

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

FILED
CIVIL INTAKE

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JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

LINDA KRONENBERG, f/k/a Linda Levy,

Plaintiff,

v.

Case No.

2016-16723

STEVEN SCHERPING, JR.,

Serve:

226 Falcon Ridge Road

Great Falls, Virginia 22066-3519

and

KAISER FOUNDATION HEALTH PLAN
OF THE MID-ATLANTIC STATES, d/b/a
"KAISER PERMANENTE,"

a Maryland corporation,

Serve: Corporation Service Company

Bank of America Center, 16th Floor

1111 East Main Street

Richmond, Virginia 23219,

Defendants.

COMPLAINT

Plaintiff, LINDA KRONENBERG, f/k/a Linda Levy ("KRONENBERG"), by counsel, hereby submits her complaint for damages against Defendants STEVEN SCHERPING, JR. ("SCHERPING") and KAISER FOUNDATION HEALTH PLAN OF THE MID-ATLANTIC STATES, d/b/a "KAISER PERMANENTE" ("KAISER") (together, "DEFENDANTS"), and alleges the following:

PARTIES

1. Plaintiff KRONENBERG resides in Boyds, Maryland with her husband, Dennis Kronenberg. From 1992 through 2015, KRONENBERG was a patient of one or more physicians and staff employed by or under contract with KAISER, including SCHERPING.

2. Defendant SCHERPING resides in Great Falls, Virginia. In 2014, SCHERPING was employed by KAISER and, through KAISER, offered services to the public as a surgeon with a specialty in treatment of disease of the spine. On information and belief, in December 2014, SCHERPING was a shareholder in KAISER.

3. Defendant KAISER, a corporation organized under the laws of Maryland, with a principal place of business in Rockville, Maryland, employs or contracts with medical doctors to offer and to provide medical services to the public, and through those contracts requires, directly or indirectly, that its doctors refer their patients only to other KAISER-affiliated doctors.

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction over this case pursuant to Virginia Code § 17.1-513, because the amount in controversy exceeds \$100, exclusive of interest, and this case is not assigned to some other tribunal.

6. This Court has personal jurisdiction over DEFENDANTS pursuant to Virginia Code § 8.01-328.1 because this action arises from the presence of DEFENDANTS, and their acts and failures to act, in Fairfax County, Virginia.

7. Venue is appropriate in this Court pursuant to Virginia Code § 8.01-262 because DEFENDANTS, and each of them, offer services to the public from one or more locations in Fairfax County, Virginia.

FACTS

8. On or about October 8, 2012, KRONENBERG presented herself to one or more KAISER physicians and staff complaining of lower (lumbar) back pain.

9. On or about October 17, 2012, one or more KAISER physicians and staff completed x-rays of KRONENBERG's spine. The x-rays showed mild degenerative disk disease in the lumbar region of KRONENBERG's spine.

10. On or about November 1, 2012, following KRONENBERG's continued complaint of pain in her lumbar spine, KAISER performed a CT scan of KRONENBERG's spine.

11. On or about November 7, 2012, following KRONENBERG's continued complaint of pain in her lumbar spine, KAISER ordered that an MRI be done of KRONENBERG's spine.

12. In December 2012, the MRI ordered by KAISER was completed.

13. KRONENBERG continued to suffer from lower back pain. On or about May 7, 2014, nearly 18 months after the MRI was completed, KAISER physicians documented their review of the MRI from December 20, 2012, noting mild degenerative changes in KRONENBERG's lumbar spine and an undefined mass, which they characterized as a "likely cyst at right kidney pole."

14. On or about July 21, 2014, KAISER physicians and staff ordered a second MRI, and referred KRONENBERG to SCHERPING, a KAISER-affiliated spinal surgeon.

15. On or about August 4, 2014, KAISER's review of the second MRI on KRONENBERG's spine revealed a possible synovial cyst.

16. In [RW1]December 2014, after consultation with SCHERPING, KRONENBERG and SCHERPING together determined that it was in KRONENBERG's best interest to have surgery on her lower back, specifically spinal laminectomy and fusion.

17. During KRONENBERG's discussions with SCHERPING, KRONENBERG relayed to SCHERPING her deep-set fear of surgery. During KRONENBERG's discussions with SCHERPING, SCHERPING assured KRONENBERG that the laminectomy and fusion were his specialty, and that she would achieve a reduction, if not elimination, of her lower back pain.

18. At no time during their pre-operation discussions did SCHERPING advise KRONENBERG that the laminectomy and fusion might cause heightened pain.

