Levasseur v Temitope
2020 NY Slip Op 34196(U)
December 14, 2020
Supreme Court, Kings County
Docket Number: 515388/16
Judge: Genine D. Edwards
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At an IAS Term, Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 14th day of December 2020.

PRESENT:

HON. GENINE D. EDWARDS,
Justice.

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SOPHIA LEVASSEUR as Mother and Natural Guardian of L.L.,

Plaintiff,

- against -

JOSE TEMITOPE, M.D., JOHN P. WEIGAND, AU.D., CCC-A, FAAA, ANN THOMPSON-GAYLE, DOWNSTATE PEDIATRIC ASSOCIATES, JOHN WEIGAND AUDIOLOGY, P.C., and LIBERTY HEARING CENTER,

Defendants.

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DECISION AND ORDER

Index No. 515388/16

Mot. Seq. No. 8-9

The following e-filed papers read herein:	NYSCEF #:
Notice of Motion, Affirmations (Affidavits) and Exhibits Annexed	145-160; 163-178, 180
Affirmations (Affidavits) in Opposition and Exhibits Annexed	184-191, 212-216; 198-211
Reply Affirmations (Affidavits) and Exhibits Annexed	217; 218-219

In this action to recover damages for medical malpractice and lack of informed consent, defendant John P. Weigand, Au.D., CCC-A, FAAA (Dr. Weigand), together with defendant Ann Thompson-Gayle (Nurse Thompson), and separately defendant Temitope Jose, M.D., incorrectly sued herein as Jose Temitope, M.D. (Dr. Jose), together with his employer, defendant Downstate Pediatric Associates (Downstate Pediatrics), move, in each instance, for summary judgment dismissing as against them the complaint of plaintiff Sophia Levasseur as mother and natural guardian of infant L.L. (plaintiff) (Seq. No. 8 and 9, respectively). Plaintiff opposes the motions insofar as they seek dismissal of the complaint as against Dr. Weigand, Dr. Jose, and Downstate Pediatrics, but does not oppose such relief as to Nurse Thompson.

Background

Plaintiff's daughter, L.L. (the child), has been completely deaf in her right ear since birth in Sept. 2006 at nonparty SUNY Downstate Hospital (SUNY).[1] In medical terms, she suffers from nonhereditary, congenital, permanent, profound, sensorineural hearing loss in her right ear caused by the developmentally stenotic (narrowed) internal auditory canal in that ear. She failed two hearing screenings in her right ear during her otherwise uneventful birth admission and her two-day stay at the well-baby nursery.[2] Within one month after her birth, she underwent, on SUNY's referral in accordance with 10 NYCRR 69-8.4 (g) - (h) ("procedures for infant hearing screening"), an outpatient evaluation with licensed audiologist Dr. Weigand, to assess her hearing status. According to plaintiff's version of events as she recounted during her deposition, but which is contested by Dr. Weigand, he found that the child was *not* suffering from hearing loss in either ear.[3]

Starting shortly after her discharge from SUNY as a neonate (including before and after her visit to Dr. Weigand) and continuing for approximately the next eight years (2006-2014), the child was seen by her sole pediatrician and primary care professional, Dr. Jose, for periodic check-ups and routine (non-emergency) health complaints. Dr. Jose acknowledged that, in partnership with plaintiff, he was responsible for monitoring

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[1] The child was born at nearly full term (39 weeks and 3 days) to a 23-year-old, first-time mother, plaintiff herein. Delivery was vaginal, assisted by an episiotomy. The only complication of labor, which was induced or stimulated for failure to progress, was plaintiff's elevated blood pressure. The child's Apgar scores were 8 and 9 at one and five minutes post-birth, respectively. As a newborn, she was on the smaller side: her birth weight was 2,680 grams (approximately 5.9 pounds); her length, 18 inches; her head circumference, 31 centimeters (approximately 12.2 inches). *See* SUNY records, pages 0005, 009-010, 051.

[2] *See* SUNY records, pages 032-033.

