

<b>Deluca-Smith v Spierer</b>
2023 NY Slip Op 30378(U)
February 2, 2023
Supreme Court, New York County
Docket Number: Index No. 157705/2013
Judge: Kathy J. King
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHY J. KING PART 06

Justice

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GINA DELUCA-SMITH and SCOTT SMITH,
Plaintiffs,

- v -

GARY SPIERER, M.D., GATEWAY OBGYN , P.C.,
MICHAEL R. CASTELLANO, M.D. MICHAEL R.
CASTELLANO, M.D., P.C., SUSAN KHALIL, M.D., PAUL
GRUBE, M.D., SEAVIEW MEDICAL GROUP, P.C.,
SEAVIEW MEDICAL ANESTHESIA GROUP, SI BAY VIEW
MEDICAL GROUP, P.C., STATEN ISLAND UNIVERSITY
HOSPITAL, NORTH SHORE-LONG ISLAND JEWISH
HEALTH SYSTEM INC., JACOB ROZBRUCH, M.D., EAST
72ND STREET ORTHOPAEDIC SURGERY SPECIALISTS,
P.C., BETH ISRAEL MEDICAL CENTER, and CONTINUUM
HEALTH PARTNERS, INC.

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 121, 122, 123, 124,
125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 138, 140, 142, 144, 146, 147, 148, 149, 150, 151,
152, 153, 165, 166

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

The following e-filed documents, listed by NYSCEF document number (Motion 005) 78, 79, 80, 81, 82,
83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107,
108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 136, 139, 141, 143, 145, 154, 155, 156,
157, 158, 159, 160, 161, 164

were read on this motion to/for JUDGMENT - SUMMARY

Defendants Gary Spierer, M.D., Gateway OBGYN Associates, P.C., Michael R.
Castellano, M.D. and Michael R. Castellano, M.D.,P.C., move for summary judgment dismissing
the plaintiffs' complaint pursuant to CPLR § 3212. Defendants, Staten Island University Hospital
and North Shore-Long Island Jewish Health System (collectively referred to as "SIUH"), move
for summary judgment dismissing the complaint pursuant to CPLR 3212, or in the alternative, for
an order dismissing the complaint, pursuant to CPLR 3211 (a)(7).

AMENDED DECISION + ORDER
ON MOTION

Plaintiffs submit opposition to the motions.

After oral argument, and consideration of the moving papers and opposition thereto, the defendants' motions are decided as set forth below.

### **THE INSTANT MOTIONS**

This is an action sounding in medical malpractice for injuries allegedly sustained by the plaintiff, Gina DeLuca-Smith ("DeLuca-Smith), and derivatively by her husband, Scott Smith, following an elective surgical procedure, for a total abdominal hysterectomy and appendectomy performed by the plaintiff's private attending physicians, Gary Spierer, M.D. ("Spierer"), and Michael Castellano, M.D. ("Castellano"), at SIUH. The plaintiffs allege that defendants deviated from the standard of care and treatment of the plaintiff, by improperly placing a pelvic retractor intraoperatively; failing to intermittently reposition and/or release the pelvic retractor during the operative procedure; and failing to provide proper post-operative care based on plaintiff's complaints, which included right leg numbness and pain; and lack of informed consent concerning the risks, benefits and alternatives to the surgery.

In support of their respective motions for summary judgment dismissing the complaint, the moving defendants submit the pleadings, deposition testimony of the parties, relevant medical records, and the affirmations of their medical experts. Specifically, Spierer and defendant Gateway OBGYN Associates submit the affirmation of Dr. Thomasena Ellison, a board-certified physician in Obstetrics and Gynecology, in which she noted that plaintiff's past medical history was significant for endometriosis and ovarian cysts. She opined that the hysterectomy performed by Spierer was medically indicated due to plaintiff's ongoing complaints of chronic abdominal and pelvic pain. Dr. Ellison also opined that Spierer appropriately discussed the risks, benefits and alternatives to a hysterectomy with the plaintiff, who then signed a consent form for the

surgery. Dr. Ellison further opined that Spierer, in performing the hysterectomy, properly placed a self-restraining retractor which carries the known and accepted risk of nerve injury. Dr. Ellison found that plaintiff's femoral nerve was not injured by the placement of the retractor, since plaintiff was ambulating prior to discharge, and left the hospital walking without assistance. Based on these findings, Dr. Ellison opined, to a reasonable degree of medical certainty, that Spierer did not depart from the standard of care in performing the hysterectomy. Additionally, Dr. Ellison opined that Spierer provided good and proper medical care from the date of plaintiff's admission to SIUH through the date of discharge on February 26, 2011, and that there was no departure by Spierer at any time during his care and treatment of the plaintiff which proximately caused her injuries.

