

**Mulcahey v Cabezon**

2022 NY Slip Op 32504(U)

July 19, 2022

Supreme Court, Kings County

Docket Number: Index No. 511708/2016

Judge: Bernard J. Graham

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

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FRED MULCAHEY,

Index No.: 511708/2016

Plaintiff,

**DECISION/ORDER**

-against-

MICHAEL CABEZON, M.D., ELIZABETH  
DUBOVSKY, M.D. NEW YORK METHODIST  
HOSPITAL, and NEW YORK METHODIST  
HOSPITAL EMERGENCY ROOM, P.C.,

Hon. Bernard J. Graham  
Supreme Court Justice

Defendants  
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**Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motion to: award summary judgment to the defendants**

<b>Papers</b>	<b>Numbered</b>
Notice of Motion and Affidavits Annexed.....	1-2, 3-4
Order to Show cause and Affidavits Annexed.....	
Answering Affidavits.....	5
Replying Affidavits.....	6,7
Exhibits.....	
Other: ..... (memo).....	

**Upon the foregoing cited papers, the Decision/Order on this motion is as follows:**

Defendants, Michael Cabezon, M.D. (“Dr. Cabezon”) and New York-Presbyterian Brooklyn Methodist Hospital d/b/a New York Methodist Hospital s/h/a New York Methodist Hospital (“NYPBMH”) have moved (seq. # 11), pursuant to CPLR §§ 3211 and 3212, for an Order awarding summary judgment and a dismissal of plaintiff’s complaint, upon the grounds that there are no issues of fact which would warrant a trial in this matter as said defendants were not negligent with respect to the care and treatment that was rendered to Fred Mulcahey (“plaintiff”) while a patient at the hospital.

Defendant, Elizabeth Dubovsky, M.D. (“Dr. Dúbovsky”) has likewise moved (seq. #13), pursuant to CPLR §§ 3211 and 3212, for an Order awarding summary judgment and a dismissal of plaintiff’s complaint, upon the grounds that the claims made against

said defendant fail to state a cause of action and/or lack merit and there are not triable issues of fact.

Counsel for the plaintiff, has opposed the relief sought in the motion for summary judgment of the defendants, upon the grounds that there are material issues of fact with regard to the causes of action that have been pled by the plaintiff, as against the defendants, based upon the argument that defendants, Dr. Cabezon and NYPBMH failed to timely and properly diagnose a cervical epidural abscess and defendant Dr. Dubovsky failed to properly assess plaintiff's symptoms which would have required performing an additional CT scan or MRI.

Background:

On or about July 11, 2016, an action was commenced on behalf of the plaintiff by the filing of a summons and complaint with the Clerk's office of Kings County. In said complaint, plaintiff seeks to recover damages based upon alleged negligence, medical malpractice, as well as lack of informed consent as against the defendants.

Issue was joined on behalf of the defendant, Dr. Dubovsky, by the service of a verified answer dated August 8, 2016 and on August 10, 2016, by the service of an answer on behalf of defendants Dr. Cabezon and NYPBMH.

In plaintiff's verified Bill of Particulars, plaintiff alleged that the defendants failed to: timely diagnose a cervical epidural abscess and an infection; prescribe and deliver antibiotics to the plaintiff; order diagnostic testing, including a complete blood work up, an x-ray, an MRI and a CT scan; timely refer plaintiff to a specialist as well as consult with specialists; perform a complete physical exam and recognize signs and symptoms of spinal cord impingement. As a result of defendants' alleged failures, decedent sustained urinary incontinence, loss of bladder function; erectile dysfunction; as well as pain and suffering.

A deposition was conducted of the plaintiff on February 26, 2018. An EBT of defendant Dr. Cabezon was held on February 25, 2020 and Dr. Dubovsky was deposed

on January 29, 2021. Mary Mulcahey, the spouse of the plaintiff and a non-party, submitted to an EBT on February 14, 2020.

A Note of Issue and Certificate of Readiness was filed on behalf of the plaintiff, on or about May 24, 2021.

Facts:

The following is a brief summary of plaintiff's medical history prior to the treatment at issue, which was in 2015.

The plaintiff had undergone right knee osteochondroma, right subscapularis and right bicep labral surgery, as well as the surgical repair of an inguinal hernia, and had hypertension and asthma.

