

**J.G. v Ihemaguba**

2016 NY Slip Op 30899(U)

April 1, 2016

Supreme Court, Bronx County

Docket Number: 350044/12

Judge: Howard H. Sherman

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: IA-6M

-----X  
J. G., an infant, by BIENVENIDA HIDALGO DE GONZALEZ,  
his Parent and Natural Guardian,  
BIENVENIDA HIDALGO DE GONZALEZ, Individually,  
and JOSE MERCEDES GONZALEZ,  
Plaintiff,

INDEX № 350044/12

-against-

MICHAEL IHEMAGUBA, M.D., RODNEY CAPIRO,  
M.D., ST. BARNABAS OB/GYN, P.C. and ST.  
BARNABAS HOSPITAL,

DECISION

-----X

**HON. HOWARD H. SHERMAN:**

The motion by Michael Ihemaguba, M.D., Rodney Capiro, M.D. and St. Barnabas OB/GYN, P.C. for an order pursuant to CPLR §3212 granting summary judgment dismissing the complaint as against them and the cross-motion by St. Barnabas Hospital (SBH) for summary judgment dismissing the complaint against it, or in the alternative, limiting any liability of SBH to vicarious liability for the alleged acts or omissions of co-defendants, Michael Ihemaguba, M.D. Rodney Capiro and St. Barnabas OB/GYN, P.C. (SB OB/GYN) are granted only to the extent that the complaint is dismissed as against Dr. Ihemaguba and all claims against SB OB/GYN and SBH limited to claims of vicarious liability for the alleged acts or omissions of Rodney Capiro, M.D.

Plaintiff claims that as a result of defendants' negligent care and treatment in connection with the delivery of the infant plaintiff on July 3, 2011, the infant suffered multiple injuries at birth, including a shoulder dystocia causing a permanent brachial plexus palsy, known as Erb's palsy, and plaintiff mother suffered injuries caused by a negligently performed episiotomy.

Plaintiff presented to SBH in the evening of July 2, 2011. She was 38 weeks into the pregnancy when she experienced a spontaneous rupture of the membranes. She was 35 years old, obese and had previously given birth to three children (9lbs; 8lbs 8oz. and 12 lbs 8oz, respectively). Dr. Ihemaguba, the on-call obstetrician, evaluated plaintiff at 2:00 a.m. on July 3, 2011. He performed maneuvers to determine the baby's approximate position and size. He also performed a standard Shoulder Dystocia Assessment in which he determined that plaintiff did not meet any of the test's four risk factors for shoulder dystocia. At 8:00 a.m., Dr. Ihemaguba's shift ended and he signed the patient out to Dr. Capiro.

Dr. Capiro assessed the baby's condition while in utero and continued to evaluate plaintiff's labor. At 6:50 p.m., plaintiff began active delivery. Dr. Capiro noted that plaintiff was fully dilated and pushing, but insisted that she could not push anymore. He began various maneuvers to facilitate delivery, including 15 seconds of 600mm Hg "vacuum assistance." However, at that point, he encountered shoulder dystocia. He performed maneuvers to assist in the delivery, but the fetus did not progress further. Dr. Capiro then performed an episiotomy to allow further manual assistance and the infant was delivered. After the infant was delivered, Dr. Capiro had no further involvement in his care, but at some point during his hospitalization, the infant was diagnosed with Erb's palsy.

Dr. Ihemaguba, Dr. Capiro and SB OB/GYN seek dismissal of the complaint against them on the ground that the care and treatment they rendered was at all times within accepted standards of obstetric practice and did not cause any of plaintiffs' claimed injuries.

In support of the motion, they submit the affirmation of Dr. Marchbein who opines that neither Dr. Ihemaguba nor Dr. Capiro deviated in any way from good and accepted practice in the obstetric care and treatment rendered to plaintiff, that all of the care and treatment rendered

by them was appropriate, and that their treatment is entirely unrelated to the claimed injuries.

Dr. Marchbein opines that Dr. Ihemaguba properly evaluated plaintiff, accurately determined the baby's position and performed a standard Shoulder Dystocia assessment in which he determined that plaintiff did not meet any of the test's four risk factors for shoulder dystocia. He also notes that Dr. Ihemaguba continued to properly monitor plaintiff until his shift ended and he played no role in the 6:50 p.m. delivery at issue.

Dr. Marchbein opines that Dr. Capiro properly assessed the child's condition while in utero and appropriately evaluated plaintiff prior to and during the delivery. He notes that Dr. Capiro was aware of plaintiff's prior deliveries and based on all available information, appropriately anticipated a normal vaginal delivery. Dr. Marchbein also opines that during the delivery, Dr. Capiro promptly and properly recognized shoulder dystocia and responded with multiple appropriate obstetric techniques, including an episiotomy to facilitate delivery. He opines that Dr. Capiro's care was entirely appropriate and his involvement is "entirely unrelated to plaintiffs' alleged injuries."

