

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS A. ADAMS,  
Acting Supreme Court Justice

TRIAL/IAS, PART 37  
NASSAU COUNTY

ACCURSIO GRAFFEO and LANA GRAFFEO,

Plaintiff(s),

MOTION DATE: 6/30/08

INDEX NO.: 362/07

-against-

SEQ. NOS. 10-12

SAUL MODLIN, M.D., MAUREEN DEL RE, M.D.,  
DUMITRU ANDRIES, M.D., SAUL MODLIN, M.D.,  
P.C., WINTHROP UNIVERSITY HOSPITAL  
ASSOCIATION and THE NASSAU COUNTY HEALTHCARE  
CORPORATION,

Defendant(s)

The plaintiffs' motion, pursuant to CPLR 3212(e), for an award of partial summary judgment, i.e., as to the issue of liability, as against the defendants Saul Modlin, M.D., Saul Modlin, M.D., P.C., and Winthrop University Hospital Association and those defendants respective cross motions, pursuant to CPLR 3212, for awards of summary judgment dismissing the plaintiffs' complaint as against them are determined as hereinafter provided.

The plaintiff Accursio Graffeo, age 66, was admitted to the defendant Winthrop University Hospital (hereinafter Winthrop) on August 25, 2005 where his private attending physician, Reese Wain, M.D., performed surgery to repair a right common iliac artery and abdominal aortic aneurism. The hospital report ( see Winthrop's Exhibit L) indicates that the patient had a significant history of myocardial infarction, congestive heart failure, peripheral vascular disease, chronic obstructive pulmonary disease, cerebral vascular accident, transient ischemic attacks, thyroid disease and anemia as well as high blood pressure, benign prostatic hyperplasia and elevated liver function tests. His social history is noteworthy for "heavy alcohol use and heavy smoking one pack per day for 40 years".

The operative report (see plaintiffs' Exhibit B) states, inter alia, that the "[p]atient tolerated the procedure and [was] brought

to the ICU in stable condition". The April 2, 2008 affidavit of the plaintiffs' daughter, Lenore McQuade, reiterates that "[t]he surgery went well" (see plaintiffs' Exhibit C). The patient remained intubated until approximately 10:40 p.m. when he was extubated by a respiratory therapist.

He remained extubated on August 26, 2005, however, Mr. Graffeo was agitated and restless, with tachycardia, some episodes of shortness of breath and hypertension. As a result, he was treated with a series of intravenous sedatives.

At approximately 2:30 a.m. on August 27, 2005 he continued to be agitated and restless and went into respiratory arrest. Cardiopulmonary resuscitation was performed, including the use of a bag mask ventilation. The defendant Saul Modlin, M.D., an otolaryngologist with no prior involvement with the patient, was in the hospital and called to assist. He intubated Mr. Graffeo with a number eight endotracheal tube - allegedly without coming into contact with his vocal cords - and the patient began breathing spontaneously. The endotracheal tube was subsequently taped and secured by a respiratory therapist (see Winthrop's Exhibit I, Dr. Modlin's November 9, 2007 deposition transcript p.82, L5-19; p.85, L13). Dr. Modlin's corresponding notation in the hospital chart states "ENT consult dictated. Diagnosis, respiratory failure, cardiorespiratory arrest, abdominal aortic aneurysm, hypertension. Suggest: intubated urgently secondary to cardiorespiratory arrest. 8.0 endotracheal tube through visualized two vocal cords. Tape secured by respiratory therapist. Check chest x-ray" ( see Winthrop's Exhibit C).

Mr. Graffeo thereafter remained intubated until August 30, 2005 when he was extubated by a member of the ICU staff. On September 4, 2005 he was transferred out of intensive care and began physical therapy. However, on September 6, 2005 he began suffering from an increased shortness of breath and was returned to the ICU where, following an ENT consultation, bilateral vocal cord paralysis was diagnosed and the potential for further intubation or a tracheotomy was noted. At approximately 11:00 p.m. that evening his oxygen saturation fell again and he was intubated once more by a respiratory therapist. He remained intubated until September 8, 2005 when Dr. Modlin performed a tracheotomy . Mr. Graffeo was

discharged to rehabilitation on September 30, 2005. The tracheotomy was removed several weeks later and, ultimately, on November 4, 2005 he was released from rehabilitation and returned home.

On April 26, 2007 the plaintiffs filed this medical malpractice action. Following joinder of issue and the completion of disclosure, the case was certified for trial on January 15, 2008 and on January 22, 2008 a note of issue was filed. The action was previously discontinued as against the defendants Maureen Del Re, M.D., Dumitru Andries, M.D. and the Nassau HealthCare Corporation. The plaintiffs currently seek an award of partial summary judgment, pursuant to CPLR 3212(e), i.e., as to the issue of liability, as against Dr. Modlin and Winthrop while those defendants have each cross moved, pursuant to CPLR 3212, for and award of summary judgment dismissing the complaint as against them.