19. At no time during their pre-operation discussions did SCHERPING advise KRONENBERG that there was evidence of a mass on or near her spine.

20. At no time during their pre-operation discussions did SCHERPING advise KRONENBERG that he had no experience in removing a mass from the lumbar spine.

21. From December 20, 2012, when KAISER physicians had evidence of a possible mass on or near KRONENBERG's spine, until SCHERPING completed his operation on December 16, 2014, no one affiliated with KAISER, including SCHERPING, informed KRONENBERG that a possible mass had been detected on or near her spine.

22. On December 16, 2014, SCHERPING performed surgery on KRONENBERG at Virginia Hospital Center in Fairfax, Virginia. The surgery took several hours longer than SCHERPING had allotted because, upon commencing the surgery, SCHERPING found a large mass had grown on KRONENBERG's lumbar spine. Sometime during the surgery, SCHERPING came out of the operating room to discuss the status of the operation with KRONENBERG's family. SCHERPING then described the mass as a "rosebush wrapped

around her spine,” and commented that he had never seen anything like it and that did not expect to see what he had found.

23. Despite his lack of experience in removing a mass from lumbar spine, SCHERPING continued to remove the mass and to conduct the laminectomy and fusion on KRONENBERG.

24. SCHERPING failed to secure KRONENBERG’s informed consent to SCHERPING’s removal of a mass from her lumbar spine.

25. SCHERPING failed to secure KRONENBERG’s informed consent to a laminectomy and fusion following the removal of a mass on her lumbar spine.

26. SCHERPING failed to conduct any review of KRONENBERG’s lumbar spine, including any x-ray, CT scan, or MRI that would have detected the mass on KRONENBERG’s lumbar spine prior to surgery and would have allowed KRONENBERG to make an informed decision about whether to undertake any surgery with SCHERPING or through KAISER generally. SCHERPING’s failure to detect the mass on KRONENBERG’S lumbar spine was reckless, because it indicates that SCHERPING wholly failed to review, or ignored, the results of the December 12, 2012, and August 4, 2014, MRI’s, which revealed the presence of a mass on or near KRONENBERG’S spine.

27. SCHERPING and KAISER failed to adhere to the minimal standard of care in their assessment and treatment of KRONENBERG.

28. As a direct and proximate result of the acts and failures to act of SCHERPING and KAISER, and each of them, KRONENBERG has suffered and continues to suffer from debilitating pain that has left her nearly unable to walk, to stand, even to lay down in one position for more than a few moments.

COUNT I
Medical Malpractice

29. KRONENBERG incorporates paragraphs 1-28 of her Complaint as if fully set forth herein.

30. The relevant standard of care prohibited DEFENDANTS from (a) performing surgery on KRONENBERG before conducting sufficient pre-operative testing to determine how, if at all, a mass detected by KAISER in 2012 might affect the laminectomy and fusion SCHERPING recommended for KRONENBERG; (b) removing the mass from KRONENBERG's spine without sufficient experience and then performing laminectomy and fusion without sufficient experience in that procedure following removal of a mass; and/or (c) continuing with the surgery on KRONENBERG after observing the mass on KRONENBERG'S spine on December 16, 2014, during surgery.

31. DEFENDANTS, and each of them, breached their duty of care to KRONENBERG.

32. As a direct and proximate result of the failure of DEFENDANTS to adhere to the standard of care due to KRONENBERG, KRONENBERG has suffered substantial physical injury, pain, mental suffering and emotional distress, loss of employment opportunity and earning capacity, and loss of enjoyment of life. KRONENBERG has also incurred, and will incur, medical expenses related to the surgical procedure, and has sustained other economic and non-economic damages.

33. All of the injuries, damages, and losses complained of were caused by the acts or omissions of DEFENDANTS, and each of them, their respective real or apparent agents, their respective servants, and their respective employees, without any negligence or want of due care on the part of KRONENBERG.

34. DEFENDANTS's failure(s) to adhere to minimal standard of care in treating KRONENBERG was wanton, outrageous, grossly negligent, and carried out with malice or with recklessness akin to malice.

COUNT II
Lack of Informed Consent

35. KRONENBERG incorporates paragraphs 1-28 of her complaint as if fully set forth herein.

36. SCHERPING and KAISER, and each of them, had a duty to explain the proposed treatment of mass removal and laminectomy/fusion prior to performance of the surgical procedure. SCHERPING and KAISER were each also required to warn KRONENBERG of any material risks or dangers inherent to the treatment, to advise KRONENBERG of any alternatives to the treatment, and to warn KRONENBERG of any unfortunate outcome associated with the treatment.