The Castellano defendants submit the affirmation of Gary Slater, M.D., a board-certified General Surgeon. Dr. Slater opined that the care and treatment provided to the plaintiff by Castellano was proper and within the standards of good and accepted surgical care. In particular, he opined that the appendectomy procedure completed on February 23, 2011, was indicated and performed without evidence of complications, and was not the cause of the plaintiff's femoral neuropathy. According to Dr. Slater, during the hysterectomy procedure Spierer observed multiple endometrial implants in the plaintiff's abdominal cavity and requested an intra-operative consultation by Castellano for lysis. During the consultation, Castellano determined that the size and location of the implants necessitated the removal of the appendix to prevent obstruction and appendicitis in the future. Dr. Slater opined that Castellano had no role in positioning the patient or selecting the type of retractor to be used during the hysterectomy procedure. He further opined that to a reasonable degree of medical certainty, the performance of the appendectomy did not cause the plaintiff's injuries, and that Castellano did not negligently prolong the duration of the surgery. Dr. Slater concluded that with a reasonable degree of medical certainty there were no

departures from the standard of medical care by Castellano, and that none of his actions and/or inactions was the proximate cause of any of the plaintiff's alleged injuries.

In support of its motion, SIUH submits the affirmation of Gary Mucciolo, M.D., a board-certified Obstetrician and Gynecologist. Dr. Mucciolo opined within a reasonable degree of medical certainty, that the care and treatment provided to the plaintiff during her admission to SIUH in February 2011, including care relating to her surgery, was exclusively under the direction of the plaintiff's private attending physicians, Spierer and Castellano, and that none of their orders were contraindicated to call into question their correctness. Further, Dr. Mucciolo opined that Spierer was responsible for procuring the plaintiff's informed consent, since he was responsible for plaintiff's surgery, and that SIUH staff were not involved or required to be involved in obtaining the plaintiff's consent to the surgery. Further, Dr. Mucciolo noted that the plaintiffs' verified bills of particulars failed to set forth independent acts of negligence by SIUH either during or after the surgery. Dr. Mucciolo opined within a reasonable degree of medical certainty that there was no negligence by the hospital staff during the plaintiff's admission, and that post-operatively the treatment rendered to the plaintiff by SIUH was in accordance with good and accepted standards of care.

SIUH also submit the affidavit of Peter Geller, M.D., a board-certified General Surgeon and Surgical Critical Care physician. Dr. Geller opined that the care and treatment rendered to the plaintiff by SIUH during her admission of February 2011 was in accord with appropriate standards of care and did not cause or contribute to the plaintiff's alleged injuries, nor was their evidence that the medical or nursing staff was negligently supervised by SIUH. Dr. Geller opined within a reasonable degree of medical certainty that plaintiff's surgery and post-operative care was

exclusively controlled and managed by her private attending physicians, Spierer and Castellano, and that SIUH appropriately carried out the orders of those physicians.

In opposition to the motions of defendants Spierer, Castellano, and SIUH, the plaintiffs submit the affirmation of a board-certified Gynecologist, with a subspecialty in Gynecologic Oncology. The expert opined that Spierer deviated from the standard of care in failing to inform DeLuca-Smith of the risk of sustaining peripheral neuropathy from the surgery. The physician further opined that Spierer and Castellano negligently positioned an abdominal retractor during the surgery, and failed to intermittently reposition or release the retractor, causing compression and damage to the femoral nerve resulting in femoral neuropathy and weakness of the plaintiff's right lower extremity. In this regard, plaintiff's expert noted that, other than endometriosis, plaintiff's pre-surgical condition showed no evidence of right leg neuropathy or any chronic conditions. He further opined that nerve damage caused by the utilization of a retractor during surgery was not an acceptable risk of the operative procedure, and that Spierer and Castellano deviated from the standard of care by improperly positioning the retractor and failing to regularly release the compression force of the blades during surgery. Plaintiff's expert further opined, within a reasonable degree of medical certainty, that the post-operative care by Spierer, Castellano and the medical staff at SIUH deviated from the standard of care and proximately caused the plaintiff's injuries because they failed to properly respond to the plaintiff's complaints of right leg numbness, conduct proper examinations of the plaintiff's right leg, or order appropriate testing to determine the cause of her symptoms.

### **DISCUSSION**

“To sustain a cause of action for medical malpractice, a plaintiff must prove two essential elements: (1) a deviation or departure from accepted practice, and (2) evidence that such departure

was a proximate cause of plaintiff's injury" (*Frye v Montefiore Med. Ctr.*, 70 AD3d 15, 24 [1st Dept 2009]; see *Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Elias v Bash*, 2-, 357 [2d Dept 2008]; *DeFilippo v New York Downtown Hosp.*, 10 AD3d 521, 522 [1st Dept 2004]).

