SCAN

*SHORT FORM ORDER*

*SUPREME COURT - STATE OF NEW YORK*

*Present:*

*HON. THOMAS P. PHELAN,*

*Justice*

TRIAL/IAS PART 9
NASSAU COUNTY

LISA MODICA and JOHN MODICA,

Plaintiff(s),

-against-

LONG ISLAND JEWISH MEDICAL CENTER, CLIFFORD GOLDSTEIN, M.D., JONATHAN KUSNITZ, M.D., GENDAL-KUSNITZ, OBS-GYN, M.D., P.C. and MATTHEW TRAUGOTT, M.D.,

Defendant(s).

ORIGINAL RETURN DATE:03/15/06
SUBMISSION DATE: 04/24/06
INDEX No.: 008526/04

MOTION SEQUENCE #1,2

The following papers read on this motion:

| | |
|---|---|
| Notice of Motion..... | 1 |
| Cross-Motion..... | 2 |
| Answering Papers..... | 3 |
| Reply..... | 4,5 |

This motion by defendants Clifford Goldstein, M.D., Jonathan Kusnitz, M.D., and Gendal-Kusnitz OBS-GYN, M.D., P.C. [Gendal-Kusnitz] and cross-motion by defendant Long Island Jewish Medical Center [LIJ] and Matthew Traugott, M.D., each seeking an order pursuant to CPLR 3212 awarding them summary judgment dismissing the complaint and any and all cross-claims against them is denied as to the main motion and granted as to the cross-motion.

In this medical malpractice action, plaintiffs seek to recover damages from defendants LIJ, Traugott, Goldstein and Gendal-Kusnitz for injuries plaintiff Lisa Modica allegedly suffered on September 22, 2003, when she sustained a bladder perforation in the course of a Cesarean-section [C-section] delivery at LIJ. Plaintiffs also seek to recover damages from said defendants as well as defendant Kusnitz for injuries plaintiff Lisa Modica allegedly suffered as a result of defendants' delay in diagnosing her perforated bladder.

The pertinent facts are as follows: Plaintiff underwent an elected scheduled C-section delivery of her second child at defendant LIJ on September 22, 2003. The delivery was performed by her private obstetrician, defendant Goldstein, with defendant Traugott, a resident at LIJ, assisting. Defendant Goldstein had delivered plaintiff's first child via primary C-section on July 10, 2001 at LIJ. Following the delivery of her son, plaintiff experienced cramping and blood in her urine. On September 23rd at 4:15 AM plaintiff's doctors were called by the resident to update them as to her condition: She was complaining of gas pain, the urine in her Foley bag was blood-tinged and the urine in the catheter was clear. The plan was to continue with pain medication and to leave the catheter in place. By the morning of the second postoperative day, plaintiff's urine was clear. Later in the day, however, she had a recurrence of bloody urine and began to complain of abdominal pain radiating to her sides. Defendant Kusnitz ordered a urology consult and a CT scan which revealed an intraperitoneal bladder rupture. Plaintiff underwent surgical repair of the bladder by a non-party physician without complication.

All defendants seek summary judgment.

"On a motion for summary judgment pursuant to CPLR 3212, the proponent 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." (Sheppard-Mobley v King, 10 AD3d 70 (2d Dept. 2004), citing Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985)) "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." (Sheppard-Mobley v King, supra, at p. 74; Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra) Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. (Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra)

"The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted practice and evidence that such departure was a proximate cause of injury or damage."(Feinberg v Feit, 23 AD3d 517, 518-519 (2d Dept. 2005), see also, Anderson v Lamaute, 306 AD2d 232, 233 (2d Dept. 2003); DiMitri v Monsouri, 302 AD2d 420, 421 (2d Dept. 2003); Holbrook v United Hosp. Med. Ctr., 248 AD2d 358, 359 (2d Dept. 1998))

Plaintiffs allege that defendants, *inter alia*, failed to: conduct a proper pre-surgical work-up; properly perform, or in the case of defendant Traugott, assist, in plaintiff's C-section; visualize the bladder and properly evaluate plaintiff's anatomical structures during the procedure; diagnose and repair a bladder perforation occurring during the C-section; provide proper postoperative care given plaintiff's complaints of severe abdominal pain; timely perform radiological studies and other diagnostic testing; and, obtain informed consent to perform the C- section. Negligent hiring is also alleged as against LIJ.