[3] *See* S. Levasseur Nov. 6, 2018 EBT tr at page 59, lines 9-22; page 86, lines 4-6; page 147, lines 7-18; S. Levasseur Mar. 21, 2019 EBT tr at page 93, line 20 to page 94, line 14.

the child's general health, development, and well-being.[4] Dr. Jose further indicated that if any of his young patients failed to meet a particular developmental milestone, he was responsible for initiating appropriate referrals for medical specialty evaluations.[5]

Throughout his approximately eight-year-long physician/patient relationship with the child, Dr. Jose was completely unaware that she was suffering from any hearing loss. Plaintiff's deposition testimony is at odds with that of Dr. Jose as to whether she told him about the child's failure to pass the hearing test during the birth admission. According to plaintiff, she told Dr. Jose, before she took the child to Dr. Weigand, about the child's repeated failure to pass the hearing test during the birth admission.[6] Dr. Jose's notes and his deposition testimony are to the contrary. In particular, Dr. Jose's notes for the child's first post-discharge visit to him on Sept. 15, 2006 (which occurred 12 days prior to her visit to Dr. Weigand on Sept. 27, 2006) state that the child "passed" the hearing test.[7] According to Dr. Jose, he was unaware, until he was served with process in this action in Sept. 2017, of the child's failure to pass the hearing tests during the birth admission.[8]

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[4] *See* Dr. Jose EBT tr at page 31, lines 3-6; page 115, lines 11-14.

[5] *See* Dr. Jose EBT tr at page 118, lines 2-11.

[6] *See* S. Levasseur Nov. 6, 2018 EBT tr at page 67, lines 7-21.

[7] *See* Dr. Jose's notes, page 020.

[8] *See* Dr. Jose EBT tr at page 26, lines 4-8. In other respects, Dr. Jose's and plaintiff's respective accounts of the events following the child's Sept. 15, 2006 visit to him are consistent. Dr. Jose testified – and plaintiff so confirmed in her deposition testimony – that throughout his treatment and observation of the child he had been unaware of: (1) the child's hearing loss; (2) the child's visit to Dr. Weigand on Sept. 27, 2006; and (3) Dr. Weigand's findings at that visit. *See* Dr. Jose EBT tr at page 28, line 14 to page 29, line 18; page 30, line 21 to page 31, line 2; page 160, lines 17-18; page 161, lines 11-13; page 166, lines 3-12. *See also* S. Levasseur Nov. 6, 2018 EBT tr at page 132, lines 15-22; page 136, lines 10-16; S. Levasseur Mar. 21, 2019 EBT tr at page 94, lines 15-19.

The record reflects that Dr. Jose, at nearly every visit throughout his approximately eight-year-long treatment and observation of the child, noted that her hearing was "normal."[9] Dr. Jose's repeated findings that the child's hearing was "normal" were apparently based on the lack of parental concerns.[10] At no time, did he test the child's hearing by practical means; for example, by evaluating her response to a soft whisper directed to one of her ears and then to the other.

Further, Dr. Jose remained unaware that the child was suffering from speech/language impairments. Dr. Jose's notes reflect that he had been performing ongoing surveillance of the child's communicative development starting when she was approximately two months old. Specifically, Dr. Jose described the child's speech/language development at her Nov. 8, 2006 visit when she was 9 weeks and 5 days old as being able to "vocalize."[11] At her next visit, on Apr. 25, 2007, when she was 7 months and 24 days old, Dr. Jose described her speech/language development at that time as a "babble."[12] Dr. Jose elaborated in his deposition testimony that:

> "From six to nine months babies . . . tend to just babble . . . ma, ma, ma, ma, ma, da, da, da, da, da, one syllable. And as they progress towards nine months it becomes multiple different syllables. We just tend to group that all as babbling."[13]

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[9] *See* Dr. Jose's notes, pages 003-004, 006-009, 012-013, 015-016, 018.

[10] *See* Dr. Jose EBT tr at page 32, lines 9-16; page 93, lines 10-14; page 153, line 7 to page 154, line 6; page 154, line 24 to page 155, line 7.