A defendant physician moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by establishing the absence of a triable issue of fact as to his or her alleged departure from accepted standards of medical practice (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Frye v Montefiore Med. Ctr.*, 70 AD3d at 24), or by establishing that the plaintiff was not injured by such treatment (see *McGuigan v Centereach Mgt. Group, Inc.*, 94 AD3d 955 [2d Dept 2012]; *Sharp v Weber*, 77 AD3d 812 [2d Dept 2010]; see generally *Stukas v Streiter*, 83 AD3d 18 [2d Dept 2011]).

To satisfy this burden, a defendant must present expert opinion testimony that is supported by the facts in the record, addresses the essential allegations in the complaint or the bill of particulars, and is detailed, specific, and factual in nature (see *Roques v Noble*, 73 AD3d at 206; *Joyner-Pack v. Sykes*, 54 AD3d 727, 729 [2d Dept 2008]; *Koi Hou Chan v Yeung*, 66 AD3d 642 [2d Dept 2009]; *Jones v Ricciardelli*, 40 AD3d 935 [2d Dept 2007]). If the expert's opinion is not based on facts in the record, the facts must be personally known to the expert and, in any event, the opinion of a defendant's expert should specify "in what way" the patient's treatment was proper and "elucidate the standard of care" (*Ocasio-Gary v Lawrence Hospital*, 69 AD3d 403, 404 [1st Dept 2010]). Furthermore, to satisfy his or her burden on a motion for summary judgment, a defendant must address and rebut specific allegations of malpractice set forth in the plaintiff's bill of particulars (see *Wall v Flushing Hosp. Med. Ctr.*, 78 AD3d 1043 [2d Dept 2010]; *Grant v Hudson Val. Hosp. Ctr.*, 55 AD3d 874 [2d Dept 2008]; *Terranova v Finklea*, 45 AD3d 572 [2d Dept 2007]).

Once defendant establishes prima facie entitlement to judgment as a matter of law, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact by submitting an expert's affidavit or affirmation attesting to a departure from accepted medical practice and opining that the defendant's acts or omissions were a competent producing cause of the plaintiff's injuries (*see Roques v Noble*, 73 AD3d at 207; *Landry v Jakubowitz*, 68 AD3d 728 [2d Dept 2009]; *Luu v Paskowski*, 57 AD3d 856 [2d Dept 2008]).

To establish a cause of action for malpractice based on lack of informed consent, plaintiffs are required to prove:

(1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury.

(*Zapata v Buitriago*, 107 AD3d 977, 979 [2d Dept. 2013]; *see Spano v Bertocci*, 299 AD2d 335, 337-338 [2d Dept 2002]; Public Health Law § 2805-d[1]). For a statutory claim of lack of informed consent to be actionable, a defendant must have engaged in a “non-emergency treatment, procedure or surgery” or “a diagnostic procedure which involved invasion or disruption of the integrity of the body” (Public Health Law § 2805-d[2]). A defendant may satisfy his or her burden of demonstrating a prima facie entitlement to judgment as a matter of law in connection with such a cause of action where a patient signs a detailed consent form, and there is also evidence that the necessity of the procedure, along with known risks and dangers, was discussed prior to the surgery (*see Bamberg-Taylor v Strauch*, 192 AD3d 401, 401-402 [1st Dept 2021]).

Based on the foregoing, defendants Spierer and Castellano have established their entitlement to summary judgment as a matter of law by establishing by the affirmation of their



medical experts showing that that they did not deviate from the standard of good and accepted medical care in placing and positioning the retractor during the surgical procedure.

In opposition, plaintiffs have rebutted Spierer and Castellano's prima facie showing based on the opinion of plaintiff's expert, that the failure to timely release and/or reposition the blades during the surgery was a deviation from the standard of care which caused the plaintiff's nerve injury. The expert opined that the standard of care required that the retractor blades used by Spierer and Castellano during the surgery be loosened or repositioned periodically, at least every hour, to avoid nerve tissue death caused by pressure on the psoas muscle and femoral nerve. The expert noted that the operative report showed no repositioning of the retractor by Spierer or Castellano for the entirety of the surgery, which lasted more than three hours. Plaintiff's expert also points out that Spierer testified at his deposition that he had "no independent recall of anybody recommending repositioning the blades or retractors during the surgery."

Plaintiffs, in opposition, have also rebutted defendant Spierer's prima facie showing on the lack of informed consent claim through their expert, who opined that nerve injury was not an accepted risk of the surgery, and in failing to obtain the informed consent of DeLuca-Smith regarding the risk of sustaining peripheral neuropathy from the placement and positioning of a retractor during surgery.