In December of 2010, the plaintiff presented to Mount Sinai Brooklyn with complaints of back and shoulder pain in connection to an injury that was sustained to his left shoulder while an employee for the Department of Sanitation of the City of New York. Later that same month, the plaintiff presented to a private physician, Dr. L'Insalata, with complaints of moderate, intermittent and burning pain along with numbness in his lower back and his shoulder in the trapezius area. In January 2011, the plaintiff who had continued pain and numbness in his neck and trapezius, was found to have strains of his left shoulder and cervical spine and decreased range of motion. At the time, both physical therapy and over-the-counter medications were recommended. In 2012, the plaintiff underwent an arthroscopic partial lateral meniscectomy and a partial synovectomy to repair a lateral meniscal tear of the right knee.

In 2013, as a result of an on-the-job injury, plaintiff sustained a tear of the left meniscal, left shoulder rotator cuff and experienced left hip pain. The plaintiff then underwent a left shoulder arthroscopic procedure. In 2014, the plaintiff sustained a left shoulder injury, and an MRI revealed both scarring and a potential tear.

With respect to the treatment at issue, on February 8, 2015 at 4:34 A.M., the plaintiff presented to the emergency department at NYPBMH, where he was triaged based upon the complaint of having had neck stiffness for five days and more recent

radiating pain to his shoulders and legs. The plaintiff reported having some tingling in his fingertips the day prior thereto.

Upon physical examination, the plaintiff exhibited bilateral trapezius spasm and decreased range of motion but was found to be neurologically intact. The plaintiff was seen by a resident, Thomas Kennedy, M.D., who was supervised by Dr. Cabezon. A CT scan of the cervical spine which was interpreted by Dr. Dubovsky, a radiologist, revealed "cervical spondylosis with multiple levels of mild canal and mild to marked bilateral foraminal stenosis" (see Dr. Dubovsky EBT p. 18). The plaintiff was given several medications including Motrin, valium and Percocet and was diagnosed with having a degenerative disc disease. The plaintiff was discharged in the early afternoon on February 8<sup>th</sup>, at which time he was provided with prescriptions for Flexeril and Percocet, given educational materials for a cervical sprain and directed to follow-up with his personal physician in 1-2 days.

Following the February 8, 2015 hospital visit, the plaintiff returned to NYPBMH's emergency department via ambulance at 12:16 A.M. on February 9, with complaints of pain in his neck and arms as well as leg weakness; an inability to walk and urinary retention. The plaintiff had also reported coughing for the previous fourteen day period for which he had been advised by his primary care physician to take Mucinex. MRIs of the cervical, thoracic and lumbar spine were ordered. Upon examination, Dr. Athena Mihailos found decreased sensation to proprioception and pain-temperature of the bilateral lower extremities with the right more decreased than left. The plaintiff was administered a steroid and intravenously given Protonix, Flexeril, Percocet and potassium chloride.

The findings from the MRI of the cervical spine revealed intramuscular edema within the posterior paravertebral muscles from C3-C7; posterior epidural collection from C3-C5 producing mass-effect upon the postural thecal sac with moderate central area stenosis at C3-C4, C4-C5 and C5-C6; spinal cord expansion from C3-C6 with intramedullary signal abnormality and an increased signal with the thoracic spine at T1 and T10. The plaintiff was then admitted to NYPBMH as an inpatient.

Dr. Martin Zonenshayn, a neurosurgeon, noted that the MRI and CT studies revealed a dorsal epidural collection mostly consistent with an epidural hematoma with marked cord compression and signal change in cord from C3-C6. Based upon the compression and symptoms, a cervical laminectomy/decompression was indicated. At that time, there allegedly was a discussion of surgery (the details and risks) with the patient, who agreed to proceed. Dr. Zonenshayn then performed a C3-C6 laminectomy and evacuation of epidural abscess. The pathology report showed focal hemorrhage and acute inflammation with abscess, and the culture from the posterior cervical muscle was positive for streptococcus pneumoniae. Following the operation, Dr. Zonenshayn noted that the plaintiff had more strength in all his extremities.

The plaintiff was discharged to the NYPBMH Rehabilitation Facility on February 12, 2015, where he was to undergo both occupational and physical therapy with a goal of being able to ambulate independently as well as to improve bed mobility, transfers, as well as standing, sitting and dynamic balance. Fourteen days later (on February 26<sup>th</sup>), the plaintiff was discharged from the rehabilitation facility to his home and at the time he believed he recovered and only had some numbness and tingling in his hands. The plaintiff did remain on a Foley catheter as he still had urinary retention issues. The plaintiff received at home nursing care from February 28-March 20, 2015.