[11] *See* Dr. Jose's notes, page 017.

[12] *See* Dr. Jose's notes, page 015.

[13] *See* Dr. Jose EBT tr at page 73, lines 14-20.

At each of the child's subsequent visits, including her last visit on Aug. 29, 2014, when she was 7 years and 11 months old, Dr. Jose reiterated in her chart his Apr. 25, 2007 description of her speech/language development as a "babble."[14] He conceded in his deposition testimony that his subsequent, repeated descriptions of the child's speech/language development as a "babble" was erroneous.[15]

Absent from Dr. Jose's appreciation of the child's speech/language development were such confounding factors as: (1) the child spent her early formative years in Haiti where she was cared for by her maternal grandmother who spoke only Creole; (2) when she first learned to speak which was in Haiti, she spoke only Creole; (3) upon her return to the United States, it took her approximately one year to learn to speak English; (4) both of the child's parents were non-native English speakers; and (5) with the exception of Haiti, the child resided since birth and until July 2014 in an underserved school district where, according to plaintiff, her hearing was not screened in any of the public and charter schools she attended in Kings County.[16]

The child's hearing loss was not detected until after her parents moved to a better-served school district in Nassau County in July 2014. Sometime in the first half of 2015, the Nassau County school district screened the child's hearing and, upon screening, reconfirmed the child's prior failure to pass the hearing test in her right ear approximately

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[14] *See* Dr. Jose's notes, page 003-014.

[15] *See e.g.* Dr. Jose EBT tr at page 81, lines 16-19; page 81, line 21 to page 82, line 4; page 83, lines 6-12; page 84, lines 5-7 and 13-23; page 87, lines 15-23; page 90, lines 8-16; page 92, lines 9-17.

[16] *See* S. Levasseur Nov. 6, 2018 EBT tr at page 55, lines 11-21; S. Levasseur Mar. 21, 2019 EBT tr at page 77, lines 14-17. *See also* Dr. Jose's notes, pages 009 and 015.

nine years earlier during the birth admission. In June 2015, nonparty otolaryngologist Warren H. Zelman, M.D. (Dr. Zelman), with the aid of a CT scan of the child's temporal bones (the first CT scan of that type in her life), diagnosed her with congenital, permanent, profound, sensorineural hearing loss in her right ear. The correct diagnosis was made when the child was three months shy of her ninth birthday, ready to start third grade in Nassau County. Only then was she enrolled in intervention that was specifically addressed to her hearing loss and its sequelae. She received from the Nassau County school district – and uses at school – an earbud-shaped personal amplifier to wear in her left (good) ear. She receives, in addition to preferential seating, extra help in school in several subjects (such as reading and math), extra time on her examinations, and a weekly training session in the use of her amplifier. She underwent a course of speech therapy. Although, following the belated diagnosis of hearing loss, she apparently caught up with her peers in most of her schoolwork (at least, as of the time of her deposition in Aug. 2019), some of its consequences persist. She is self-conscious about using her personal amplifier in public and uses it in school only, and only to a few of her classes. Questioning why she is different from others, she mentioned her suicidal ideation in her class composition in 2017. Her expression of self-harm prompted counseling intervention in the form of periodic psychotherapy sessions with a child psychologist starting in September 2017 and continuing to the present.

According to the parents, the child's spoken language level is not commensurate with that of her peers in terms of pronunciation, vocabulary, and grammar.[17]

[17] *See* S. Levasseur (plaintiff-mother) Nov. 6, 2018 EBT tr at page 198, line 17 to page 199, line 12; *see also* J. Levasseur (nonparty father) EBT tr at page 165, line 10 to page 166, line 16.

Plaintiff observed that when her daughter is talking, her mouth is "kind of crooked" or "twisted" toward her left (good) ear.[18]

The child receives ongoing audiologic monitoring with Dr. Zelman at six-month intervals to ensure that the hearing in her left (good) ear remains uncompromised. The child's left (good) ear presents, on a CT scan, a "very mild asymmetric enlargement of the left vestibular aqueduct of undetermined significance."[19] At Dr. Zelman's instructions, she avoids participation in all contact sports.