In support of their motion, defendants Goldstein, Kusnitz and Gendal-Kusnitz submit the affirmation of Leonard Benedict, M.D., a Board Certified Obstetrician and Gynecologist. He attests that he reviewed all of plaintiff's relevant medical records as well as the testimony given at the examinations-before-trial and that it is his opinion "with a reasonable degree of medical certainty that the care and treatment rendered by Dr. Goldstein and Kusnitz was consistent with good and accepted medical practices and that nothing that they did or failed to do caused any injury to plaintiff." While Dr. Benedict goes on to discuss in detail plaintiff's C-section and the postoperative symptoms she displayed, and, to describe, in detail, how these defendant doctors' treatment of her was in accordance with prevailing medical standards, he states that his conclusions are based upon his familiarity "with the proper standards of obstetrical and gynecological practice as same existed in **1999**." (emphasis added) The alleged malpractice occurred in 2003. There is no basis for this court to conclude that the applicable medical standards remained unchanged from 1999 to 2003. Therefore, the basis of Dr. Benedict's conclusion has not been adequately established and defendants Goldstein, Kusnitz and Gendal-Kusnitz have failed to establish their prima facie entitlement to summary judgment.

Their motion for summary judgment is denied.

Turning to the cross-motion by defendants LIJ and Traugott, "[a] resident who assists a doctor during a medical procedure, and who does not exercise any independent medical judgment, cannot be held liable for malpractice so long as the doctor's directions did not so greatly deviate from normal practice that the resident should be held liable for failing to intervene." (Soto v Andaz, 8 AD3d 470, 471 (2d Dept. 2004), citing Cook v Reisner, 295AD2d 466, 467 (2d Dept. 2002); Buchheim v Sanghavi, 299 AD2d 229 (2d Dept. 2002), lv den., 100 NY2d 506 (2003); Roseingrave v Massapequa Gen. Hosp., 298 AD2d 377 (2d Dept. 2002); Filppone v St. Vincent's Hosp. & Med. Ctr. of N.Y., 253 AD2d 616 (1st Dept. 1998)) Furthermore, "as a rule, a hospital is normally protected from tort liability if its staff follows the orders of the patient's private physician. An exception exists where the hospital staff knows that the doctor's orders are so clearly contraindicated by normal practice that ordinary prudence requires inquiry into the correctness of the orders." (Cook v Reisner, supra, at p. 467, quoting Warney v Haddad, 237 AD2d 123 (1st Dept. 1997))

In support of their motion, defendants LIJ and Traugott submit the Affirmation of Dr. Sheldon Cherry, also a Board Certified Obstetrician and Gynecologist. He affirms that having reviewed all of plaintiff's medical records and the testimonial evidence, plaintiff's treatment by defendant Traugott and the staff of defendant LIJ comported with good and accepted medical standards at all times and that no act or omission by them caused or contributed to plaintiff's condition. Dr. Cherry notes that plaintiff's attending doctor, defendant Goldstein, was in complete charge during the C-section and that it was defendant Traugott's role as a surgical assistant to follow defendant Goldstein's directions. Plaintiff's medical records as well as defendant Goldstein's testimony at his examination-before-trial establish that defendant Traugott in fact did so.

Dr. Cherry further affirms that while it was the responsibility of Traugott and the staff of LIJ to monitor plaintiff post-operatively, plaintiff's medical records indicate that she was in fact closely monitored and that her private physicians were notified when warranted. Dr. Cherry states that plaintiff's symptoms, namely abdominal pain, tenderness and hematuria, i.e., blood in her urine, are common when a second C-section is performed. He explains that adhesions often form between the bladder and uterus after the first C-section and that the adhesions necessitate additional dissection of the bladder during the second C-section, causing postoperative hematuria. In addition, he states that it is not uncommon for this hematuria to last for 24 hours. Dr. Cherry notes that plaintiff's urine was clear 24 hours after the delivery, thus, the CT scan which revealed her perforation was not indicated until her bleeding resumed–at which time the scan was promptly performed.

