintiff and necessary to determine if she was an appropriate candidate to receive a kidney transplant. Dr. McKinley opines that prior to the procedure, Dr. Distler properly examined Plaintiff and considered her medical history. Dr. McKinley notes that Plaintiff’s baseline BP of 175/87 was not unexpected given her history of hypertension. According to Dr. McKinley, Dr. Distler performed the colonoscopy in accordance with good and accepted practice. Dr. McKinley opines that based upon Plaintiff’s lack of symptoms and the location of the perforation, Plaintiff suffered a delayed colon perforation after she was discharged due to barotrauma, which is a buildup of air pressure in the colon that can cause diminished blood flow

to the tissue causing necrosis. Dr. McKinley notes that Dr. Distler took the appropriate precautions to avoid perforation vis-à-vis barotrauma, which is a known risk of a colonoscopy, and advised Plaintiff of such risk prior to the procedure both verbally and in writing. Therefore, Dr. McKinley notes, Dr. Distler obtained the appropriate informed consent.

With respect to Plaintiff's post-operative care, Dr. McKinley states that the record shows Plaintiff did not report pain up until and through the time of her discharge. Despite "multiple" physical examinations, Plaintiff's abdomen was within normal limits and was noted to be soft and non-tender.<sup>1</sup> Dr. McKinley notes that even Plaintiff's BP reading of 204/143 was accurate, such is not indicative of a colonic perforation. Dr. McKinley opines that Plaintiff's elevated BP level would not be unexpected in light of Plaintiff's history of hypertension and the fact that she stopped taking her hypertension medication the day prior to the procedure. According to Dr. McKinley, it was appropriate for Defendants to discharge the Plaintiff based upon her normal clinical exam, lack of physical complaints, repeated denial of pain and two normal Aldrete scores (which is a test used by anesthesiologists to determine if a patient is cleared to be discharged). Dr. McKinley opines that since the perforation did not occur until after she was discharged, Plaintiff's treatment plan would have been the same had Dr. Distler and Westside GI reevaluated her after the elevated BP reading.<sup>2</sup> Therefore, Dr. McKinley states, the care and treatment rendered by Dr. Distler and Westside GI was within the standard of care and did not cause any of Plaintiff's alleged injuries.

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<sup>1</sup> Dr. McKinley opines that if some injury to the colon took place at that time, including a perforation, one would expect the patient to complaint of pain or have distension on an abdominal exam, which Plaintiff did not.

<sup>2</sup> Dr. McKinley represents that according to the Mt. Sinai records, Plaintiff stated that she felt fine while in the colonoscopy suite and only began suffering abdominal pain after she arrived home. Dr. McKinley opines that even if Defendants were suspicious for a perforation at that time and made an earlier diagnosis, Plaintiff would have still required a laparotomy, ileocolic resection and ileostomy.

Plaintiff's Opposition to Defendants' Motion

In opposition to Defendants' motion, Plaintiff submits the redacted expert affirmation of a physician who is board certified in General Surgery and Colon and Rectal Surgery. According to Plaintiff's expert, Dr. Distler and the staff at Westside GI departed from good and accepted standards of medical care in failing to recognize, workup and appropriately treat signs and symptoms of a post-operative complication prior to discharging the Plaintiff. In addition to causing Plaintiff to suffer overt peritonitis and symptoms of sepsis, such departures caused Plaintiff to undergo multiple protracted hospital admissions and start full dialysis after she lost the opportunity to have the kidney transplant. Recognizing that hypotension (a low BP) is most associated with a bowel perforation, Plaintiff's Expert states that an elevated BP "is certainly evidence of an ongoing complication including the possibility that the bowel had been injured." According to Plaintiff's expert, Dr. Distler and the staff at Westside GI departed from the standard of care by failing to repeat Plaintiff's vital signs after her elevated BP reading, conduct a thorough post-operative workup, and monitor her for an extended period of time to ensure that the abnormality normalized prior to her discharge.