The plaintiff returned to the emergency department of NYPBMH on March 15, 2015, with a complaint of having pain at the Foley catheter site when he had the urge to void. The Foley catheter was initially removed, then replaced and the plaintiff was discharged. The plaintiff returned fifteen days later (March 30) to the emergency department at NYPBMH with complaints of discomfort from the catheter. At the alleged request of the plaintiff, the catheter was removed and he was able to void without pain. The plaintiff was discharged from NYPBMH and advised to follow-up with a urologist.

The plaintiff presented to Dr. Edward Zoltan, a urologist, in April 2015, with complaints of urinary retention. The doctor determined that the plaintiff had benign prostatic hyperplasia with obstruction and prescribed Flomax.



In the ensuing months, the plaintiff had medical appointments with Dr. Natalya Goldshteyn, an infectious disease specialist, Dr. Leonard A. Pace, a neurologist, as well as Dr. Salvatore Degliuomini, an internist, to monitor his condition and address his complaints.

Parties' Contentions:

Here, the Court is presented with the issue as to whether defendants NYPBMH and Dr. Dubovsky departed from accepted medical practice in the care and treatment rendered to the plaintiff, and if so, whether that departure from accepted medical practice was the proximate cause of the injuries that allegedly occurred.

In support of the motion for summary judgment by counsel for NYPBMH, and a dismissal of plaintiff's cause of action against said defendant, counsel offers the affirmation of Robert H. Meyer, M.D. ("Dr. Meyer"), who opines that the plaintiff's complaints upon presentation did not indicate the "extremely rare" diagnosis of cervical epidural abscess.

In support of the motion for summary judgment by counsel for Dr. Dubovsky, and a dismissal of plaintiff's cause of action against said defendant, counsel offers the affirmation of Caren Jahre, M.D. ("Dr. Jahre"), who opines that the interpretation of the plaintiff's films, which were ordered and performed by the NYPBMH staff on February 8, 2015, was accurate, and the allegations of departures from the standard of care against Dr. Dubovsky were either not her responsibility as a radiologist or were not departures, as they were properly performed.

Plaintiff, by his attorneys, opposes defendant NYPBMH and Dr. Dubovsky's motions for summary judgment, arguing that issues of fact exist with regard to the care rendered to the plaintiff. Plaintiff's expert opines that Dr. Cabezon and NYPBMH failed to timely and properly diagnose plaintiff's cervical epidural abscess. Plaintiff's expert also opines that Dr. Dubovsky departed from the standard of care by failing to perform another CT scan or an MRI, given plaintiff's symptoms.

*Discussion:*

A defendant moving for summary judgment in a case sounding in medical malpractice “must make a prima facie showing either that there was no departure from accepted medical practice, or that any departure was not a proximate cause of the plaintiff’s injuries.” Guctas v Pessolano, 132 AD3d 632, 633 [2d Dept 2015], quoting Matos v Khan, 119 AD3d 909, 910 [2d Dept 2014].

This Court finds that defendants Dr. Cabezon and NYPBMH, as well as defendant Dr. Dubovsky, have presented sufficient evidence to meet this burden, including expert affirmations. Dr. Cabezon and NYPBMH’s expert, Dr. Meyer, opines that the manifestations of a cervical epidural abscess generally include fever and malaise, spinal pain, and focal neurologic deficits. Dr. Meyer argues that plaintiff’s presentation with neck pain, which was his only complaint on February 8, 2015,<sup>1</sup> did not warrant suspicion of an infectious process. Dr. Meyer asserts that the physical examination performed by Dr. Kennedy and Dr. Cabezon did not reveal focal neurologic deficits, and without significant lower extremity complaints or complaints of urination issues, there was no reason to consider an epidural abscess. Dr. Meyer states that, due to plaintiff’s stable vital signs and lack of fever, bloodwork was not indicated. Dr. Meyer opines that not only did Dr. Cabezon and NYPBMH exceed the standard of care by performing a CT of the spine on February 8, 2015, they also instructed plaintiff to return to the emergency department for changing or worsening symptoms, which plaintiff heeded when he returned twelve (12) hours later with urinary difficulty and weakness. Upon plaintiff’s return to NYPBMH on February 9, 2015, Dr. Meyer asserts that the plaintiff’s condition was dramatically different, and the new symptoms (including difficulty standing, significant lower extremity weakness, and inability to urinate) prompted an appropriate diagnosis and immediate neurosurgery intervention. Dr. Meyer maintains that Dr. Cabezon and

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<sup>1</sup> Plaintiff, as well as plaintiff’s wife, confirmed in their deposition testimony that plaintiff’s only complaint on February 8, 2015 was neck pain. (See EBT of Mary Mulcahey, wife of the plaintiff).



