SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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JOAN PESCE and JOHN PESCE,

Plaintiff(s)

-against-

STATEN ISLAND UNIVERSITY HOSPITAL; ALEX GIANNAKAKOS, M.D., and JOHN DOE #1-10 Fictitious names real names unknown, intended to represent the physician or physicians, technician or technicians, nurse or nurses, physicians' assistants, employee or employees, agent or agents, or other individuals who assisted in the care given to plaintiff, JOAN PESCE and/or gave, administered, ordered, directed, prescribed, instructed, and/or otherwise caused the plaintiff, JOAN PESCE to sustain serious personal injuries on or about June 26, 2006, at Staten Island University Hospital, and ALEX GIANNAKAKOS, M.D. P.C.,

Defendant(s).

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DCM Part 5
Present:

HON. JUDITH N. MCMAHON

DECISION AND ORDER

Index No. 102308/2008
Motion Nos. 002, 003, 004, 005

The following papers numbered 1 to 10 were used on this motion this 14th day of September, 2010:

[002] Notice of Motion [Defendant Dr. Giannakakos](Affirmations in Support)	**1**
[003] Notice of Cross Motion [Plaintiff](Affirmation in Support)	**2**
[004] Notice of Motion [Defendant SIUH](Affirmation in Support)	**3**
]005] Notice of Cross-Motion [Plaintiff](Affirmation in Support)	**4**
Affirmation in Partial Opposition [Defendant SIUH]	**5**
Affirmation in Opposition [Plaintiff]	**6**
Reply Affirmation & Opposition [Defendant SIUH]	**7**
Reply Affirmation & Opposition [Defendant Dr. Giannakakos]	**8**
Reply Affirmation & Opposition [Defendant Dr. Giannakakos]	**9**
Reply Affirmation [Defendant SIUH].....	**10**

On or about May 22, 2008, the plaintiffs, Joan Pesce and John Pesce, commenced this medical malpractice action against the defendants after plaintiff, Joan Pesce, allegedly sustained burns on her lower genital tract after undergoing a global uterine ablative procedure known as hydrothermal ablation (HTA) and laparoscopic tubal ligation. It is undisputed that on or about June 26, 2006, the plaintiff Joan Pesce, was admitted to Staten

Island University Hospital to undergo the aforementioned procedure. Defendant Dr. Alex Giannakakos, plaintiff's private attending physician, performed the procedure to treat uterine fibroids which were discovered during the plaintiff, Joan Pesce's visit to Dr. Giannakakos on April 7, 2006. After the procedure, on several occasions, the plaintiff presented back to Dr. Giannakakos with complaints of burning and pain sensation. This action was thereafter commenced.

At present, discovery is complete and the case is set for immediate trial. Presently, defendant Dr. Giannakakos is moving [Motion 002] for dismissal of the plaintiff, John Pesce's derivative claims on the ground that the plaintiffs were not married at the time of the alleged negligence. The plaintiff [Motion 003] is moving to amend the complaint to include a second cause of action (Lack of Informed Consent), third cause of action (Res Ipsa Loquitur) and a fourth cause of action (Breach of Contract). The defendant Staten Island University Hospital [Motion 004] is moving for summary judgment on the ground that Dr. Giannakakos, as plaintiff's private attending physician performed the procedure, and it, nor its employees were liable for any deviations or injury. Lastly, plaintiff [Motion 005] is moving for summary judgment on liability.

I. Defendant Dr. Giannakakos' Motion for Summary Judgment

Motion 002

It is well settled that loss of consortium/services claims are inappropriate where the plaintiffs were not married at the time of the alleged negligence (Anderson v. Lilly & Co., 79 NY2d 797 (1991); Nicholson v. South Oaks Hospital, 27 AD3d 628, 628-629 (2d Dept., 2006)(holding that where husband-plaintiff was not married to decedent at the time of the

alleged negligence, his individual claims were inappropriate). Here, the alleged negligence took place on June 26, 2006, and plaintiffs were thereafter married on July 14, 2006. Clearly, because the plaintiffs, Joan and John Pesce, were married after the alleged negligence, plaintiff John Pesce's claims are inappropriate and dismissed. As a result, defendant Dr. Giannakakos' motion to dismiss the claims of plaintiff, John Pesce, is granted.