Defendants LIJ and Traugott have met their burden of establishing their prima facie entitlement to summary judgment dismissing the medical malpractice claim. (Alvarez v Prospect Hosp., 68 NY2d 320 (1986); see also, Feinberg v Feit, supra, at p. 519) Although defendant Traugott played an active role in plaintiff's C-section, there is no evidence that he exercised any independent medical judgment or that there was a need for him to do so. (Soto v Andaz, supra; Cook v Reisner, supra; Filippone v St. Vincent's Hosp. & Med. Ctr. of N.Y., supra)

As for plaintiff's claim of lack of informed consent, under the circumstances, there was no duty on the hospital employees to obtain plaintiff's informed consent. (Spinosa v Weinstein, 168 AD2d 32, 38-39 (2nd Dept. 1991)) "[T]o hold a hospital or its employees have a duty to intervene in the independent physician/patient relationship, unless the hospital is aware of [extraordinary] circumstances ... would be far more disruptive than beneficial to a patient." (Spinosa v Weinstein, supra, at p. 40 quoting Alexander v Gonser, 42 Wash. App. 234, 239 (1985))

A claim for breach of duty to use due care in the selection of doctors and nurses and to furnish competent medical personnel requires a plaintiff to establish that "the hospital failed to use due care in selecting and furnishing personnel–that is, that it failed to make an appropriate investigation of the characters and capacity of the agencies of service (quotations omitted)–and that such failure was a proximate cause of his injury." (Bleiler v Bleiler, 65 NY2d 65, 73 (1985), citing Lewis v Columbus Hosp., 1 AD2d 444, 447 (1st Dept. 1956))

Marianne Ambookan, Vice President of Risk Management at LIJ, attests that defendants Goldstein and Kusnitz's privileges were granted in accordance with LIJ's policies applicable to assessing doctors' qualifications and that there was never any reason to suspend or revoke them. Similarly, defendant Traugott underwent the hiring process for residents and there was never any reason to suspend or terminate him. There is no evidence here that LIJ breached the duty of care in its selection and employment of these doctors or its staff.

Dismissal of the claims of plaintiff Lisa Modica as against defendants LIJ and Traugott would require dismissal of plaintiff John Modica's claim of loss of consortium against said defendants as well (Millington v Southeastern Elevator Co., 22 NY2d 498 (1968)).

Defendants Traugott and LIJ have established their entitlement to summary judgment dismissing all claims as against them thereby shifting the burden to plaintiffs to establish the existence of a material issue of fact. (Alvarez v Prospect Hosp., supra, at p. 324-325)

To defeat defendant's motion, "plaintiff [is] obligated to submit competent, rebuttal medical evidence establishing that defendants deviated from the applicable standard of care, as well as a causal nexus between their conduct and her injuries (citations omitted)." (Hoffman v Pelletier, 6 AD3d 889, 891 (3d Dept. 2004); see also, Johnson v Queens-Long Island Medical Group, P.C., 23 AD3d 525, 526 (2d Dept. 2005)).

In opposition to these applications, plaintiffs have submitted the Affirmation of Anthony C. Casamassima, a retired New York physician who is Board Certified in Pediatrics and Clinical Genetics. He claims to be qualified to evaluate the care provided plaintiff on account of his having, *inter alia*, attended numerous C-sections as a Pediatrician and served in the Department of Obstetrics and Gynecology at the National Naval Medical Center. Dr. Casamassima affirms that having reviewed plaintiff's relevant medical records as well as the testimony given by the parties at their examinations-before-trial, he found with a reasonable degree of medical certainty that defendants LIJ, Goldstein and Kusnitz departed from good and acceptable medical standards in their care of plaintiff and that those departures were substantial contributing factors to her injuries.

As for the surgery, Dr. Casamassima acknowledges that a ruptured bladder is a risk of C-sections, therefore, good visualization is of paramount importance. However, in light of the location of plaintiff's bladder perforation, i.e., at the dome of her bladder, he concludes that it should have been seen easily without an unusually excessive amount of dissection and thus, it should not have been perforated. He states that if the bladder was not visualized, it should have been and remarks that this is especially so since there is no evidence of any adhesions which could have blocked the bladder's view or interfered with the dissection of the bladder from the uterus in either the C-section or laparotomy operative reports, nor was there any evidence of excessive bladder manipulation which could have caused the rupture. Dr. Casamassima states that even the Urology consultation note states that there had been "no excessive bladder manipulation" during the C-section. Moreover, no pelvic adhesions were noted during the bladder repair surgery and plaintiff experienced no hematuria post-operatively.