On Aug. 31, 2016, plaintiff commenced this action for medical malpractice and lack of informed consent against Dr. Weigand, Nurse Thompson, Dr. Jose, and Downstate Pediatrics, among others (the first and second causes of action, respectively).[20] Defendants joined issue. After discovery was completed and a note of issue was filed, the instant motions followed. As stated, plaintiff does not object to the dismissal of Nurse Thompson from the action. Further, plaintiff's informed consent cause of action as against the other moving defendants fails, as she does not allege lack of consent in connection with any specific affirmative treatment or testing involving a violation of the child's physical integrity.[21] *See* Public Health Law § 2805-d; *Rosenthal v. Alexander*, 180 A.D.3d 826, 118 N.Y.S.3d 658 (2d Dept., 2020).

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18. *See* S. Levasseur Mar. 21, 2019 EBT tr at page 111, lines 17-22; page 131, lines 4-9; page 132, lines 15-17)

19. *See* Dr. Zelman's records.

20. Plaintiff discontinued her claims, with prejudice, against the other named defendants, John Weigand Audiology, P.C., and Liberty Hearing Center (NYSCEF #144).

21. *See* Amended/Supplemental Verified Bills of Particulars as to Dr. Weigand and Dr. Jose, each dated Mar. 11, 2019.

Discussion

The elements of a medical malpractice cause of action are that the medical provider "deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries." *Stukas v. Streiter*, 83 A.D.3d 18, 918 N.Y.S.2d 176 (2d Dept., 2011). A medical provider "seeking summary judgment must make a prima facie showing that there was no departure from good and accepted medical practice *or* that the plaintiff was not injured thereby." *Id.* (emphasis added). The plaintiff is required only to rebut the defendant's prima facie showing; that is, "to defeat summary judgment, the [plaintiff] need only raise a triable issue of fact with respect to the element of the cause of action or theory of nonliability that is the subject of the [defendant's] prima facie showing." *Id.*

Dr. Weigand

In support of his motion, Dr. Weigand submitted, among other documents, an expert affirmation by a New York State-licensed and board-certified otolaryngologist, Lawrence Lustig, M.D. (Dr. Lustig), who opined that the care and treatment rendered by Dr. Weigand to the child comported with good and accepted audiologic practice.[22]

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[22] The concluding paragraph of Dr. Lustig's affirmation, as quoted in full below, makes it clear that he opined solely on the departure element:

> "In sum, it is my opinion, to a reasonable degree of medical certainty, that there is no theory of good otolaryngology practice that could find that . . . Dr. Weigand performed any action with relation to the [child] that was below the standards of practice within the field of otolaryngology. It is my opinion, that summary judgment should be granted to [this] defendant[ ] and that all causes of action against [him] be dismissed."

(NYSCEF #148, ¶ 25 [unnecessary capitalization omitted]).

Dr. Lustig based his opinion on three pages of the child's billing records.[23] Those records, being uncertified, are not admissible as hospital bills under CPLR 4518 (b).[24] Dr. Weigand also failed to lay any foundation for their admissibility as business records under CPLR 4518 (c). *See Vaccariello v. Meineke Car Care Ctr., Inc.*, 136 A.D.3d 890, 26 N.Y.S.3d 139 (2d Dept., 2016); *Annan v. Abdelaziz*, 68 A.D.3d 794, 889 N.Y.S.2d 481 (2d Dept., 2009). More fundamentally, Dr. Lustig ignored plaintiff's contradictory account, as developed in her deposition testimony, of what transpired at the child's visit to Dr. Weigand. *See Larcy v. Kamler*, 185 A.D.3d 564, 127 N.Y.S.3d 122 (2d Dept., 2020); *Zapata v. Buitriago*, 107 A.D.3d 977, 969 N.Y.S.2d 79 (2d Dept., 2013). Plaintiff's deposition testimony in that regard "was not incredible as a matter of law . . . [, nor] was [her description of the child's visit to Dr. Weigand] manifestly untrue, physically impossible, or contrary to common experience." *Allen v. Federation of Jewish Philanthropies of N.Y.*, 175 A.D.3d 1226, 109 N.Y.S.3d 181 (2d Dept., 2019) (internal quotation marks omitted). Accordingly, Dr. Weigand failed to make a prima facie showing that he did not depart from the accepted standards of audiologic practice,