In reaching this conclusion, the expert relied on Spierer's deposition testimony, during which he testified that it was not his custom and practice to discuss peripheral neuropathy when obtaining a patient's informed consent. Significantly, Spierer's deposition testimony stands in stark contrast to the opinion of his medical expert, Dr. Ellison, that nerve injury is "a known and accepted risk of any such retractors, including the type of retractor used by Dr. Spierer in this

case.” The plaintiffs’ expert also noted that DeLuca-Smith testified that the only risk Spierer discussed with her related to endometriosis and the bladder.

On the other hand, plaintiff’s expert failed to raise a triable issue of fact as to whether Castellano deviated from the standard of care by failing to obtain the plaintiff’s informed consent. The expert not only failed to provide an opinion on this issue, but also a review of the record shows that the surgery was well underway when Spierer requested the consult from Castellano, therefore the risks, benefits and alternatives could not be explained to plaintiff prior to the surgery.

Similarly, plaintiff’s expert failed to raise a triable issue of fact whether SIUH were negligent in departing from acceptable medical practice in their care and treatment of the plaintiff, since Spierer and Castellano’s are private attending physicians and not employees of SIUH. “Generally, a hospital cannot be held vicariously liable for the malpractice of a private attending physician who is not its employee” (*see Pratt v Haber*, 105 AD3d 429, 429 [1st Dept 2013]), (*Sampson v Contillo*, 55 AD3d 588, 589 [2d Dept 2008], quoting *Quezada v O’Reilly-Green*, 24 AD3d 744, 746 [2d Dept 2005] [internal quotation marks omitted]; *see Hill v St. Clare’s Hosp.*, 67 NY2d 72, 79 [1986] [(a)lthough a hospital or other medical facility is liable for the negligence or malpractice of its employees . . . that rule does not apply when the treatment is provided by an independent physician, as when the physician is retained by the patient himself”]; *Dragotta v Southampton Hosp.*, 39 AD3d 697, 698 [2d Dept 2007]; *Salvatore v Winthrop Univ. Med. Ctr.*, 36 AD3d 887 [2d Dept 2007]; *Welch v Scheinfeld*, 21 AD3d 802, 807 [1st Dept 2005].

Plaintiffs also failed to raise a triable issue of fact as to the liability of SIUH, since the orders of Spierer and Castellano were within normal practice pursuant to the expert opinion of Drs. Ellison and Slater. “[A] hospital is . . . immune from liability where its employees follow the direction of the [independent] attending physician, unless that physician’s orders ‘are so clearly

contraindicated by normal practice that ordinary prudence requires inquiry into the correctness of the orders” (*Garson v Beth Israel Med. Ctr.*, 41 AD3d 159, 160 [1st Dept 2007], quoting *Walter v Betancourt*, 283 AD2d 223, 224 [1st Dept 2001] [internal quotation marks and citations omitted]).

Additionally, where a physician is not employed by a hospital, and the plaintiff makes no allegations of “any separate alleged acts and omissions of” the hospital’s staff (*Suits v Wyckoff Heights Med. Ctr.*, 84 AD3d 487, 489 [1st Dept 2011]), the hospital cannot be held liable for the physician’s malpractice (*see id.*). Spierer and Castellano were not employed by SIUH, and the plaintiffs have made no allegations of separate acts and/or omissions of the hospital’s staff which proximately caused the plaintiff’s injury. Consistent therewith, Dr. Mucciolo opined, “within a reasonable degree of medical certainty, that the care and treatment rendered to Deluca-Smith by SIUH, its employees, servants, and agents during the admission of February 2011, was in accord with appropriate standards of care and did not cause or contribute to the injuries being alleged in this case.” Consequently, summary judgment dismissing the complaint against SIUH is warranted.

The defendants’ remaining contentions are without merit.

Accordingly, it is hereby

**ORDERED**, that the summary judgment motion of defendants Gary Spierer, M.D. and Gateway OBGYN Associates, P.C. is denied; and it is further


**ORDERED**, that the summary judgment motion of defendants Michael R. Castellano, M.D. and Michael R. Castellano, M.D., P.C. is granted to the extent that the lack of informed consent cause of action is dismissed; in all other respects the motion is denied; and it is further

**ORDERED**, that the summary judgment motion of defendants Staten Island University Hospital and North Shore-Long Island Jewish Health System, Inc. is granted; and it is further

**ORDERED**, that the Clerk of the Court shall enter judgment dismissing the complaint insofar as asserted against the defendants Staten Island University Hospital and North Shore Long Island Jewish Health System.

This constitutes the Decision and Order of the Court.

A settlement conference is scheduled for March 28, 2023 at 2:30 p.m., at 60 Centre Street, Part 6, Room #351.

2/2/2023		
DATE		KATNY J. KING, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE