**SUPREME COURT OF THE STATE OF NEW YORK**
**NEW YORK COUNTY: IAS PART 6**

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SVETLANA LIPPMAN, MOTHER NATURAL GUARDIAN OF S. L., INFANT, and SVETLANA LIPPMAN, INDIVIDUALLY,

Plaintiffs,

-against-

COLUMBIA PRESBYTERIAN MEDICAL CENTER, NEW YORK PRESBYTERIAN HOSPITAL, CHRISTINE MERK, M.D., JAN M. QUAEGEBEUR, M.D., RISHI MALHOTRA, M.D., and JOHN DOES 1-20 who are persons, professional and/or doctors, nurses, medical personnel and/or others whose names are presently unknown, TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK,

Defendants.

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Index No. 105941/2009

**Decision and Order**



**JOAN B. LOBIS, J.S.C.:**

By this motion, sequence 6, defendants ask that I so order a stipulation discontinuing the action as to defendants Christine Merk s/h/a Christine Merk, M.D. and Rishi Malhorta, M.D. and grant summary judgment dismissing the complaint against the remaining defendants. The plaintiffs do not oppose the first branch of the motion but dispute the remaining defendants' right to summary judgment. For the reasons stated below, the second branch of the motion is denied.

This is a malpractice action alleging acts of medical malpractice during heart surgery performed on the infant S. L. on February 28, 2007 at the New York Presbyterian Hospital by Dr. Jan M. Quaegebeur, M.D. The child suffered a devastating stroke at some point during the surgery. The extent of his injuries are not disputed.

S. L. was born in Israel on May 8, 2002, with a congenital valve defect known as a pulmonary atresia with an intact ventricular septum. The condition restricts blood flow from the right ventricle to the lungs. Several days after his birth a Blalock-Taussig shunt was placed to create a conduit for blood flow between his aorta and the pulmonary arteries. Within a year after the procedure the child underwent an infundibulectomy valvuloplasty of the pulmonary valve and a Glenn anastomosis. The surgery created a connection between the superior vena cava and the right pulmonary artery so that deoxygenated blood could bypass the heart and travel directly to the lungs to be oxygenated. By 2006 the child had developed a condition defendants describe as severe subpulmonic stenosis or blockage below the pulmonary valve with a very prominent muscle bundle near the opening of the infundibulum of the right ventricular out-flow tract and hypertrophy of the right ventricle. Without correction the child could experience a sudden and potentially fatal arrhythmia. The plaintiffs' expert described the presence of an atrial septal defect (ASD) or patent foramen ovale (PFO), which is a hole between the right and left atria which allows blood to flow. It can also allow air to flow to the left side of the heart.

Dr. Quaegebeur performed a resection of the infundibular pulmonary stenosis on February 28, 2007 after the child was given medical clearance. During the pre-surgical work-up it was noted that the child had been limping or favoring his right foot. The condition was noted during a neurological consult but it was determined that the condition did not require a delay in the surgery. Dr. Quaegebeur performed the surgery on a beating heart with the use of a cardio-pulmonary bypass. The bypass lasted sixty-three minutes. At the end of the procedure a transesophageal echocardiogram (TEE) was taken. Air was observed in all four chambers and Dr.

Quaegebeur initiated a procedure to vent air from the aorta. After the operation the child was taken to the pediatric intensive care unit (PICU). It was apparent that the child had suffered some form of a cerebral event or stroke causing severe neurological injuries.

In support of the motion defendants offer the affirmations or affidavits of experts Dr. Vincent Parnell, a board-certified thoracic surgeon specializing in congenital cardiac surgery; Dr. Joseph Maytal, a board-certified pediatrician, psychiatrist, and neurologist; and Dr. Gordon Sze, a board-certified neurologist. It is the defendants' contention that the stroke was not a result of malpractice. Dr. Parnell recites in detail the pertinent medical history and the treatment provided to S. L. in February, 2007. The work-up given to the child properly cleared him for the procedure, he opines, and the surgery was done correctly and the treatment at all times was proper. As to the surgery itself, the expert opined that the technique Dr. Quaegebeur employed, operating on a still-beating heart, was an accepted method of performing surgery on the right side of the heart and that the issue of air in the heart was appropriately addressed by de-airing with a needle. He commented further that the medical literature does not establish a required standard of practice on the key issues raised in this lawsuit. It is his opinion that there is no definitive proof that an air embolism caused the child's neurological injuries. He states that obtaining informed consent does not require a surgeon to disclose the relative merits of various choices of techniques in performing a procedure. Finally, as to the claims of negligent hiring and supervision, the expert opines that no showing has been made of any specific departures.

Dr. Maytal's affirmation was offered to challenge plaintiffs' causation theory, that the injuries occurred because of an air embolism. His opinion is that the injuries occurred as a

result of global hypoperfusion, or decreased blood flow to the brain. This is a known risk of cardiac surgery. He opines that the imaging studies are consistent with this occurring and not of an air embolism. Dr. Gordon Sze offered greater detail on this issue. He describes the cerebral damage depicted on the MRI images and CT scans and concludes that hypoperfusion caused S. L.'s brain damage.