Furthermore, Plaintiff's Expert explains that it was a departure for Dr. Distler and Westside GI to not properly train Daniel Rivera, R.N. ("Nurse Rivera") and ensure that proper protocols were in place in the event of an abnormality in a post-operative patient. Plaintiff's Expert opines that based upon the location of the perforation and evidence of improper bowel prep, Plaintiff's perforation was most likely due to barotrauma caused by excessive CO<sub>2</sub> insufflation by Dr. Distler. Plaintiff's Expert rebuts Dr. McKinley's statements that Plaintiff had no symptoms of colon perforation prior to leaving Westside GI and states that Plaintiff had "grossly abnormal" BP that was "clear evidence" of an ongoing complication in light of her

multiple comorbidities. Plaintiff's Expert further states that Plaintiff testified of immediate abdominal pain while in the recovery suite, "which was told to both Dr. Distler and his staff." According to Plaintiff's Expert, Dr. McKinley's statements about Plaintiff's BP levels are inaccurate and explains that one cannot assume that such a high level was caused by her hypertension. By failing to physically examine the Plaintiff after the procedure and repeat the BP reading, Dr. Distler violated the standard of care, which required extended observation of the Plaintiff and referral for an abdominal x-ray to rule out colon perforation.

### DISCUSSION

Pursuant to CPLR §3212(b), a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the Court as a matter of law in directing Judgment in favor of any party." CPLR §3212(b). A party seeking summary judgment must show that there are not material issues of fact that are in dispute and that it is entitled to judgment as a matter of law. *See Dallas-Stephenson v. Waisman*, 39 AD3d 303, 306 [1st Dept., 2007]. Once a movant makes such a showing, "the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial. *Id.*

#### Standard for Summary Judgment in Medical Malpractice Actions

"A defendant in a medical malpractice action establishes prima facie entitlement to summary judgment by showing that in treating the plaintiff, he or she did not depart from good and accepted medical practice, or that any such departure was not a proximate cause of the plaintiff's alleged injuries." *Anye B. v. Bronx Lebanon Hosp.*, 128 AD3d 1, 3 [1st Dept 2015].

(See *Costa v. Columbia Presbyt. Med. Ctr.*, 105 AD3d 525, 525 [1st Dept 2013]). “Once a defendant has established prima facie entitlement to summary judgment, the burden shifts to plaintiff to ‘rebut the prima facie showing via medical evidence attesting that the defendant departed from accepted medical practice and that such departure was a proximate cause of the injuries alleged.’” *Ducasse v. New York City Health and Hosps. Corp.*, 148 AD3d 434, 435 [1st Dept 2017] (internal citations omitted). “The opinion of a qualified expert that a plaintiff’s injuries were caused by a deviation from relevant industry standards would preclude a grant of summary judgment in favor of the defendants.” *Diaz v. New York Downtown Hosp.*, 99 N.Y.2d 542, 544 [2002].

“To defeat summary judgment, the expert’s opinion “must demonstrate ‘the requisite nexus between the malpractice allegedly committed’ and the harm suffered.” *Anyie B. v. Bronx Lebanon Hosp.*, 128 AD3d 1, 3 [1st Dept 2015] (internal citations omitted). “General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat defendant physician’s summary judgment motion.” *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 325 [1986]. (See *Otero v. Faierman*, 128 AD3d 499, 500 [1st Dept 2015]. See generally *Cruz v. New York City Health and Hosps. Corp.*, 188 AD3d 592, 593 [1st Dept 2020]; *Henry v. Duncan*, 169 AD3d 421 [1st Dept 2019]). “In order not to be considered speculative or conclusory, expert opinions in opposition should address specific assertions made by the movant’s experts, setting forth an explanation of the reasoning and relying on ‘specifically cited evidence in the record.’” *Lowe v. Japal*, 170 AD3d 701, 703 [2d Dept 2019]. See *Frye v. Montefiore Med. Ctr.*, 70 AD3d 15, 24 [1st Dept 2009].



Based upon the affidavit of Dr. McKinley and the underlying record, the Court finds that Defendants have made prima facie showing of their entitlement to judgment as a matter of law. In his affidavit, Dr. McKinley details his finding that the colonoscopy was indicated for the Plaintiff and that Dr. Distler properly performed the procedure. Dr. McKinley also sufficiently explains that Plaintiff gave informed consent for the colonoscopy and that perforation is a known risk of the procedure. Dr. McKinley describes his basis for finding that Plaintiff did not suffer the perforation until after she was discharged. Dr. McKinley sufficiently details his opinion that Plaintiff's elevated BP level was not indicative of perforation, particularly since hypotension is typically correlated with bowel perforation and Plaintiff ceased her BP medication in order to undergo the colonoscopy. In his affirmation, Dr. McKinley also explains how Plaintiff's treatment plan would not have changed if Dr. Distler or Westside GI repeated Plaintiff's BP reading or continued to monitor her. Therefore, the Court finds that Defendants Dr. Distler and Westside GI have made a prima facie showing that they did not depart from the standard of care or proximately cause Plaintiff's alleged injuries. The Court also finds that Defendants have met their prima facie burden and shown that they obtained proper informed consent.