Dr. Casamassima concludes that plaintiff's perforated bladder constituted a departure from the accepted standards of care by defendant Goldstein. He also opines that plaintiff's significant hematuria and pain, coupled with the absence of both adhesions and extensive bladder manipulation, should have led defendant Goldstein to examine and test her sooner. Dr. Casamassima also faults defendant Kusnitz for not evaluating plaintiff sooner in light of her severe pain and hematuria, which constituted a departure from the accepted standards of medical care.

As for the delay in diagnosis, Dr. Casamassima again notes that plaintiff's operative report did not note adhesions to or extensive manipulation of plaintiff's bladder. Nevertheless, her urine appeared bloody for hours after the surgery: at 11:00 AM, 12:00 PM, 1:15 PM, 6:00 PM and 6:45 PM on

September 22nd and at 12:30 AM on September 23, 2003. At 4:15 AM and 6:15 AM that day, plaintiff not only continued to experience blood in her urine, she complained of blood clots in her urine and severe abdominal pain, which even she herself testified at her examination before trial she distinguished from the pain she had experienced as a result of her first C-section when she described it to the doctor.

Dr. Casamassima states that while plaintiff's urine was clear at 8:00 AM on September 23, 2003, there is no indication that it was checked again until 7:00 PM. Dr. Casamassima faults defendants Goldstein, Kusnitz and the LIJ staff for not monitoring plaintiff, particularly her urine, from 8:00 AM until 7:00 PM on September 23, 2003, which he characterizes as a departure from the accepted standards of care which he states contributed to the delay in diagnosis and prolonged plaintiff's abdominal pain and hematuria.

Defendants challenge Dr. Casamassima's qualifications to testify as an expert on three grounds: (1) that he represented plaintiffs as their counsel at defendants' depositions*; (2) that he has not registered to practice medicine in New York with the Department of Education as is required by Education Law § 6502; and (3) that he lacks the requisite skill, knowledge and/or experience.

An expert witness must "be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or the opinion rendered is reliable (citation omitted)." (Matott v Ward, 48 NY2d 455, 459 (1979); see also, LaMarque v North Shore Univ. Hosp., 227 AD2d 594 (2d Dept. 1996)) While a medical expert need not be a specialist in the particular field, his opinion must nevertheless be based on some level of education or practical experience. "A witness may be qualified as an expert based upon '[l]ong observation, actual experience and/or study.' " (Steinbuch v Stern, 2 AD3d 709, 710 (2d Dept. 2003) quoting McLamb v Metropolitan Suburban Bus Auth., 139 AD2d 572, 573 (2d Dept. 1988))

There is no precise rule concerning how such skill and experience must be acquired and the lack of a medical license does not necessitate disqualification. (Steinbuch v Stern, supra, at p. 710, citing Meiselman v Crown Heights Hosp, 285 NY 389 (1941); People v Rice, 159 N.Y. 400 (1899); Karasik v Bird, 98 AD2d 359 (1st Dept. 1984)) However, "where a physician opines outside his or her area of specialization, a foundation must be laid tending to support the reliability of the opinion rendered." (Behar v Coren, 21 AD3d 1045, 1047 (3d Dept. 2005), lv den., 6 NY2d 705 (2006), citing Romano v Stanley, 90 NY2d 444, 451-452 (1997) and Nagano v Mount Sinai Hosp., 305 AD2d 473 (2d Dept. 2003); LaMarque v North Shore Univ. Hosp., supra.)

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* Dr. Casamassima is also an attorney.

Disciplinary Rule 5-102(c) provides, with certain exceptions, that "[i]f, after accepting employment in pending . . . litigation, a lawyer learns or it is obvious that the lawyer ought to be called as a witness on a significant issue on behalf of the client, the lawyer shall not serve as an advocate on issues of fact before the tribunal." Defendants seek to have this Court reject Dr. Casamassima's testimony on the ground that he represented plaintiff in this action during defendant doctors' depositions.

