

Joseph v Long Is. Jewish Med. Ctr.
2020 NY Slip Op 35131(U)
January 6, 2020
Supreme Court, Nassau County
Docket Number: Index No. 603591/18
Judge: Diccia T. Pineda-Kirwan
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Short Form Order

NEW YORK SUPREME COURT - NASSAU COUNTY

Present: Honorable DICCIA T. PINEDA-KIRWAN
Justice

IA PART 30

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ORINE JOSEPH and MD HUMAYAN KABIR,

Index No.: 603591/18
Motion Date: 11/7/19
Motion Cal. #: 8, 9
Seq. No.: 1, 2

Plaintiff(s),

-against-

LONG ISLAND JEWISH MEDICAL
CENTER, ET AL,

Defendant(s).

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The following numbered papers read on these motions by defendants for summary judgment.

PAPERS	NUMBERED
Notices of Motion-Affidavits-Exhibits.....	EF 26 - 62
Answering-Affidavits-Exhibits.....	EF 63 - 68
Reply.....	EF 69 - 74

Upon the foregoing cited papers, and after conference, it is ordered that the motions by defendants for summary judgment, pursuant to CPLR 3212, are consolidated for disposition, and are decided as follows:

Plaintiffs commenced the instant action to recover for injuries plaintiff Orine Joseph allegedly sustained from the improper placement of a catheter by defendant Steven J. Bernstein, M.D., an anesthesiologist, while she was admitted for labor and delivery from November 30, 2015, through December 7, 2015, at defendant Long Island Jewish Medical Center (LIJMC). Plaintiffs claim that the negligent placement of the epidural catheter caused Ms. Joseph permanent nerve injury, including a left foot drop, left sided deep peroneal neuropathy, constant pain to the left lower extremity, and traumatic spondylopathy of the lumbar spine. Defendants now move for summary judgment on the issue of liability.

The proponent of a summary judgment motion has the burden of submitting evidence in admissible form, demonstrating the absence of any triable issues of fact and establishing entitlement to judgment as a matter of law (*see Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Only when the movant satisfies its initial burden will the burden shift to the opponent, “to lay bare his or her proof and demonstrate the existence of triable issues of fact” (*Chance v Felder*, 33 AD3d 645, 645-646 [2006]).

Beginning with defendants LIJMC and Northwell Health, Inc. (Northwell), in support, they submit, among other things, the depositions of plaintiffs and Dr. Bernstein, the affirmations of Richard M. Smiley, M.D., an anesthesiologist, and Ms. Joseph's medical records.

Pursuant to the LIJMC medical chart, Ms. Joseph presented to LIJMC on November 30, 2015, at 9:32A.M. At approximately 4:09P.M., non-party Dr. Haren Heller, M.D. administered an epidural catheter in Ms. Joseph at L3-4. At 12:12A.M. on December 1, 2015, the Certified Registered Nurse Anesthetist noticed that the catheter had become dislodged and informed Dr. Bernstein at 12:25A.M. Dr. Bernstein performed a combined spinal-epidural procedure at 1:09 A.M. At 3:05 A.M., Ms. Joseph was noted to have some discomfort in her left leg. Ms. Joseph gave birth at 3:37 A.M. The epidural catheter was removed with tip intact at 4:15 A.M. Between 7:00 and 7:20 A.M., Ms. Joseph reported experiencing sensory loss and pinching pain down her left lower extremity below the knee, with pain upon touch.

At 11:15 A.M., an obstetric resident spoke to Ms. Joseph and noted that she began feeling pain after the epidural was first replaced, experiencing muscle jerks, and then numbness in her left lower extremity. When her sensation returned, she felt severe pain in her left leg below the knee, limiting her range of motion. Ms. Joseph continued to experience pain and limited range of motion in her left lower extremity through December 4, 2015, when her symptoms slightly improved. She was discharged on December 7, 2015. Ms. Joseph returned to LIJMC on December 11, 2015, complaining of left leg swelling and pain. She subsequently had MRIs of her lumbar and thoracic spine and EMG/NCV study, all of which revealed abnormalities.

Ms. Joseph states that during the reinsertion of her epidural catheter, she felt Dr. Bernstein begin to insert the needle and then pull it back out. Dr. Bernstein then attempted to insert the needle again unsuccessfully on three different tries, and on each one, her left leg jumped, and she cried in pain. The catheter was finally placed on the fifth try.