SBH cross-moves for summary judgment in its favor on the grounds that: (1) plaintiffs' care and treatment was managed and controlled by private attending physicians, Drs. Ihemaguba and Capiro, with no independent negligence alleged against SBH; (2) Drs. Ihemaguba and Capiro did not depart from the standard of care in their treatment of plaintiffs; and (3) citing Lopez v. Master (58 AD3d 425), if the motion by Drs. Ihemaguba, Capiro and SB OB/GYN is granted, then the action must also be dismissed as against SBH as it cannot be held vicariously liable for any acts and omissions of its employees who have been dismissed from the case.

In opposition to the motion by Dr. Capiro and SB OB/GYN and the cross-motion by SBH, plaintiff submits the affirmation of an expert (name redacted) who opines that Dr. Capiro

departed from the standard of care, inter alia, by: (1) failing to perform and/or offer a cesarean section prior to attempting to deliver the vertex via vacuum extraction; (2) failing to explain the risks and benefits of a cesarean section versus the vacuum extraction to plaintiff; and (3) failing to appreciate the risk of shoulder dystocia based upon plaintiff's obesity, prior macrosomic babies, and a prolonged second stage of labor in multiparous woman.

The expert opines that a cesarean section was clearly indicated and should have been offered prior to the attempt to deliver the vertex via vacuum extraction and that had a cesarean section been performed, shoulder dystocia would not have occurred and the infant plaintiff would not have injured the brachial plexus causing Erb's Palsy. The expert opines that by rapidly delivering the vertex from +2 station with the vacuum extractor in just 15 seconds at maximum pressure of 600 mm Hg throughout, Dr. Capiro caused the infant plaintiff's right shoulder to become impacted. The expert also opines that Dr. Capiro departed from good and accepted medical practice by failing to perform a wide medial lateral episiotomy after the right shoulder became impacted to help with delivery of the shoulder and that had he done so, plaintiff mother would not have sustained a 4<sup>th</sup> degree laceration and subsequent pain and suffering.

Plaintiff contends that SB OB/GYN and SBH are vicariously liable for the malpractice of Dr. Capiro, if any, as he was acting within the scope of his employment by SB OB/GYN at the time he treated plaintiff and that SBH is vicariously liable for the malpractice of Dr. Capiro, if any, pursuant to Mduba v. Benedictine Hospital (52 AD2d 450), because she presented to the hospital on July 2nd and was assigned to several treating physicians, including Dr. Capiro, none of whom had ever seen or treated her prior to that date.

Initially, it is noted that plaintiff has not opposed that part of the motion which seeks dismissal of the complaint as against Dr. Ihemaguba. Accordingly, Dr. Ihemaguba's motion for

summary judgment is granted.

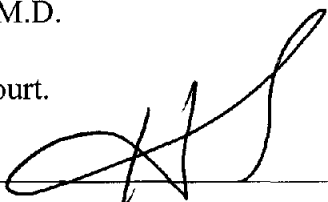
As to Dr. Capiro, while the affirmation of Dr. Marchbein is sufficient to establish, prima facie, that Dr. Capiro did not depart from the standard of care in his treatment of plaintiffs and that his care and treatment did not cause the claimed injuries, the opinion of plaintiff's expert that Dr. Capiro departed from good and accepted standards of practice, inter alia, by failing to offer and/or perform a cesarean section based upon plaintiff's obesity, prolonged second stage of labor and history of having given birth to more than one child, by attempting to deliver the vertex via vacuum extraction applied for about 15 seconds at 600 mmHg, and by failing to perform a wide medial lateral episiotomy after the right shoulder became impacted, is sufficient to raise material issues of fact which preclude a grant of summary judgment. Despite defendants' assertions to the contrary, plaintiff's expert's opinion is based upon facts in the record and is sufficient to raise a material issue of fact as to whether Dr. Capiro departed from the standard of care and caused the claimed injuries. Accordingly, the motion for summary judgment by Dr. Capiro is denied.

As Dr. Ihemaguba has been granted summary judgment, there is no basis upon which to hold SB OB/GYN or SBH vicariously liable for his alleged malpractice. Accordingly, the motions for summary judgment by SB OB/GYN and SBH are granted to the extent that they cannot be held vicariously liable based upon the alleged malpractice of Dr. Ihemaguba.

Movant shall serve a copy of this order on the clerk of the court who shall enter judgment dismissing the complaint against Michael Ihemaguba, M.D.

This constitutes the decision and order of the court.

Dated: April 1, 2016



---

**HON. HOWARD H. SHERMAN, J.S.C.**