II. Plaintiff's motion to Amend the Complaint

Motion 003

"Leave to amend a pleading should be freely granted where the proposed amendment is not palpably insufficient or patently devoid of merit and will not prejudice or surprise the opposing party" (CPLR § 3025[b]; Krioutchkova v. Gaad Realty Corp., 28 AD3d 427, 428 [2d Dept. 2006]). Here, the plaintiff seeks to add three additional causes of action, namely; lack of informed consent, res ispa loquitor and breach of contract. At this juncture, this case is scheduled for trial in less than one week and as a result, this Court will leave the decision of whether to amend the complaint adding the res ipsa claim up to the trial judge on the case. Considering the 'eve of trial' nature of the amendment, weighing the potential prejudicial value to the defendants is best reserved for the trial judge.

However, with respect to the breach of contract cause of action, the plaintiff has failed to present any evidence to establish or support such a claim. As a result, this Court finds the breach of contract claim devoid of merit and denies plaintiff's motion to amend with respect to the breach of contract cause of action (Krioutchkova v. Gaad Realty Corp.,

28 AD3d 427, 428 [2d Dept. 2006]).

Lastly, with respect to the plaintiff's lack of informed consent claim;

> **Public Health Law § 2805-d (1) defines lack of informed consent as 'the failure of the person providing the professional treatment . . . to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable medical, dental or podiatric practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation'. (Manning v. Brookhaven Memorial Hosp. Med. Ctr., 11 AD3d 518, 520 [2d Dept., 2004]).**

To recover for a lack of informed consent cause of action the plaintiff "must allege that the wrong complained of arose out of some affirmative violation of plaintiff's physical integrity" and further that "a reasonably prudent person in the plaintiff's position would not have undergone the treatment if he or she had been fully informed and that the lack of consent is a proximate cause of the injury or condition for which recovery is sought (Smith v. Fields, 268 AD2d 579, 580 [2d Dept., 2000]; Iazzetta v. Vicenzi, 200 AD2d 209, 213-214 [3d Dept., 1994]). To amend the complaint to add an informed consent cause of action requires an expert opinion attesting to the validity of the claim because "malpractice turns on whether the acts or omissions complained of involve a matter of medical science or art requiring special skills not ordinarily possessed by lay persons" (Glasgow v. Chou, 33 AD3d 959, 961 [2d Dept., 2006]).

Here, the plaintiff has failed to present an expert opinion with respect to the addition of any medical claim (id.). Plaintiff's expert fails to address the validity of any potential lack of informed consent cause of action. Further, the delay by plaintiff is highly prejudicial to the defendants as no discovery was conducted on the lack of informed

consent claim and as such, the plaintiff's motion to amend with respect to the informed consent cause of action is hereby denied.

III. Defendant SIUH's Motion for Summary Judgment

Motion 004

It is well settled that summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of triable issues of fact (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Herrin v Airborne Freight Corp., 301 AD2d 500, 500-501 [2d Dept 2003]). The party moving for summary judgment bears the initial burden of establishing its right to judgment as a matter of law (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]), and in this regard " the evidence is to be viewed in a light most favorable to the party opposing the motion, giving [it] the benefit of every favorable inference" (Cortale v Educational Testing Serv., 251 AD2d 528, 531 [2d Dept 1998]). Nevertheless, upon a prima facie showing by the moving party, it is incumbent upon the party opposing the motion to produce "evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (Alvarez v Prospect Hosp., 68 NY2d at 324; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]).