In opposition, plaintiffs argue that the injury to the child was the direct result of departures from the standard of care during S. L.'s surgery and defendants' failure to prevent air from entering into the child's circulatory system. The plaintiffs offer the affidavit of a board-certified cardiothoracic surgeon with over twenty years of experience in pediatric cardiothoracic surgery. He opines that because of S. L.'s condition the known danger of an air embolism was serious. In light of this, Dr. Quaegebeur's surgical choice to operate on a beating heart created a very strong likelihood of air escaping from the right atria into the left side of the heart and traveling to the brain. The expert also asserted that the method of de-airing the patient's heart Dr. Quaegebeur used could not remove air that had already escaped into S. L.'s body and listed a number of procedures that would have been more successful. In support of his conclusions he points to places in the record that mentioned embolic stroke as the cause of the child's injuries – not hypoperfusion. This expert also opines that informed consent was not obtained prior to surgery because the risks of operating on a beating heart were not disclosed. The expert disagreed with Dr. Parnell's statements characterizing the child's care as within the standard of care and denying causation.

The plaintiffs include an affidavit by Dr. Elis Lahat, a pediatric neurologist and the affirmation of Dr. Mitchell Chess, a pediatric radiologist. They state opinions contrary to the conclusions of Dr. Maytal and Dr. Sze regarding the cause of S. L.'s injury and cite to portions of the medical record and images that support their views that S. L. suffered an air embolism. Finally, Svetlana Lippman affirms that she was never given enough information about the risks and alternatives to the surgery.

In reply defense counsel, in addition to pointing out the lack of opposition to discontinuing against defendants Christine Merle, N.P. and Rishi Malhorta, M.D., argues that plaintiffs have not offered any opposition to defendants' arguments that there were no departures from the standard of care during the pre- and post-operative phases of S. L.'s care. By not opposing these arguments plaintiffs are limiting their claim for medical malpractice to Dr. Quaegebeur's surgery, and the fact that his employer, Columbia University, would be vicariously liable for his departures, and lack of informed consent. Defendants argue that on the balance of the claims, plaintiffs have not rebutted the opinions of defendants' experts. They argue that the plaintiffs' expert opinions are conclusory and speculative and that the mother's affirmation on the issue of informed consent is not substantiated nor does it meet the reasonableness test.

To prevail on summary judgment in a medical malpractice case, a defendant must demonstrate that he or she did not depart from accepted standards of practice or that, even if he or she did, this did not proximately cause the patient's injury. Roques v. Noble, 73 A.D.3d 204, 206 (1st Dep't 2010). The movant must provide an expert opinion that is detailed, specific and factual in nature. E.g., Joyner-Pack v. Sykes, 54 A.D.3d 727, 729 (2d Dep't 2008). The defense expert's

opinion should state "in what way" a patient's treatment was proper and explain the standard of care. Ocasio-Gary v. Lawrence Hosp., 69 A.D.3d 403, 404 (1st Dep't 2010). Further, it must "explain 'what defendant did and why.'" Id. (quoting Wasserman v. Carella, 307 A.D.2d 225, 226 (1st Dep't 2003)). If the movant fails to make a prima facie showing, then the burden does not shift to the plaintiff. Makinen v. Torelli, 106 A.D.3d 782, 784 (2nd Dep't 2013). If the defendant does make a prima facie showing, on the other hand, the plaintiff must "produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact . . . ." Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986). To meet that burden, a plaintiff must submit an expert affidavit attesting the defendant departed from the accepted standard of care and this proximately caused the injuries. See Rogues, 73 AD.3d at 207. Summary judgment is improper where conflicting expert opinions exist. Elmes v. Yelon, 140 A.D.3d 1009, - (2nd Dep't 2016). Instead, the conflicts must be resolved by the factfinder. See id.

Here the defendants established a prima facie right to summary judgment, but the plaintiffs have countered with sufficient evidence on the issues of malpractice by the surgeon, proximate cause, and informed consent to withstand summary judgment on those issues. Because there are sharply disputed issues of fact the issues of malpractice, causation, and informed consent must be tried. See Torres v. Gergnul, M.D., 146 A.D.3d 509 (1st Dep't 2017); Frye v. Montefiore Med. Ctr., 70 A.D.3d 15 (1st Dep't 2009). Furthermore, the claim of defendants that the reasonableness portion of informed consent must be asserted by an expert is incorrect. A lay witness may offer evidence as to the reasonableness of a person's decision to forego surgery. Hugh v. Ofodile, 87 A.D.3d 508 (1st Dep't 2011). Therefore, it is

ORDERED that summary judgment is granted as to defendants Christine Merk s/h/a Christine Merk, M.D. and Rishi Malhorta, M.D; and it is further

ORDERED that all papers, pleadings, and proceedings in the above-entitled action be amended to read:

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SVETLANA LIPPMAN, MOTHER NATURAL GUARDIAN OF S. L., INFANT, and SVETLANA LIPPMAN, INDIVIDUALLY,

Plaintiff,

Index No. 105941/2009

-against-

COLUMBIA PRESBYTERIAN MEDICAL CENTER, NEW YORK PRESBYTERIAN HOSPITAL, JAN M. QUAEGEBEUR, M.D., and JOHN DOES 1-20 who are persons, professional and/or doctors, nurses, medical personnel and/or others whose names are presently unknown, TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK,

Defendants.

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And it is further

ORDERED that the remainder of the motion is denied. The Clerk of the Court is directed to enter judgment accordingly.



Dated: March 8, 2017

ENTER:

JOAN B. LOBIS, J.S.C.