NYPBMH timely diagnosed and treated the plaintiff, and were not the proximate cause of plaintiff's alleged injuries.

In addition, Dr. Dubovsky testified in her deposition that her only involvement with the plaintiff's treatment was the interpretation of the films and images taken at NYPBMH on February 8, 2015. Dr. Dubovsky's expert, Dr. Jahre, opines that Dr. Dubovsky's interpretation of the x-ray of plaintiff's cervical spine, as well as the CT scan, was accurate and in accordance with the standard of care. At the time of the x-ray, plaintiff's sole complaint was neck pain, which was 8/10 on the pain scale and was exacerbated by turning his head. Dr. Jahre states that relying on this information, which was provided by the referring physician, is in accordance with the standard of care for the radiologist prior to reading a study. Dr. Jahre asserts that following Dr. Dubovsky's interpretation of the x-ray imaging, plaintiff was seen by an emergency department resident, then underwent a neurological examination, and was ultimately diagnosed with cervical strain, neck pain, cervical radiculopathy, and torticollis. Dr. Jahre notes that Dr. Dubovsky then interpreted a CT scan of the cervical spine, and as a result, plaintiff was diagnosed with degenerative disc disease and prescribed Motrin, Valium, and Percoset/oxycodone. Dr. Jahre agrees with Dr. Cabezon's deposition testimony that plaintiff's complaints were consistent with stenosis, and that based upon the x-ray and CT scan, there was no reason to believe plaintiff had an infection or to order an MRI. Dr. Jahre argues that a CT scan is generally ordered by an emergency room physician if there is trauma or general neck pain, which is what plaintiff complained of in the emergency room. Further, Dr. Jahre asserts that Dr. Dubovsky, as a radiologist, has no input into what study is ordered, and it is not the standard of care for the radiologist to look at the emergency room record to determine if a higher level of radiology imaging is indicated. Dr. Jahre opines that Dr. Dubovsky's reliance on the requisition form was within the standard of care. Dr. Jahre also states that it is not Dr. Dubovsky's role, as a radiologist, to clinically evaluate the plaintiff's symptoms or lab test results, diagnose an epidural hematoma, order radiology imaging, or refer plaintiff to a specialist. Dr. Jahre maintains

that based on the clinical history of pain, and the non-specific findings noted, there was no reason for Dr. Dubovsky to recommend any additional studies.

Once the movant has made a prima facie showing, the plaintiff must submit evidence in opposition to rebut the movant's prima facie showing. Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Poter v Adams, 104 AD3d 925 [2d Dept 2013]; Stukas v Streiter, 83 AD3d 18 [2d Dept 2011]. The plaintiff must "lay bare her proof and produce evidence, in admissible form, sufficient to raise a triable issue of fact as to the essential elements of a medical malpractice claim, to wit, (1) a deviation or departure from accepted medical practice, [and/or] (2) evidence that such a departure was a proximate cause of injury." Sheridan v Bieniewicz, 7 AD3d 508, 509 [2d Dept 2004]; Gargiulo v Geiss, 40 AD3d 811-812 [2d Dept 2007]. In order to prevail on a claim for medical malpractice, "expert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause." Nicholas v Stammer, 49 AD3d 832-833 [2008].

In addressing the issue of proximate cause, the Court notes that "[i]n a medical malpractice action, where causation is often a difficult issue, a plaintiff need do no more than offer sufficient evidence from which a reasonable person might conclude that it was more probable than not that the injury was caused by the defendant." Johnson v Jamaica Hosp. Med. Ctr., 21 AD3d 881, 883 [2d Dept 2005]. "A plaintiff's evidence of proximate cause may be found legally sufficient even if his or her expert is unable to quantify the extent to which the defendant's act or omission decreased the plaintiff's chance of a better outcome or increased the injury, as long as evidence is presented from which the jury may infer that the defendant's conduct diminished the plaintiff's chance of a better outcome or increased [the] injury." Semel v Guzman, 84 AD3d 1054, 1055-1056 [2d Dept 2011]. "The issue is whether a doctor's negligence is more likely than not a proximate cause of [a plaintiff's] injury is usually for the jury to decide." Polanco v Reed, 105 AD3d 438, 439 [1st Dept 2013]. It has also been held that where "a failure to treat is alleged, the plaintiff simply must show that it was probable that some diminution in the chance of survival had occurred." Borawski v Huang, 34 AD3d 409, 410 [2d Dept 2006].

