

Case Summary: Medical Malpractice

This is a wrongful death and medical malpractice action in which defendants summary judgment pursuant to CPLR 3211 or, alternatively, dismissal of the complaint pursuant to CPLR 3212. The first two causes of action in the complaint were for wrongful death and conscious pain and suffering. The Court found that defendants failed to make a prima facie showing of their entitlement to summary judgment as a matter of law and that such failure required denial of the motion, regardless of the sufficiency of the opposing papers. Decision included discussion in a very recent decision (Pullman v. Silverman, 28 NY3d 1060, 1066 [2016]) which focused on the need for the movant's expert to address the assertions in a plaintiff's bill of particulars.

54 Misc.3d 1218(A)

STATE OF NEW YORK  
SUPREME COURT COUNTY OF WARREN

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PAULINE A. SHUMEK-GREGORY, As Administratrix  
of the Estate of MICHAEL JOHN GREGORY, Deceased,

Plaintiff,

v.

THE VASCULAR GROUP, PLLC, NISHAN DADIAN M.D.  
and GLENS FALLS HOSPITAL,

Defendants.

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DECISION AND ORDER

Index No. 60702

RJI No. 56-1-2015-0043

E. Stewart Jones Hacker Murphy, LLP, Troy (E. Stewart Jones, Jr. of counsel), for plaintiff.

Maynard, O'Connor, Smith & Catalinotto, LLP, Albany (Concetta R. Lomanto of counsel), for defendants The Vascular Group, PLLC and Nishan Dadian, M.D.

McPhillips, Fitzgerald & Cullum, LLP, Glens Falls (Eric Schwenker of counsel), for defendant Glens Falls Hospital.

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ROBERT J. MULLER, J.S.C.

This is a wrongful death and medical malpractice action in which defendant The Vascular Group, PLLC and defendant Nishan Dadian, M.D. (hereinafter collectively referred to as defendants or movants) seek summary judgment pursuant to CPLR 3211 or, alternatively, dismissal of the complaint pursuant to CPLR 3212. The first two causes of action in the complaint are for wrongful death and conscious pain and suffering. A specific cause of action pertaining to informed consent and a hybrid spoliation cause of action were withdrawn at oral argument. Also embedded in the complaint was a *res ipsa loquitur* theory that was also abandoned at oral argument. The following facts do not seem to be in dispute.

#### FACTS

Michael John Gregory (hereinafter decedent) was first seen by Dadian in the Glens Falls office of The Vascular Group on March 1, 2013. He was then 49 years old, smoked between 10 and 19 cigarettes per day, consumed 6 to 8 beers daily and was an occasional marijuana user. Dadian's treatment note described his patient as having a history of severe claudication – a painful circulatory condition – of the left lower extremity, which had progressively worsened over the last few years. After diagnosing peripheral vascular occlusive disease Dadian recommended an immediate cessation of smoking and prescribed Pletal (Cilostazol) for the claudication. At follow-up visits in March, April, and May of 2013 there was little improvement.

On June 5, 2013, decedent underwent a computed tomography angiography ("CTA")

which demonstrated mild left common iliac disease, moderate stenosis of the common femoral artery as well as the distal superficial femoral artery, and popliteal disease with two vessel runoff to the foot. Additional testing revealed a complete occlusion of the proximal left superficial femoral artery as well as the left common femoral artery. On June 28, 2013 Dadian also noted stenosis at the ostium of the profunda femoris on the left side, and a high grade stenosis at the level of the retrogeniculate popliteal artery.

As a result of these findings Dadian recommended a bypass of the left lower extremity and on August 5, 2013 decedent was admitted to defendant Glens Falls Hospital for a left femoral to below-the-knee popliteal in situ greater saphenous vein bypass surgery. This procedure involved removing a blockage in the lining of the left femoral artery after which a vein from the patient's leg (in this surgery, the greater saphenous vein) was to be used to bypass the occluded portion of the artery. This left femoral endarterectomy and bypass was a procedure that Dadian had performed on over sixty prior occasions in the three years prior to decedent's surgery, employing Prolene 6-0 sutures, without ever encountering a separation in the suture line.

The surgery was completed without recorded complications. Decedent was standing and prepared to walk on the day following surgery and on August 7, 2013 at approximately 2:00 P.M. he was discharged to home with instructions for follow up.

The records on the motion demonstrate the terminal events of August 7, 2013. Four hours after discharge, at approximately 6:00 P.M., decedent began bleeding at home. Emergency medical services ("EMS") were summoned and paramedics found him on the porch with plaintiff Pauline A. Shumek-Gregory – his wife – holding direct pressure to the left upper leg near the surgical site. The EMS records and the testimony of decedent's wife indicate blood started coming out of the leg area after the patient sneezed while simply lying in bed. While en route to

the hospital decedent lost consciousness, never regained it, and ultimately expired.

On August 8, 2013, at the request of the county coroner, a pathologist scheduled an autopsy limited to the left leg. Dadian was present and assisted in performing the autopsy to the extent of dissecting the leg, tracing the graft, and finding "that one of the sutures in the left femoral artery at the bypass site had torn."

The pathologist stated that, at the point of the connection between the femoral artery and the vein bypass, "there was a suture sticking up [with] a loss of continuity in the suture." The pathologist concluded that this caused a hemorrhage in the femoral artery and the ensuing death. Dadian similarly described "[t]he suture [as] sticking up . . . and look[ing] like a tiny corkscrew [with] the two ends of the suture . . . visible, . . . and where the hole in the blood vessel was." Dadian also described the remainder of his reconstruction of the blood vessel – the connection between the left femoral artery and the vein bypass – as intact. The site of the "loss of continuity" is not where the suture was tied off but at a midpoint some distance from the tying.