Dr. Smiley opines that the care and treatment rendered by LIJMC's staff was at all times within accepted standards of practice. When Ms. Joseph began voicing her postpartum complaints of pain and numbness in her left lower extremity, LIJMC staff provided the applicable screenings, neurology, physical consultations and proper follow-up treatment meeting the required standard of good and accepted medical practice. Dr. Smiley stated that the dislodgement of Ms. Joseph's original epidural catheter was not a departure from the standards of good and accepted medical practice by the LIJMC staff as it is not uncommon for epidural catheters to become dislodged from a patient's back and not be

immediately noticed by the staff when a patient is in active labor and lying on their back. The increased pain that Ms. Joseph felt could easily have been attributed to the progression of her labor rather than the dislodgement of catheter. Here, LIJMC's staff closely monitored Ms. Joseph, timely assessed that she was not receiving proper relief from the epidural, deduced the dislodgement of the catheter, and promptly and appropriately notified the attending anesthesiologist, Dr. Bernstein. Dr. Smiley concludes that no acts or omissions of LIJMC or its staff were the proximate cause of Ms. Joseph's injuries, and the care and treatment rendered by LIJMC's staff was at all times within accepted standards of practice.

“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 [2005]). “[T]he fact that doctors are affiliated with a hospital and have been granted admitting privileges has been held insufficient to impose vicarious liability on the hospital” (*Nagengast v Samaritan Hosp.*, 211 AD2d 878, 879 [1995]). An exception exists where a patient goes to a hospital emergency room and seeks treatment from the hospital itself instead of a physician of the patient's own choosing (*see Brink v Muller*, 86 AD3d 894, 896 [2011]). In that case, the hospital may be liable under a theory of apparent or ostensible agency, where the words or conduct of the hospital, communicated to a third party, are sufficient to give “the appearance and belief that the agent possesses authority to act on behalf of the principal” (*Searle v Cayuga Med. Ctr. at Ithaca*, 28 AD3d 834, 836 [2006]).

Here, LIJMC and Northwell have established that they are not vicariously liable for the alleged malpractice of Dr. Bernstein by submitting evidence that plaintiffs were referred to LIJMC by their private obstetrician, and were treated by private attending physicians, such as Dr. Bernstein, who were not their employees (*see Giambona v Hines*, 104 AD3d 807, 811 [2013]; *Corletta v Fischer*, 101 AD3d 929, 930 [2012]). Specifically, Dr. Bernstein testified that he was a self-employed anesthesiologist who practices mainly at LIJMC as a “voluntary attending,” but that he is not employed or compensated by LIJMC. Additionally, the emergency room exception does not apply as Ms. Joseph was treated in the Labor and Delivery unit of the Department of Obstetrics and Gynecology, and there is no evidence of any words or actions by the principal to give plaintiffs the appearance and belief that Dr. Bernstein had the authority to act on behalf of LIJMC and Northwell (*see Sullivan v Sirop*, 74 AD3d 1326, 1328 [2010]; *Klippel v Rubinstein*, 300 AD2d 448, 449 [2002]).

Furthermore, LIJMC and Northwell have established that the hospital staff did not commit any independent acts of negligence (*see Fink v DeAngelis*, 117 AD3d 894, 896 [2014]). Dr. Bernstein testified that Ms. Joseph's epidural catheter was originally placed by non-party Dr. Heller, and that he was the only one administering anesthesia to Ms. Joseph on December 1, 2015. Dr. Smiley further opined that LIJMC's staff timely notified Dr. Bernstein of the catheter dislodgement and did not commit any acts or omissions that proximately caused plaintiffs' injuries.

In opposition, plaintiffs submit, among other things, the affirmation of Aharon Gutterman, M.D., an attending anesthesiologist, who opines defendants departed from the standard of care in their treatment of Ms. Joseph by failing to recognize the signs and symptoms of spinal nerve root compression from catheter malposition, and failing to properly and timely reposition the catheter. Here, however, the evidence shows that Dr. Bernstein was solely responsible for reinserting Ms. Joseph's catheter and there is no evidence of any independent acts or omissions by hospital staff. Thus, LIJMC and Northwell are entitled to judgment as a matter of law as to the first cause of action asserted against them for medical malpractice.

Additionally, with respect to a cause of action alleging lack of informed consent, it is well settled that a private physician attending to his or her patient at a hospital has the duty to obtain their patient's informed consent (*see Doria v Benisch*, 130 AD3d 777, 778 [2015]). Thus, this claim is dismissed as to LIJMC and Northwell.

Furthermore, the third cause of action asserting MD Humayan Kabir's derivative claims is dismissed, as dismissal of Ms. Joseph's direct claim mandates dismissal of her husband's derivative action as against LIJMC and Northwell (*see Djeddah v Williams*, 83 AD3d 590 [2011]; *Camadeo v Leeds*, 290 AD2d 355 [2002]).

As to defendant Dr. Bernstein, in support, he submits, among other things, the affirmations of Joy Emma-Lee Schabel, M.D., an anesthesiologist, and Mark A. Kaufman, M.D., a neurologist.