"Generally, a hospital cannot be held vicariously liable for the malpractice of a private attending physician who is not its employee" (Quezada v. O'Reilly-Green, 24 AD3d 744, 746 [2d Dept. 2005]). Nor, can it be held liable "where its employees follow the direction of the 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 Medical Ctr., 41 AD3d 159, 159 [1st Dept. 2007]; Toth v. Bloshinsky, 39 AD3d 848, 850 [2d Dept. 2007]; Cerny v. Williams, 32 AD3d 881, 883 [2d Dept. 2006]; Welch v. Scheinfeld, 21 AD3d 802, 807 [1st Dept. 2005]).

Here, the defendant SIUH has established its entitlement to summary judgment by demonstrating that Dr. Giannakakos was plaintiff Joan Pesce's private attending physician and not an employee of the hospital (Quezada v.O'Reilly-Green, 24 AD3d 744, 746 [2d Dept. 2005]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). Defendant SIUH established that the plaintiff Joan Pesce presented to SIUH at the recommendation of Dr. Giannakakos to undergo the HTA procedure and that Dr. Giannakakos performed the procedure. Further, SIUH established that its employees neither committed independent acts of negligence, nor did they follow orders from Dr. Giannakakos that were "so clearly contraindicated by normal practice" that they should have inquired into the accuracy of such orders (Garson v. Beth Israel Medical Ctr., 41 AD3d at 159; Cerny v. Williams, 32 AD3d at 883). In opposition, the plaintiff has failed to raise a triable issue of fact regarding any independent acts of negligence on behalf of the hospital or that SIUH's employees failed to inquire into acts of the independent doctor that were so contradictory to normal practice. As such, SIUH is entitled to summary judgment, dismissing the complaint, in its entirety, as against it.

IV. Plaintiff's Motion for Summary Judgment

Motion 005

With regard to plaintiff's motion for summary judgment on liability, she has successfully established prima facie entitlement to summary judgment as a matter of law

through submission of the affidavit of Dr. Douglas G. Moss (Alvarez v. Prospect Hosp. 68 NY2d 320, 325 [1986]; Rebozo v. Wilen, 41 AD3d 457, 458-59 [2d Dept., 2007]; Johnson v. Queens-Long Island Med. Group, 23 AD3d 525, 526-27 [2d Dept., 2005]). Plaintiff's expert, Dr. Moss, opined that the defendants deviated from the standard of care applicable in the treatment of the plaintiff, Joan Pesce, because certain protective measures were not taken to avoid the complication that Mrs. Pesce sustained. However, questions of fact still exist as to whether defendant Dr. Giannakakos took these protective measures and these questions should be decided by the trier of fact (Chance v. Felder, 33 AD3d 645, 645-46 [2d Dept 2006]; Zuckerman v. City of New York, 49 NY2d 557 [1980]; Rebozo v. Wilen, 41 AD3d at 458-59).

Accordingly, it is

ORDERED that defendant Dr. Giannakakos' motion [Motion 002] for summary judgment with respect to plaintiff John Pesce's claims, pursuant to CPLR § 3212, is hereby granted, and it is further

ORDERED that plaintiff John Pesce's claims are hereby dismissed and the caption be amended deleting the name of John Pesce, and it is further

ORDERED that plaintiff, Joan Pesce's motion [Motion 003] to amend the complaint, pursuant to CPLR § 3025(b), is hereby denied in part, as claims for breach of contract and lack of informed consent are not permitted to be added, and reserved in part for the trial judge on the res ipsa claims, and it is further

ORDERED that the defendant Staten Island University Hospital's motion [Motion 004] for summary judgment pursuant to CPLR § 3212 is hereby granted, and it is further

ORDERED that the caption be amended deleting the name of Staten Island University Hospital, and it is further

ORDERED that the plaintiff Joan Pesce's motion [Motion 005] for summary judgment on liability is hereby denied, and it is further

ORDERED that any and all other additional requests for relief are hereby denied, and it is further

ORDERED that this case proceed immediately to trial, and it is further

ORDERED the that the Clerk enter Judgment Accordingly.

THIS IS THE DECISION AND ORDER OF THE COURT.

Dated: September 22, 2010 **E N T E R,**

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Hon. Judith N. McMahon
Justice of the Supreme Court