As the burden now shifts to Plaintiff, the Court notes that there are many issues of fact in this Action, particularly surrounding Plaintiff's elevated BP level and whether Plaintiff had symptoms of pain prior to her discharge from Westside GI. Plaintiff testified that she complained of stomach pain to Dr. Distler before she was discharged. According to Plaintiff's testimony, Dr. Distler told her that it was natural for her to have some pain and gave her some juice and crackers prior to leaving Westside GI for the day. Upon reviewing the record, it is unclear if Dr. Distler had a protocol for seeing patients after performing a colonoscopy and if the Westside GI staff was required to inform him of a patient's vital signs before discharge. The

testimony of Nurse Rivera is also inconclusive, as he denied signing off on the Plaintiff's elevated BP reading and has no independent recollection of treating the Plaintiff. More significantly, the affidavit of Plaintiff's Expert shows that an issue of fact exists as to whether Dr. Distler and Westside GI departed from the standard of care in failing to retake Plaintiff's BP and properly monitor the Plaintiff in light of the elevated BP and her significant comorbidities. Plaintiff's Expert contests Dr. McKinley's statements regarding Plaintiff's BP level and opines that the Plaintiff's elevated BP level could have been an indication of an ongoing complication, specifically a perforation. In the affidavit, Plaintiff's Expert further explains how Dr. Distler and Westside GI staff departed from the standard of care in discharging the Plaintiff with such an elevated BP level without properly monitoring her and determining what was causing it. The Court finds that Plaintiff's Expert has rebutted Dr. McKinley's opinion to a level sufficient to show the existence of a triable issue of fact and defeat Defendants' motion for summary judgment dismissal of Plaintiff's cause of action for medical malpractice.

With respect to Plaintiff's cause of action alleging lack of informed consent, the Court finds that Plaintiff has failed to sufficiently rebut Defendants' prima facie showing and demonstrate an issue of fact exists as to this claim. Therefore, Plaintiff's cause of action for lack of informed consent is hereby dismissed. The Court also finds that Plaintiff's claim for negligent hiring and training must be dismissed, "as there is no evidence that any of the persons involved in plaintiff's care was unqualified or had a history of negligent conduct." *Shewbaran v. Laufer*, 177 AD3d 510, 511 [1st Dept 2019]. Furthermore, a plaintiff must allege that the defendant's employee acted outside the scope of his employment in order to bring a claim against the employer for negligent hiring, retention and training. *See Lindsay-Thompson v. Montefiore Med. Ctr.*, 147 AD3d 638, 639 [1st Dept 2017]. *See also Decker v. State*, 164 AD3d 650, 653 [2d

Dept 2018]. Here, the Plaintiff has not alleged that the Defendants' employees were acting outside the scope of their employment. Based upon the absence of such factors and Dr. McKinley's opinion regarding this claim, the Court finds that this cause of action for negligent hiring and retention must be dismissed.

Therefore, it is hereby

**ORDERED** that Defendants' Motion to dismiss Plaintiff's cause of action for medical malpractice is hereby denied; it is further

**ORDERED** that Defendants' Motion to dismiss Plaintiff's cause of action for lack of informed consent is hereby granted; it is further

**ORDERED** that Plaintiff's cause of action for lack of informed consent is hereby dismissed; it is further

**ORDERED** that Defendants' Motion to dismiss Plaintiff's cause of action for negligent hiring and training is hereby granted; it is further

**ORDERED** that Plaintiff's cause of action for negligent hiring and training is hereby dismissed; and it is

**ORDERED** that any and all requests for additional relief are hereby denied.

6/1/2021  
DATE

  
JUDITH REEVES MCMAHON, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED IN PART		

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN

<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
<input type="checkbox"/>	FIDUCIARY APPOINTMENT		

CHECK IF APPROPRIATE: