

**Infranco v Hides**

2016 NY Slip Op 31815(U)

March 29, 2016

Supreme Court, Suffolk County

Docket Number: 12-6359

Judge: Ralph T. Gazzillo

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**ORDERED** that the motion by defendant St. Charles Hospital and Rehabilitation Center, s/h/a St. Charles Hospital, for, inter alia, summary judgment in its favor is granted as set forth herein, and is otherwise denied.

In June 16, 2010, plaintiff Donna Infranco presented at defendant St. Charles Hospital and Rehabilitation Center (hereinafter St. Charles Hospital) for a total left hip replacement surgery. Plaintiff, who had congenital left hip dysplasia, allegedly was suffering from severe degenerative arthritis in her hip. The procedure, also known as total hip arthroplasty, was performed that same day by defendant Richard Hinds, M.D., plaintiff's treating orthopedic surgeon and a partner of defendant Orthopedic Associates of Long Island, LLP. Richard Melucci, M.D., an anesthesiologist and a partner of Long Island Anesthesia Physicians, LLP, administered and managed the anesthesia used during plaintiff's surgery. Matthew Vetrano, a physician assistant (PA) employed by Orthopedic Associates of Long Island, assisted Dr. Hinds during plaintiff's hip replacement surgery.

Following surgery, plaintiff was transferred to the hospital's Post Anesthesia Care Unit (PACU), where her post-operative recovery was assessed. Shortly after plaintiff arrived in the PACU, a nurse documented that plaintiff was unable to dorsiflex her left foot and informed Dr. Hinds of such symptom. Dr. Hinds confirmed plaintiff's lack of ankle dorsiflexion. Approximately 15 to 30 minutes later, while she was still recovering in the PACU, Dr. Hinds again asked plaintiff to move her feet. Plaintiff was unable to move her left foot, and an orthosis was ordered to support the ankle and protect the heel of her foot. Two days after her surgery, plaintiff was experiencing weakness in her quadriceps and loss of sensation in her left leg, and continued to lack dorsiflexion in her left ankle. Having diagnosed plaintiff as suffering from foot drop, also called drop foot, a common complication of hip replacement surgery, Dr. Hinds ordered various tests in an effort to ascertain what caused such condition. According to Dr. Hinds' deposition testimony, plaintiff's muscle weakness and inability to dorsiflex her left foot after surgery indicated that she sustained injury to both the femoral nerve and the peroneal branch of the sciatic nerve.

On June 21, 2010, plaintiff was transferred from a medical floor to the hospital's in-patient rehabilitation center, where she received acute rehabilitation services. She continued to receive physical therapy treatments after she was discharged from the hospital on June 26, 2010, and eventually regained her ability to walk independently. Plaintiff, however, continues to suffer from foot drop in her left leg, and a nerve conduction study performed in August 2010 reportedly showed no electrical activity in the peroneal nerve.

Subsequently, plaintiff commenced this action seeking damages for medical malpractice, negligent hiring, and lack of informed consent. Her husband, plaintiff Michael Infranco, brought a derivative claim for loss of services. The bill of particulars alleges, in part, that plaintiff suffered injuries to her nerves and various symptoms due to defendants' negligence in connection with the hip replacement surgery. More specifically, as relevant to the instant motion, it alleges St. Charles Hospital was negligent, among other things, in failing to take protect plaintiff's nerves intraoperatively; in causing damage to plaintiff's nerves during the surgery; in failing to perform indicated tests and procedures; and in hiring, retaining, supervising, training and controlling staff members. It alleges plaintiff sustained injuries to her femoral, peroneal and sciatic nerves, as well as a variety of symptoms, including the inability to extend her left knee, and altered gait, and decreased sensation in her left leg and foot.

A note of issue and certificate of readiness were filed in this action on January 12, 2015. Thereafter, on

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March 3, 2015, a stipulation discontinuing, with prejudice, plaintiffs' claims against Matthew Vetrano was executed by plaintiffs' counsel and Vetrano's counsel. Less than three weeks later, on March 23, 2015, a stipulation was executed by plaintiffs' counsel and counsel for Dr. Melucci, Richard M. Melucci, M.D., P.C., and Long Island Anesthesia Physicians discontinuing, with prejudice, plaintiffs' claims against them. Subsequently, by order dated August 21, 2015, the Court granted motions by Vetrano, Dr. Melucci, Richard Melucci, M.D., P.C., and Long Island Anesthesia Physicians for an order discontinuing, with prejudice, plaintiffs' claims against them.

St. Charles Hospital now moves for an order (1) granting summary judgment in its favor on the complaint and any cross claims against it, and (2) amending the caption of this action by removing its name. The hospital argues it cannot be held vicariously liable for the alleged malpractice of Dr. Hindes, because he is not a staff member. It further argues the care rendered by its employees in connection with and during plaintiff's June 2010 admission did not deviate from accepted medical practice or cause plaintiff's alleged injuries, and that it had no duty to disclose to plaintiff the risks, benefits and alternatives to hip replacement surgery. The hospital's submissions in support of its motion include copies of the complaint and its answer; the deposition transcripts of plaintiff, Dr. Hindes and Dr. Melucci; the records relating to plaintiff's June 2010 hospital admission; and an expert affidavit of Dr. Philip Robbins. Plaintiffs oppose the motion, contending Dr. Robbins' affidavit is insufficient, as it fails to address all of the allegations of negligence contained in the bill of particulars. Plaintiffs also request that, in the event St. Charles is granted summary judgment in its favor, the Court "require the co-defendants to make a prima facie showing as to the malpractice of St. Charles Hospital or be precluded from asserting their rights under Article 16 at trial."

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted standards of medical practice, and (2) evidence that such departure was a proximate cause of the plaintiff's injury or damage (*see Duvidovich v George*, 122 AD3d 666, 995 NYS2d 616 [2d Dept 2014]; *Ahmed v Pannone*, 116 AD3d 802, 984 NYS2d 104 [2d Dept 2014], *lv dismissed* 25 NY3d 964, 8 NYS3d 261 [2015]; *Lau v Wan*, 93 AD3d 763, 940 NYS2d 662 [2d Dept 2012]; *Castro v New York City Health & Hosps. Corp.*, 74 AD3d 1005, 903 NYS2d 152 [2d Dept 2010]; *DiMitri v Monsouri*, 302 AD2d 420, 754 NYS2d 674 [2d Dept 2003]). On a motion for summary judgment dismissing a medical malpractice action, the moving defendant has the initial burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby (*see Macias v Ferzli*, 131 AD3d 673, 15 NYS3d 466 [2d Dept 2015]; *Michel v Long Is. Jewish Med. Ctr.*, 125 AD3d 945, 5 NYS3d 162 [2d Dept 2015]; *Savage v Quinn*, 91 AD3d 748, 937 NYS2d 265 [2d Dept 2012]; *Stukas v Streiter*, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]). If the defendant makes such a showing, the burden shifts to the plaintiff to submit evidentiary proof rebutting the defendant's prima facie showing (*see Gillespie v New York Hosp. Queens*, 96 AD3d 901, 947 NYS2d 148 [2d Dept 2012]; *Stukas v Streiter*, 83 AD3d 18, 24, 918 NYS2d 176).

Although a hospital may be vicariously liable under the doctrine of respondent superior for malpractice committed by a physician or other professional employee provided by the hospital (*Fiorentino v Wenger*, 19 NY2d 407, 414, 280 NYS2d 373 [1967]), it generally may not be held liable for malpractice committed by a physician not in its employment (*see Hill v St. Clare's Hosp.*, 67 NY2d 72, 499 NYS2d 904 [1986]; *Doria v Benisch*, 130 AD3d 777, 14 NYS3d 95 [2d Dept 2015]; *Salvatore v Winthrop Univ. Med. Ctr.*, 36 AD3d 887, 829 NYS2d 183 [2d Dept 2007]). An exception exists when a patient presents at a hospital seeking treatment

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from the hospital and not from a particular physician of the patient's own choosing (*see Loaiza v Lam*, 107 AD3d 951, 968 NYS2d 548 [2d Dept 2013]; *Sampson v Contillo*, 55 AD3d 588, 865 NYS2d 634 [2d Dept 2008]; *Salvatore v Winthrop Univ. Med. Ctr.*, 36 AD3d 887, 829 NYS2d 183; *Johnson v Jamaica Hosp. Med. Ctr.*, 21 AD3d 881, 800 NYS2d 609 [2d Dept 2005]; *Orgovan v Bloom*, 7 AD3d 770, 776 NYS2d 879 [2d Dept 2004]). Under this exception, liability is predicated on the hospital's apparent or ostensible agency over the independent physician (*see Hill v St. Clare's Hosp.*, 67 NY2d 72, 499 NYS2d 904; *Hannon v Siegel-Cooper Co.*, 167 NY 244, 60 NE 597 [1901]; *Loaiza v Lam*, 107 AD3d 951, 968 NYS2d 548; *Sampson v Contillo*, 55 AD3d 588, 865 NYS2d 634; *Dragotta v Southampton Hosp.*, 39 AD3d 697, 833 NYS2d 638 [2d Dept 2007]). Further, a hospital may be held concurrently liable with a private physician if its employees committed independent acts of negligence or failed to inquire about the correctness of a private physician's orders that were contrary to normal practice (*see Lormel v Macura*, 113 AD3d 734, 979 NYS2d 345 [2d Dept 2014]; *Corletta v Fisher*, 101 AD3d 929, 956 NYS2d 163 [2d Dept 2012]; *Martinez v La Porta*, 50 AD3d 976, 857 NYS2d 194 [2d Dept 2008]; *Cerney v Williams*, 32 AD3d 881, 822 NYS2d 548 [2d Dept 2006]).