Defendants rely on Markus v Touliopoulos (8 Misc.3d 1017[A] [N.Y. City Civ. Ct. 2005]) in which the Court stated:

> "The 'advocate witness rule,' codified in Disciplinary Rule 5-102 of the Code of Professional Responsibility (22 NYCRR 1200.21) **prohibits a lawyer from representing a client** where it is evident that the attorney's testimony will be required in the trial of the action (citation omitted). The purpose of the advocate-witness rule is salutary and, indeed, important for the preservation of the adversary nature of our common law system. A lawyer arguing a matter or trying an action should be restricted to his crucial role as a spokesperson for his client. He or she should not be cast simultaneously in the dual role of arguing on behalf of a client and urging a court to believe him or her as credible (citations omitted) (emphasis added)."

The remedy for a violation of the Disciplinary Rules is disqualification of the attorney, not preclusion of his testimony. (Disciplinary Rule 5-102 (22 NYCRR §1200.21); see also, 1B Carmody-Wait 2d § 3:307; 7 N.Y. Jur. 2d Attorneys at Law § 345) An application to disqualify Dr. Casamassima has not been made.

Defendants additionally contend that the failure of Dr. Casamassima to register with the Department of Education as is required by Education Law §6502 precludes consideration of his affirmation. It is true that if a doctor fails to register the continued practice of medicine will subject that doctor to penalty (see Education Law §§6509, 6510 and 6511; see, also, Medical Society of the State of New York v Sobol, 153 Misc.2d 815 [Supreme Court, Albany County 1992], rev'd on other grounds, 192 AD2d 78 [3d Dept. 1993]), app dism., 82 NY2d 802 [1993], reconsideration den., 82 NY2d 917 [1994], cert den., 511 U.S. 1152 [1994]). It is also true that the preparation of medical reports and the offering of expert testimony constitutes the practice of medicine (Lazachek v Board of Regents of the University of the State of New York, 101 AD2d 639 [3rd Dept. 1984], app den., 63 NY2d 608 [1984]; Wasserman v Board of Regents of the University of the State of New York, 11 NY2d 173, 182 [1962], cert den., 371 U.S. 23 [1962]). However, just as the lack of a license is not determinative of the admissibility of testimony (Steinback v Stern, supra), *a fortiori,* Dr. Casamassima's failure to register is not either.

Given Dr. Casamassima's experience attending numerous C-sections, his testimony cannot be summarily rejected on the ground that he is not qualified to testify as an expert here. "Any lack of skill or experience goes to the weight of his . . . opinion as evidence, not its admissibility."(Erbstein v Savasatit, 274 AD2d 445 (2d Dept. 2000), citing Adamy v Ziriakus, 92 NY2d 396 (1998); Julien v Physician's Hosp., 231 AD2d 678, 680 (2d Dept. 1996); Ariola v Long, 197 AD2d 605 (2d Dept. 1993), lv dism., 82 NY2d 920 (1994))

Turning to Dr. Casamassima's Affirmation in Opposition, he has not addressed any of the claims against defendant Traugott, nor has he addressed the issues relating to plaintiff's claim against defendant LIJ for failure to obtain informed consent or negligent hiring.

The complaint as against defendant Traugott and the lack of informed consent and negligent hiring claim are accordingly dismissed.

As for LIJ's alleged failure to properly monitor plaintiff post-operatively from 8:00 AM until 7:00 PM on September 23rd, plaintiff's records in fact show that her urine output was measured at 8:00 AM and 2:50 PM on September 23, 2003, with no mention of blood. The Patient Care Flow Sheet reflects that plaintiff's overall condition was evaluated at 9:00 AM, 12:00 PM, 1:00 PM and at 4:00 PM and the Direct Doctor Order Sheet reveals that she was attended to at 10:15 AM, 12:35 PM, and 5:00 PM in some way. Close monitoring of plaintiff has in fact been established. In any event, plaintiff has not established that her treatment would have been any different had she been monitored more closely. (See, Giambona v Stein, 265 AD2d 775, 776 (3rd Dept. 1999); Bossio v Fiorillo, 210 AD2d 836, 838 (3d Dept. 1994).) Plaintiff has failed to raise an issue of fact concerning LIJ's care and treatment of her.

In conclusion, the motion by defendants Goldstein, Kusnitz and Gendal-Kusnitz is denied. The cross-motion by defendants Traugott and LIJ is granted and the complaint and any and all cross-claims as against LIJ and Traugott are dismissed without costs.

This decision constitutes the order of the court.

Dated: 6-12-06

HON THOMAS P. PHELAN

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