The complaint and bill of particulars allege that defendants improperly performed the surgery with the result that decedent's left femoral artery's integrity and intactness was not secured; that defendants created a risk for a femoral artery bleed by failing to employ a suturing technique that was appropriate for decedent's medical conditions; and defendants improperly sutured the femoral artery causing the suture line to fail, leading to a hemorrhage and death. This recitation of the theories advanced is more illustrative than comprehensive but suffices for this analysis.

## DISCUSSION

It is well settled that "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to

demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Failure to make such prima facie "showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Establishing entitlement to summary judgment as a matter of law requires the defendant to "rebut[ ] with factual proof plaintiff's claim of malpractice" (*Alvarez*, 68 NY2d at 325). "[B]are conclusory assertions . . . with no factual relationship to the alleged injury" are insufficient to "establish that the cause of action has no merit so as to entitle defendant[ ] to summary judgment" (*Winegrad*, 64 NY2d at 853). "To meet the initial burden on a summary judgment motion in a medical malpractice action, defendants must present factual proof, generally consisting of affidavits, deposition testimony and medical records, to rebut the claim of malpractice by establishing that they complied with the accepted standard of care or did not cause any injury to the patient" (*Cole v Champlain Val. Physicians' Hosp. Med. Ctr.*, 116 AD3d 1283, 1285 [2014]; see *Webb v Scanlon*, 133 AD3d 1385, 1386 [2015]; *Suib v Keller*, 6 AD3d 805, 806 [2004]).

Affidavits "which do no more than simply state, in conclusory fashion, that [the physician has] acted in conformity with the appropriate standard of care [or] 'bare conclusory assertions . . . that [the physician] did not deviate from good and accepted medical practices, with no factual relationship to the alleged injury, do not establish that the cause of action has no merit so as to entitle [the movant] to summary judgment" (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 325-326 [1986], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; accord *Machac v Anderson*, 261 AD2d 811, 812-813 [1999]). Clearly, defendants must meet this burden by submitting a factually specific physician's affidavit or affirmation describing the facts in detail and opining that the care provided did not deviate from the described applicable

standard of care (see *LaFountain v Champlain Val. Physicians Hosp. Med. Ctr.*, 97 AD3d 1060, 1061 [2012]; *Martino v Miller*, 97 AD3d 1009, 1009-1010 [2012]; *Menard v Feinberg*, 60 AD3d at 1136).

In pursuit of this evidentiary benchmark the movants' expert opines that Dadian did not deviate from the applicable standard of care with respect to the surgery; that the use of a 6-0 Prolene suture to close the artery conformed to the standard of care; and that the technique and procedure followed by Dadian was also within the standard of care. The standard of care with which a surgeon shall proceed to use a 6-0 Prolene – or any other suture – to close the artery (or perhaps how a vascular surgeon shall close an artery) is similarly unexplained. Quite simply, this aspect of the expert's affidavit lacks the necessary degree of detail. Furthermore, the movants' expert never adequately refutes the specific allegations in the bill of particulars to the degree necessary to establish entitlement to summary judgment (see *Pullman v Silverman*, 28 NY3d 1060, 1066 [2016]).

Based upon the foregoing, the Court finds that defendants have failed to make a prima facie showing of their entitlement to summary judgment as a matter of law. Such failure requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853; *Cole v Champlain Val. Physicians' Hosp. Med. Ctr.*, 116 AD3d at 1285; *LaFountain v Champlain Val. Physicians Hosp. Med. Ctr.*, 97 AD3d at 1062; *Repeti v McDonald's Corp.*, 49 AD3d 1089, 1090 [2008]). Accordingly, the Court "need not consider whether the evidence submitted by [plaintiff] was sufficient to raise a triable issue of fact" (*Korn v Korn*, 135 AD3d 1023, 1025 [2016]; see *Town of Sidney v Scutt*, 117 AD3d 1220, 1220-1221 [2014]; *Salas v Town of Lake Luzerne*, 265 AD2d 770, 770-771 [1999]).

The within constitutes the Decision and Order of this Court and it is hereby

ORDERED that motion for summary judgment of defendants The Vascular Group, PLLC and Nishan Dadian, M.D is denied in its entirety, and it is further

ORDERED that any relief not specifically addressed herein has nonetheless been considered and is expressly denied.

The original of this Decision and Order has been filed by the Court together with the submissions enumerated hereinbelow. Counsel for plaintiff is hereby directed to promptly obtain a filed copy of this Decision and Order for service with notice of entry upon all parties in accordance with CPLR 5513.

Dated: February 21, 2017

Lake George, New York

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ROBERT J. MULLER, J.S.C.

ENTER:

Papers Submitted:

1. Notice of Motion dated December 2, 2016;
2. Affirmation of Justin W. Gray, Esq. dated December 2, 2016 together with Exhibits "A" through "O";
3. Affidavit of Louis M. Messina, M.D. sworn to November 30, 2016 together with Exhibit "A";
4. Affirmation of E. Stewart Jones, Jr., Esq. dated January 6, 2017 together with Exhibits "A" through "D";
5. Plaintiff's physician expert's sworn affidavit reviewed in camera and hereinafter sealed;
6. Plaintiff's Memorandum of Law dated January 6, 2017;
7. Reply Affirmation of Justin W. Gray, Esq. dated January 25, 2017 with Exhibits "A" through "C" and pral argument held before the Court on February 17, 2017, with Concetta R. Lomanto, Esq. appearing in support of the motion and E. Stewart Jones, Jr., Esq. appearing in opposition thereto.