Dr. Schabel states within a reasonable degree of medical certainty that the combined spinal epidural was a proper procedure for Ms. Joseph as it delivers quick pain relief, and is the preferred method of relieving pain during labor. She opines that the spinal epidural and insertion of the catheter was performed correctly. Based on Ms. Joseph's MRI and EMG/NCV studies, Ms. Joseph's peroneal nerve palsy was caused by pressure on the peroneal nerve during labor and delivery, and the abnormalities on Ms. Joseph's MRIs of her thoracic and lumbar spine appear to be pre-existing as they do not correlate with either the placement of the combined spinal epidural, or her sensory and motor deficits.

Dr. Kaufman opines that Ms. Joseph's alleged injuries were the result of a spinal cord abnormality which is congenital in nature and not the result of an epidural catheter insertion. He states that the MRIs of Ms. Joseph's back show that her spinal abnormality is located above the area where Dr. Bernstein inserted the catheter, and that the EMG studies indicate that any nerve dysfunction originated at the knee or slightly above the knee. Had there been an injury to the catheter site at L3-4, Ms. Joseph would have had pain between her lower back and left knee, which she never complained she felt.

Both Drs. Schabel and Kaufman conclude that Dr. Bernstein's treatment was at all times in accordance with good and accepted medical practice, and that the combined spinal epidural was not a proximate cause of her injuries.

In opposition, plaintiffs submit, among other things, the affirmation of Aharon Gutterman, M.D., an attending anesthesiologist.

Dr. Gutterman opines that Dr. Bernstein departed from the standard of care by failing to recognize the signs and symptoms of spinal nerve root compression from catheter malposition, and failing to properly and timely reposition the catheter to take pressure off Ms. Joseph's spinal nerve root. He refers to a note by Dr. Bernstein that during the reinsertion of the catheter, Ms. Joseph experienced paresthesias, which is a pins-and-needles or numbness sensation. Paresthesias, and Ms. Joseph's other symptoms, such as pain and leg jumping during a spinal catheter insertion are signs of pressure on a spinal nerve root or a malpositioned catheter. Additionally, injecting drugs or anesthetics into a malpositioned catheter falls below the standard of care and can further exacerbate damage to a spinal nerve root. He states that by the time the catheter was removed, it had been pressing on her nerve root for approximately three hours, which is sufficient time to cause her to suffer permanent nerve damage. He concludes that Dr. Bernstein's departures were a proximate cause of Ms. Joseph's injuries.

Dr. Gutterman points out that Drs. Schabel and Kaufman do not address Ms. Joseph's testimony that her left leg jumped three times, and that she felt a "cold and painful" sensation when the epidural was administered. He disagrees with the interpretations by Drs. Schabel and Kaufman of Ms. Orine's back MRIs, and avers they show nerve injury from level T10, and T11-12, to the conus, which is defined as the lower end of the spinal cord, and encompasses the area where the catheter was placed. He further does not accept the conclusions of Drs. Schabel and Kaufman that Ms. Joseph's injuries were due to preexisting conditions. He asserts that an obstetrical peroneal nerve injury, such as the one alleged by Dr. Schabel, could only occur if Ms. Joseph was placed in the lithotomy position, a particular placement of the hips and legs, and there is no evidence that

Ms. Joseph was placed in this position. He also disagrees with Dr. Kaufman's assessment that an injury at L3-4 would have presented with radiating pain between Ms. Joseph's lower back and knee, as L3-4 damage commonly presents as peripheral nerve pain and damage. He opines that a malpositioned catheter at L3-4 explains all of Ms. Joseph's claimed injuries.

A physician is liable for medical malpractice where the physician deviates or departs from accepted community standards of practice, and that departure was a proximate cause of the plaintiff's injuries (*see Leigh v Kyle*, 143 AD3d 779, 781 [2016]). In order to establish entitlement to summary judgment on a medical malpractice claim, a physician must establish either that there was no departure, or that any departure was not a proximate cause of plaintiff's injuries (*see Id*). Whereas here, the parties adduce conflicting medical expert opinions, summary judgment is inappropriate (*see Feinberg v Feit*, 23 AD3d 517, 519 [2005]). Thus, Dr. Bernstein is not entitled to judgment as a matter of law.

Accordingly, the motion by defendants LIJMC and Northwell is granted, and Dr. Bernstein's motion is denied.

Any request for relief not expressly granted herein is denied.

This constitutes the decision and order of the Court.

Dated: January 6, 2020



DICCIA T. PINEDA-KIRWAN, J.S.C.

ENTERED

JAN 29 2020

NASSAU COUNTY
COUNTY CLERK'S OFFICE