SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS
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JEANETTE FLUELLEN,
Plaintiff(s),

-against-

NIRANJAN K. MITTAL, M.D., JOSE WILEY, M.D., ELIZABETH RUBANO, M.D., PETER VANGRONIGEN, M.D., ST. JUDES MEDICAL CENTER, MOUNT SINAI BROOKLYN, NEW YORK PET IMAGING CENTER, LLC d/b/a FAMILY HEALTH CARE & CARDIAC CENTER and NIRANJAN K. MITTAL, PHYSICIAN, PLLC,
Defendants,
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**DECISION AND ORDER**
Index No.: 518615/2019
Motion Sequence: 008

**HON. CONSUELO MALLAFRE MELENDEZ, J.S.C**

Recitation, as required by CPLR §2219 [a], of the papers considered in the review: NYSCEF #s: 141, 142-165, 166; 169-176; 178-179.

Defendant JOSE WILEY, M.D., moves for an Order pursuant to CPLR § 3212 granting summary judgment and dismissing all claims against him; directing a severance of the causes of action alleged against defendant JOSE WILEY, M.D.; directing the entry of judgment with prejudice in favor of JOSE WILEY, M.D.; and amending the caption to delete defendant JOSE WILEY, M.D. therefrom. Plaintiff submitted opposition to this motion.

"'In order to establish the liability of a physician for medical malpractice, a plaintiff must prove that the physician deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries.'" *Hutchinson v. New York City Health and Hosps. Corp.*, 172 AD3d 1037, 1039 [2d Dept. 2019] citing *Stukas v. Streiter*, 83 AD3d 18, 23 [2d Dept. 2011]; see *Donnelly v. Parikh*, 150 AD3d 820, 822 [2d Dept. 2017]; *Leavy v. Merriam*, 133 AD3d 636, 637 [2d Dept. 2015]; *Lesniak v. Stockholm Obstetrics & Gynecological Servs., P.C.*, 132 AD3d 959, 960 [2d Dept. 2015]. "Thus, in moving for summary judgment, a physician defendant must establish, prima facie, 'either that there was no departure or that any departure was not a proximate cause of the plaintiff's injuries.'" *Hutchinson*, 132 AD3d at 1039, citing *Lesniak*, 132 AD3d at 960; see *Stukas*, 83 AD3d at 23. "Expert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause [internal citations omitted]." *Navarro v. Ortiz*, 203 AD3d 834, 836 [2d Dept 2022]. "'When experts offer conflicting opinions, a credibility question is presented

requiring a jury's resolution.'" *Stewart v. North Shore University Hospital at Syosset*, 204 AD3d 858, 860 [2d Dept. 2022] citing *Russell v. Garafalo*, 189 A.D.3d 1100, 1102, [2d Dept. 2020] [internal citations omitted]. "Any conflicts in the testimony merely raised an issue of fact for the fact-finder to resolve." *Palmiero v. Luchs*, 202 AD3d 989, 992 [2d Dept. 2022] citing *Lavi v. NYU Hosps. Ctr.*, 133 A.D.3d 830, 832 [2d Dept. 2015]. However, "expert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise a triable issue of fact [internal citations omitted]." *Wagner v. Parker*, 172 AD3d 954, 966 [2d Dept. 2019].

Defendant's expert Carlos Mena-Hurtado, M.D., FACC, FSCAI, a physician board certified in internal medicine with sub-certifications in cardiovascular medicine and interventional cardiology established that he is qualified to opine as to the care and treatment rendered to the plaintiff in this case. Plaintiff's expert, a physician board certified by the American Board of Surgery and the American Board of Vascular Surgery, established that they are qualified to opine as to the care the plaintiff received in this case.