"To establish a prima facie case of liability in a medical malpractice action, a plaintiff must establish (1) the standard of care in the locality where the treatment occurred, (2) that the defendant breached that standard of care, and (3) that the breach was a proximate cause of the injury" (Rosen v John T. Foley Skilled Nursing Facility, 45 AD3d 558). "On a motion for summary judgment, a defendant doctor has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby (see Williams v Sahay, 12 AD3d 366,368 [2004]). In opposition, the plaintiff must submit a physician's affidavit attesting to the defendant's departure from accepted practice, which departure was a competent producing cause of the injury (see Domaradzki v Glen Cove Ob/Gyn Assoc., 242 AD2d 282 [1997]). General allegations that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat summary judgment" (Rebozo v Wilen, 41 AD3d 457,458).

Here, Dr. Modlin relies upon the affirmation of Arnold E. Katz, M.D., a Diplomat of the American Board of Otolaryngology, who avers, with a reasonable degree of medical certainty, "that nothing Dr. Modlin did or is alleged to have failed to do was a departure from good and accepted medical practice nor did anything Dr. Modlin [do] or is alleged to have failed to do cause plaintiff Accursio

Graffeo to sustain the injury alleged, bilateral vocal cord paralysis" (see Dr. Modlin's Exhibit C, para.4). Rather, he opines that Dr. Modlin's emergency intubation of Mr. Graffeo was "without evidence of trauma" and "saved his life" (para.5).

More particularly, Dr. Katz observed, inter alia, that Dr. Modlin specifically noted that "the patient was intubated through visible vocal cords" and that a respiratory therapist subsequently taped and secured the endotracheal tube (para.10). Confirmation of the lack of negligence is also alleged to exist in the absence of damage to the patient's arytenoid cartilage "which would be evidenced if there was injury from a traumatic intubation" (para.14). Instead, Dr. Katz concludes that "the vocal cord paralysis is the result of severe longstanding chronic illness and the surgery required to extend this man's life" (para.18) i.e., because Mr. Graffeo "was in poor health, smoked heavily, drank excessive amounts of alcohol and indeed, had gastroesophageal reflux disease and therefore poor tissue quality", he "was more vulnerable to a temporary injury to the vocal cords upon proper intubation and extubation, which was necessary to save [his] life" (para.14).

The April 9, 2008 affirmation of Winthrop's expert, Philip W. Perlman, M.D., a Board Certified Otolaryngologist, is in accord (see Winthrop's Exhibit B). He likewise avers, in sum, that "it appears to a reasonable degree of medical certainty that the proper intubation and extubation of this patient who is in poor health, smoked heavily, drank excessive amounts of alcohol, had gastroesophageal reflux disease and therefore poor tissue quality, was more vulnerable to a temporary injury to the vocal cords upon improper intubation and extubation which was necessary here to save Mr. Graffeo's life" (para.9). Lastly, he notes that the patient has made a full recovery from the temporary injury as evidenced by the fact that he is, once more, eating, drinking, swallowing, smoking and speaking (para.9).

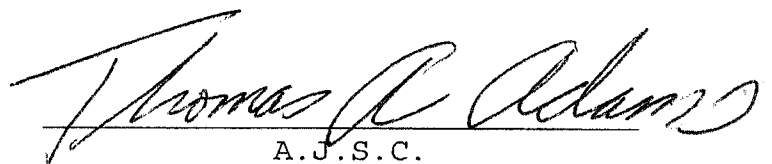
These affirmations, coupled with the parties' depositions and the remaining record, are sufficient to establish a prima facie entitlement to summary judgement on behalf of the defendants (see Rebozo supra at 458). In opposition, the plaintiffs have failed to establish a triable issue of fact.

The May 23, 2008 purported affirmation in opposition of the plaintiffs' counsel - affirmed by Harry I. Katz, Esq., but signed by Victoria L. Weinman, Esq., - is not in admissible form and therefore has not been considered.

Moreover, the conclusory, undated affirmation of the plaintiffs' expert, Alvin Katz, M.D., a Board Certified Otolaryngologist (see plaintiffs' Exhibit I), is "conclusory, speculative and based upon an incorrect understanding of the facts" (Micciola v Sacchi, 36 AD 869,871). In addition, it makes "no attempt to distinguish among the individual doctors or to differentiate the alleged departures by each moving defendant" (Peters v Goldner, M.D., 50 AD3d 350,352).

Accordingly, the defendants Saul Modlin, M.D., Saul Modlin, M.D., P.C., and Winthrop University Hospital Association's respective motions, pursuant to CPLR 3212, for an award of summary judgment dismissing the plaintiffs' complaint as against them are granted and the plaintiffs' cross motion, pursuant to CPLR 3212(e), for an award of partial summary judgment i.e., as to the issue of liability, is denied.

Dated: August 5, 2008



A.J.S.C.

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**ENTERED**

AUG 07 2008

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**