“[T]he evidence presented by the plaintiff need not eliminate every other possible cause of the resulting injury.” Clarke v Limone, 40 AD3d 571, 571-572 [2d Dept 2007], *lv denied* 9 NY3d 809 [2017].

This Court finds that the plaintiff has failed to provide sufficient evidence to raise an issue of fact with respect to the treatment provided to the plaintiff by NYPMHB, Dr. Cabezon, and Dr. Dubovsky. Plaintiff’s expert opines that the standard of care for a patient that exhibits neck pain and tingling in their fingertips is to order an MRI, bloodwork, and a urine culture to determine if there is an infection. However, when plaintiff first presented on February 8, 2015, his sole complaint was neck pain. Defendants’ experts clearly established that, based on plaintiff’s condition on February 8<sup>th</sup>, there was no indication to perform the tests plaintiff claims should have been done (MRI imaging, bloodwork, and a urine culture). In addition, the record indicates that the plaintiff’s condition was dramatically different when he returned the next day (February 9<sup>th</sup>), with complaints that indicated that additional testing was required for a possible infection. Plaintiff’s expert also opines that the standard of care requires Dr. Dubovsky to perform “more than a single CT scan of Mr. Mulcahey.” Plaintiff’s expert asserts that “when the CT scan taken showed no sign of cervical epidural abscess, Dr. Dubovsky should have been highly suspicious given Mr. Mulcahey’s symptoms.” However, the record and Dr. Jahre’s opinion supports defendant’s argument that Dr. Dubovsky’s reliance on the treating physician’s assessment of the plaintiff was in accordance with the standard of care. Plaintiff’s expert does not argue that Dr. Dubovsky misinterpreted the CT scan, but asserts that Dr. Dubovsky should have recommended further imaging, which, as established by Dr. Jahre, is not Dr. Dubovsky’s responsibility as radiologist. Accordingly, plaintiff has failed to submit evidence that raises a question of fact, and defendants NYPBMH, Dr. Cabezon, and Dr. Dubovsky’s motions to dismiss plaintiff’s cause of action as against them for medical malpractice and negligence are granted.

With respect to plaintiff’s allegations of “recklessness” and/or “reckless” behavior on behalf of the defendants, this Court finds that the plaintiff has not presented any

evidence that NYPBMH, Dr. Cabezon, or Dr. Dubovsky have behaved in such a manner, and has not addressed this claim in the papers filed in opposition to the instant motions. This Court recognizes that punitive damages are not designed to compensate a plaintiff for their injuries but “as punishment for gross misbehavior for the good of the public.” Home Insurance Company v American Home Products Corporation, 75 NY2d 196 [2d Dept. 1990]. Further, the Court of Appeals has ruled that punitive damages are only permissible under the very limited circumstances where a “very high threshold of moral culpability is satisfied.” Giblin v Murphy, 73 NY2d 769 [1988]. As such, this Court finds there is no merit to the claim for an award of punitive damages, and plaintiffs claim for “recklessness” and/or “reckless” behavior on behalf of the defendants is dismissed.

Conclusion:

The defendants NYPBMH, Dr. Cabezon, and Dr. Dubovsky have met their burden for establishing a prima facie case for summary judgment, and the plaintiff, in opposition, has failed to meet his burden to offer admissible evidence raising a question of fact as to whether NYPBMH, Dr. Cabezon, and Dr. Dubovsky departed from good and accepted medical practice in the treatment of the plaintiff. Accordingly, the motions by NYPBMH, Dr. Cabezon, and Dr. Dubovsky for summary judgment and a dismissal of plaintiff’s complaint, pursuant to CPLR §3212, are granted in their entirety.

This shall constitute the decision and order of this Court.

Dated: July 19, 2022

Brooklyn, NY

ENTER



Hon. Bernard J. Graham, Justice  
Supreme Court, Kings County

**HON. BERNARD J. GRAHAM**