In their opposition, Plaintiff states that Defendant's expert's out-of-state affirmation is not accompanied by a Certificate of Conformity in violation of CPLR § 2309(c). Plaintiff argues that this is prejudicial because the affirmation is submitted in support of a motion to dismiss. As noted in Defendant's reply, the Second Department held that failure to conform to the requirements of CPLR § 2309(c) in a motion for summary judgment was not fatal and the Plaintiff in that case was not prejudiced thereby. *Betz v. Conti*, 69 A.D.3d 545 (2d Dept. 2010). Defendant has also included with their reply, a Certificate of Conformity, arguing that such a certificate can be provided *nunc pro tunc* to correct any potential defects. *U.S. Bank Nat. Ass'n. v. Dellarmo*, 94 A.D.3d 746, 748 (2d Dept. 2012). Plaintiff has not established how Plaintiff is prejudiced due to the missing Certificate of Conformity. The court accepts the Certificate of Conformity, *nunc pro tunc*.

At oral argument, Plaintiff argued that the expertise of Defendant's expert is not relevant to the claims in this case. Any lack of skill or expertise of an expert "'goes to the weight of his or her opinion as evidence, not its admissibility.'" *Lesniak v. Huang*, 186 AD3d 1512, 1513 [2d Dept. 2020] quoting *Cummings v. Brooklyn Hosp. Ctr.*, 147 AD3d 902, 904 [internal quotation marks omitted]. Therefore, the court will entertain the opinions of each expert.

In their reply, Defendant argues that Plaintiff's expert affirmation should be disregarded on the grounds that there is no indication that a signed, unredacted version of the expert affirmation was provided for an *in camera* review. The court is in possession of said documents and as such Plaintiff's expert affirmation is accepted for the court's consideration.

Defendant argues, *inter alia*, that Dr. Wiley should be granted summary judgment as to claims arising out of Plaintiff's pre-operative care and with regard to the decision to perform the subject surgery. Defendant's expert states that Dr. Wiley was not involved in Plaintiff's pre-operative care. The expert opines that, as Ms. Fluellen's physician, the decision to perform the procedure lies with Dr. Mittal. In opposition, Plaintiff's expert does not discuss Dr. Wiley's involvement in Ms. Fluellen's pre-operative care. Despite this, Plaintiff's expert opines that Dr. Wiley's failure to determine whether this procedure was necessary was a departure from good and accepted medical practice. Thus, the opinion is speculative and conclusory as to this claim.

Furthermore, the patient testified at her deposition that she met Dr. Wiley for the first time on the day of the surgery when he introduced himself as Dr. Mittal's assistant. Plaintiff has not established that a physician-patient relationship existed prior to the surgery. Based on the evidence presented, the only physician-patient relationship for professional services rendered by Dr. Wiley and accepted by Ms. Fluellen were for the purposes of performing the surgery. The Second Department has held that "[a] physician-patient relationship is created when professional services are rendered and accepted for purposes of medical or surgical treatment." *Blau v. Benodin*, 190 AD3d 922, 924 [2d Dept. 2021] citing *Thomas v. Hermoso*, 110 A.D.3d 984, 985 [2d Dept. 2013]. As such, summary judgment is granted as to the claim that Dr. Wiley was required to determine whether the surgery was necessary. Accordingly, all claims regarding the medical professional's decision to perform the surgery are dismissed as to JOSE WILEY, M.D.

Defendant seeks summary judgment dismissing claims of medical malpractice committed during the surgery by Dr. Wiley. Defendant's expert opines that Dr. Wiley had no decision-making authority and therefore could not override the decisions of Dr. Mittal. Defendant cites to *Pol v. Our Lady of Mercy Med. Ctr.*, 51 A.D.3d 430 (1d Dept. 2008) where the First Department affirmed the lower court's decision to grant defendant-respondent's motion for judgment notwithstanding the verdict. The Court held that "the lead surgeon had ultimate responsibility for making all decisions with respect to the operation and could not have been compelled to follow" any advice given by the assistant surgeon. *Id.* at 431. While the defense cites to *Pol*, the

Second Department came to a similar holding in *Spinosa v. Weinstein*, 168 AD2d 32 [2d Dept. 1991] in which the lead surgeon clearly differentiated his own role in the surgery from the role of his assistant surgeon. The lead surgeon in that case stated, "the actual work was my work." *Spinosa*, at 37. The Court explained that courts have generally been reluctant "to impose liability upon surgical assistants … who neither ordered nor performed the surgery." *Id.* at 38; see also *Beard v. Brunswick Hosp. Ctr.*, 220 AD2d 550, 551 [2d Dept. 1995] [the Court held that the evidence adduced established that the defendant "merely assisted in the operation … and had not acted as the primary surgeon."].