37. SCHERPING and KAISER did not explain the proposed treatment of mass removal or laminectomy/fusion following mass removal to KRONENBERG prior to performance of the surgical procedure, did not warn KRONENBERG of any material risks or dangers inherent to the treatment, did not advise KRONENBERG of any alternatives to the treatment, and did not warn KRONENBERG of any unfortunate outcome associated with the treatment.

38. Had SCHERPING or KAISER, or either of them, made a complete disclosure of the treatment to KRONENBERG prior to performing the surgical procedure, KRONENBERG would not have consented to the surgery by SCHERPING on December 16, 2014, and would have elected a more thorough diagnosis, including by one or more physicians outside of KAISER's limited referral pool.

39. As a direct and proximate result of the failure of SCHERPING and KAISER to obtain informed consent from KRONENBERG prior to performance of the surgical procedure, KRONENBERG has suffered substantial physical injury, pain, mental suffering and emotional distress, loss of employment opportunity and earning capacity, and loss of enjoyment of life. KRONENBERG has also incurred, and will incur, medical expenses related to the surgical procedure, and has sustained other economic and non-economic damages.

40. All of the injuries, damages, and losses complained of were caused by the acts or omissions of SCHERPING and KAISER, and each of them, its real or apparent agents, its servants, and its employees, without any negligence or want of due care on the part of KRONENBERG.

41. SCHERPING's and KAISER's failure to secure KRONENBERG's informed consent to the mass removal followed by laminectomy/fusion was wanton, outrageous, grossly negligent, and carried out with malice or with recklessness akin to malice.

COUNT III
Battery
(Against SCHERPING Only)

42. KRONENBERG incorporates paragraphs 1-28 of her complaint as if fully set forth herein.

43. In obtaining KRONENBERG's consent to surgery, SCHERPING failed to explain the proposed treatment of mass removal or laminectomy/fusion following mass removal to KRONENBERG, did not warn KRONENBERG of any material risks or dangers inherent to the treatment, did not advise KRONENBERG of any alternatives to the treatment, and did not warn KRONENBERG of any unfortunate outcome associated with the treatment.

44. Had SCHERPING made a complete disclosure of the treatment to KRONENBERG prior to performing the surgical procedure, KRONENBERG would not have consented to the surgery by SCHERPING on December 16, 2014, and would have elected a more thorough diagnosis, including by one or more physicians outside of KAISER's limited referral pool.

45. SCHERPING's failure to obtain KRONENBERG's informed consent to the surgery rendered SCHERPING's performance of the surgery a physical touching that was not consented to, excused, nor justified.

46. As a direct and proximate result of the failure of SCHERPING to obtain informed consent from KRONENBERG prior to performance of the surgical procedure, KRONENBERG has suffered substantial physical injury, pain, mental suffering and emotional distress, loss of employment opportunity and earning capacity, and loss of enjoyment of life. KRONENBERG has also incurred, and will incur, medical expenses related to the surgical procedure, and has sustained other economic and non-economic damages.

47. SCHERPING's failure to secure KRONENBERG's informed consent to the mass removal followed by laminectomy/fusion was wanton, outrageous, grossly negligent, and carried out with malice or with recklessness akin to malice.

PRAYER FOR RELIEF

WHEREFORE, KRONENBERG requests that the Court:

A. Enter judgment for KRONENBERG for damages, and pre-judgment interest thereon, in the amount of \$2.15 million, as well as post-judgment interest;

B. Award KRONENBERG punitive damages, and pre-judgment interest thereon, in the amount of \$350,000, subject to Virginia Code § 8.01-581.15's statutory cap, along with post-judgment interest; and

C. Award KRONENBERG her costs and expense of this suit, and such other and further relief as justice may require.

JURY DEMAND

KRONENBERG demands a trial by jury as to all issues triable by jury.

Dated: December 13, 2016

Respectfully submitted,



Robert O. Wilson (VSB 77791)

WILSON LAW PLC

2 South Main Street, Suite 409

Harrisonburg, Virginia 22802

Phone: (540) 430-0122

Email: robert@thewilsonlaw.com

Counsel for Plaintiff

Of Counsel:

Mitchell J. Rotbert (*pro hac vice* motion forthcoming)

ROTBERT BUSINESS LAW P.C.

8937 Shady Grove Court

Gaithersburg, Maryland 20877

Phone: (240) 600-6467

Email: mitch@rotberlaw.com