The branch of St. Charles Hospital's motion seeking summary judgment in its favor on the medical malpractice claim against it is granted. The affidavit of Dr. Robbins, together with the deposition testimony of plaintiff, Dr. Hindes and Dr. Melucci, establishes that Dr. Hindes was not an employee of St. Charles Hospital; that plaintiff was admitted to the hospital on June 16, 2010 as Dr. Hindes' private patient; that Dr. Hindes, assisted by Vetrano, performed the hip replacement surgery on June 16 that allegedly caused plaintiff's nerve injuries; and that Dr. Hindes supervised plaintiff's post-operative treatment until she was transferred to the hospital's in-patient rehabilitation center on June 21, 2010. Thus, the hospital demonstrated it can not be vicariously liable for Dr. Hindes' alleged negligent acts (*see Muslim v Horizon Med. Group. P.C.*, 118 AD3d 681, 988 NYS2d 628 [2d Dept 2014]; *Corletta v Fisher*, 101 AD3d 929, 956 NYS2d 163; *Giambona v Hines*, 104 AD3d 807, 961 NYS2d 519 [2d Dept 2013]; *Gardner v Brookdale Hosp. Med. Ctr.*, 73 AD3d 1124, 901 NYS2d 680 [2d Dept 2010]). Moreover, Dr. Robbins' affidavit establishes a prima facie case that the hospital staff did not provide improper surgical equipment, ignore orders issued by Dr. Hindes or commit any other independent acts of negligence in rendering care to plaintiff (*see Tomeo v Beccia*, 127 AD3d 1071, 7 NYS3d 472 [2d Dept 2015]; *Fink v DeAngelis*, 117 AD3d 894, 986 NYS2d 212 [2d Dept 2014]; *Sela v Katz*, 78 AD3d 681, 911 NYS2d 112 [2d 2010]; *Martinez v La Porta*, 50 AD3d 976, 857 NYS2d 194).

The burden, then, shifted to plaintiffs to raise triable issues of fact as to whether St. Charles Hospital could be vicariously liable for Dr. Hindes' alleged negligence or whether its staff departed from good and accepted medical practice (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923). Here, plaintiffs do not dispute that plaintiff sought treatment from Dr. Hindes for her degenerative hip condition, and that she was admitted to the hospital as Dr. Hindes' patient. Further, plaintiffs failed to present any expert evidence indicating that St. Charles Hospital's staff committed independent acts of negligence or that it improperly followed orders issued by Dr. Hindes that were contraindicated by normal medical practice (*see Tomeo v Beccia*, 127 AD3d 1071, 7 NYS3d 472; *Schultz v Shreedhar*, 66 AD3d 666, 886 NYS2d 484 [2d Dept 2009]; *Toth v Bloshinsky*, 39 AD3d 848, 835 NYS2d 301 [2d Dept 2007]).

The branch of the motion for summary judgment dismissing the claim for lack of informed consent also is granted. "[W]here a private physician attends his or her patient at the facilities of a hospital, it is the duty of the physician, not the hospital, to obtain the patient's informed consent" (*Salandy v Bryk*, 55 AD3d 147, 152,


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864 NYS2d 46 [2d Dept 2008]; see *Doria v Benisch*, 130 AD3d 777, 14 NYS3d 95; *Tomeo v Beccia*, 127 AD3d 1071, 7 NYS3d 472). Plaintiffs, who did not address this application by St. Charles Hospital in their opposition papers, failed to raise a triable issue of fact.

However, the branch of the motion for summary judgment dismissing any cross claims asserted against St. Charles Hospital is denied, without prejudice, as copies of co-defendants' answers were not included with the moving papers (see CPLR 3212 [b]; *Roach v AVR Realty Co.*, 41 AD3d 821, 839 NYS2d 173 [2d Dept 2007]). Finally, plaintiffs' request for an order precluding the remaining defendants from asserting Article 16 rights against St. Charles Hospital is denied.

Accordingly, St. Charles Hospital's motion for summary judgment in its favor is granted to the extent that plaintiffs' causes of action against it are dismissed, and is otherwise denied.

Dated: 3/29/16

  
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A.J.S.C.

       FINAL DISPOSITION      X   NON-FINAL DISPOSITION