While this court is cognizant of the foregoing caselaw, the evidence submitted herein does not support that conclusion. Here, Plaintiff's expert highlights that neither doctor could recall what they did during the performance of surgery, as evidenced by each of their deposition testimonies. Dr. Mittal testified that he could not recall who did what, but that Dr. Wiley is well credentialled and can do everything on his own. Dr. Mittal further testified that he could not recall if he left the room during this procedure. If he had, that would have necessarily left Dr. Wiley with decision-making authority. Clearly, the evidence presented does not support the claim that Dr. Wiley was merely an assistant or that he had no decision-making authority. Therefore, the plaintiff's expert raises a question of fact as to Dr. Wiley's role during this surgery. Accordingly, summary judgment is denied as to the claims of medical malpractice committed during the surgery by Dr. Wiley.

Defendant's expert opines that there is no evidence that Dr. Wiley's acts as Dr. Mittal's assistant caused any harm to Ms. Fluellen. The expert bases this opinion on their experience and knowledge of the role of an assistant and not on any information in the record, rendering the expert's opinion as to this claim speculative. Additionally, in opposition, Plaintiff's expert opines that the use of the Silverhawk atherectomy device combined with the use of an angioplasty balloon was a departure from good and accepted practice which caused the three (3) subsequently discovered pseudoaneurysms. Plaintiff's expert opines that both defendants' decision to proceed with the atherectomy after encountering an unspecified amount of plaque in the left tibialis artery and deciding to use a "motorized cutting device" known as a Silverhawk "through the catheter and into the left anterior tibialis" to remove said plaque was a departure from the standard of care. This raises issues of fact regarding whether the use of the Silverhawk

was a departure from good and accepted medical practice and whether its use was a substantial factor in causing injury to the Plaintiff. Accordingly, summary judgment is denied on this claim.

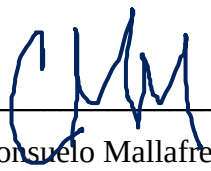
Movant seeks summary judgment in favor of Dr. Wiley on the claim of lack of informed consent. Defendant's expert opines that as the assistant, Dr. Wiley was not required to obtain the patient's informed consent. Defendant's expert states that Dr. Mittal was Ms. Fluellen's primary care physician since January of 2014. Defendant argues that Dr. Mittal discussed the details of this surgery with the patient including the necessity of the surgery and the patient's consent, and that there is no requirement that two doctors obtain a patient's consent for the same surgery. In opposition, the Plaintiff's expert states that Ms. Fluellen was not sufficiently informed about the procedure, without identifying which doctor spoke with her or providing any basis for what information was not given to the patient. Accordingly, Plaintiff's expert's opinion is conclusory and speculative and fails to raise an issue of fact. Therefore, Dr. Wiley established his prima facie burden for summary judgment on this claim and an issue of fact is not sufficiently raised in opposition. Thus, summary judgment is granted as to this claim, and the cause of action against Dr. Wiley for lack of informed consent is dismissed.

In conclusion, Defendant's motion for summary judgment is DENIED as to all claims against JOSE WILEY, M.D. regarding the performance of the surgery. That portion of the motion seeking summary judgment for claims regarding the necessity of the surgery is GRANTED and such claims relating to JOSE WILEY, M.D. are dismissed; and summary judgment is GRANTED to the extent that the claim of lack of informed consent against JOSE WILEY, M.D. is dismissed. All relief not expressly granted has been considered and DENIED.

This constitutes the decision and order of the Court.

Dated: June 1, 2023

**ENTER.**



Hon. Consuelo Mallafre Melendez, J.S.C.