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[23] *See* Dr. Lustig's Affirmation, ¶¶ 10-12, 15-16 (NYSCEF #148); Billing Records (NYSCEF #160). Dr. Weigand's paper records – none were electronic – regarding the child were lost, and he had no independent recollection of either the child or plaintiff. Dr. Weigand EBT tr at page 32, lines 2-7; page 39, line 2 to page 40, line 9; page 59, lines 4-15.

[24] CPLR 4518 (b) provides, in relevant part, that:

> "A hospital bill is admissible in evidence under this rule and is prima facie evidence of the facts contained, *provided it bears a certification* by the head of the hospital or by a responsible employee in the controller's or accounting office that the bill is correct, that each of the items was necessarily supplied and that the amount charged is reasonable" (emphasis added).

thus making it unnecessary to consider the sufficiency of plaintiff's opposition. *See e.g. E.K. v. Tovar*, 185 A.D.3d 803, 127 N.Y.S.3d 580 (2d Dept., 2020).

Dr. Jose And Downstate Pediatrics

In support of their motion, Dr. Jose and his employer, Downstate Pediatrics, submitted, among other documents, an expert affirmation by a New York State-licensed and board-certified pediatrician, Alan Salem, M.D. (Dr. Salem), who opined that "any injuries claimed in this suit . . . cannot be medically attributed to any action or inaction on behalf of Dr. Jose or [Downstate Pediatrics]."[25] Dr. Salem advanced three arguments in support of his opinion regarding lack of proximate cause: (1) Dr. Jose (and vicariously Downstate Pediatrics) had nothing to do with the child's congenital hearing loss; (2) plaintiff, at least after her visit to Dr. Weigand, never expressed any concerns to Dr. Jose about the child's hearing; in other words, because plaintiff was in charge of the child, Dr. Jose, in his limited role as a pediatric consultant, was only required to address plaintiff's non-hearing-related concerns; and (3) the child, following the correct diagnosis in Nassau County in 2015 after Dr. Jose's care and treatment ended, was reasonably well adjusted – which is, essentially, a "no harm, no foul" argument.[26]

There are two fundamental problems with Dr. Salem's opinion on the subject of proximate cause (he did not address the issue of departures). Initially, Dr. Salem ignored or glossed over the relevant portions of the record as summarized below:

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[25] *See* Dr. Salem's Affirmation, ¶ 8 (NYSCEF #165).

[26] Dr. Salem's Affirmation, ¶ 8.

(1) The conflicting deposition testimony as to whether or not plaintiff told Dr. Jose at the child's first post-discharge visit to him on Sept. 16, 2006 (*i.e.*, before her visit to Dr. Weigand on Sept. 27, 2006) about the child's repeated failure to pass the hearing test during the birth admission.

(2) Dr. Jose's notes, as well as his deposition testimony, reflecting that he assessed the child's overall condition, including her hearing and speech/language development, at almost every visit throughout his eight-year-long (2006-2014) observation of the child. In particular, Dr. Jose: (a) consistently, but incorrectly, assessed the child's hearing to be "normal"; and (b) failed to formally re-assess her language development for many years following his early assessment of the child's speech/language development as a "babble."

Separately, Dr. Salem ignored or glossed over the adverse effects of the more than eight-year-long delay of the diagnosis of the child's unilateral deafness on her speech/language development. The congenital nature of the child's unilateral deafness cannot shield Dr. Jose, as her pediatrician and primary healthcare professional, from ensuring that her speech and language met the applicable developmental milestones.[27] In that regard, plaintiff's expert, New York State-licensed and board-certified pediatrician, Mitchell I. Weiler, M.D. (Dr. Weiler), raised a triable issue of fact on the subject of proximate cause, warranting a trial.[28]

According to Dr. Weiler who reviewed the record extensively as reflected by his detailed expert affirmation, "[b]ecause the [child] was deprived of an opportunity to

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[27] To the extent Dr. Jose and Downstate Pediatrics suggest that plaintiff, a licensed practical nurse working with adult patients, was negligent in failing to alert Dr. Jose about the child's speech/language impairments and to request referrals to audiologists and otolaryngologists, her actions or inactions cannot be imputed to the child. *See e.g. Martinez v. Kaz USA, Inc.*, 183 A.D.3d 720, 121 N.Y.S.3d 880 (2d Dept., 2020)

[28] Dr. Weiler's Affirmation, ¶¶ 40-45 (NYSCEF #199). Dr. Weiler also raised a triable issue of fact on the subject of Dr. Jose's (and vicariously Downstate Pediatrics') departures. *Id.*, ¶¶ 30-39).

ameliorate . . . [or] mitigate . . . her condition during the crucial time period, *i.e.*, her earliest years of development, she . . . suffered loss, severe psychological distress and embarrassment over her condition [as well as] . . . suffered a years-long and crucial period of impaired development due to her untreated condition during that time."[29] It is for the jury to assess, with the aid of expert testimony, whether Dr. Jose's alleged failure to detect (or even suspect) the child's hearing loss and his allegedly inadequate monitoring of the child's speech/language development in light of her then-undetected hearing loss, proximately caused her alleged speech/learning delays, social-emotional deficiencies, and decreased academic outcomes. Contrary to Dr. Salem's contention in his reply affirmation, the permanency of the child's hearing loss, whether she is (or is not) a viable candidate for a cochlear implant, and whether cochlear implantation may (or may not) be helpful to alleviate her hearing loss, are all irrelevant.[30] In further contradiction to Dr. Salem's argument, Dr. Weiler's opinion regarding proximate cause is not conclusory or without evidentiary value. *See Uchitel v. Fleischer*, 137 A.D.3d 1111, 27 N.Y.S.3d 668 (2d Dept., 2016).

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[29] Dr. Weiler's Affirmation, ¶ 45.

[30] Dr. Salem Reply Affirmation, ¶¶ 6-9 (NYSCEF #219).

Conclusion

Accordingly, it is

ORDERED that in Seq. No. 8 the joint motion of Dr. Weigand and Nurse Thompson is *granted to the extent that*: (1) all causes of action as against Nurse Thompson are dismissed without opposition, and without costs and disbursements, and (2) the informed consent cause of action as against Dr. Weigand is dismissed, and the remainder of their motion is denied; and it is further

ORDERED that in Seq. No. 9 the joint motion of Dr. Jose and Downstate Pediatrics is *granted to the extent that* the informed consent cause of action is dismissed as against both of them, and the remainder of their motion is denied; and it is further

ORDERED that to reflect the dismissal from this action of Nurse Thompson and the prior stipulated dismissal of the remaining defendants, John Weigand Audiology, P.C., and Liberty Hearing Center, as well as to correct Dr. Jose's name, the caption is amended to read in its entirety as follows:

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SOPHIA LEVASSEUR as Mother and
Natural Guardian of L.L.,

Plaintiff,

- against -

JOSE TEMITOPE, M.D., a/k/a TEMITOPE JOSE, M.D.,
JOHN P. WEIGAND, AU.D., CCC-A, FAAA,
and DOWNSTATE PEDIATRIC ASSOCIATES,

Defendants.

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; and it is further

ORDERED that plaintiff's counsel shall electronically serve a copy of this Decision and Order with notice of entry on defendants' respective counsel and shall electronically file an affidavit of said service with the Kings County Clerk.

This constitutes the Decision and Order of the Court.

ENTER,

J. S. C.