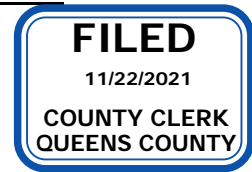


Staab v Long Is. Jewish Med. Ctr.
2021 NY Slip Op 33082(U)
November 19, 2021
Supreme Court, Queens County
Docket Number: Index No. 701455 2019
Judge: Peter J. O'Donoghue
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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PETER J. O'DONOGHUE IA Part MD
Justice



KRISZTINA STAAB and JESSE STAAB,

Plaintiff
-against-

Index
Number 701455 2019

LONG ISLAND JEWISH MEDICAL CENTER, et. al., Date July 21, 2021

Defendants

Motion Seq. Nos. 3 and 4

The following papers read on this motion defendant Lynda S. Piboon, M.D. (motion sequence no. 3), moves for an order dismissing the complaint and all claims arising therefrom and relating thereto in their entirety , with prejudice on the grounds of failure to state a cause of action; granting summary judgment dismissing the complaint and all claims arising therefrom and relating thereto in their entirety, with prejudice; granting summary judgment dismissing any and all claims of lack of informed consent and any claims arising therefrom and relating thereto in their entirety, with prejudice; granting summary judgment dismissing any and all claims of negligence per se, and any claims arising therefrom, with prejudice; granting summary judgment dismissing any and all claims for punitive damages and any claims arising therefrom and relating thereto in their entirety, with prejudice; and granting summary judgment and dismissing any and all claims which Dr. Piboon has made a prima facie showing and which plaintiffs fail to sufficiently rebut. Plaintiffs cross move for an order granting partial summary judgment against defendants Lynda Piboon, M.D.; Lauren Scanlon, M.D. and Long Island Jewish Medical Center on the claim for negligence per se. Defendant Mayer J. Saad, M.D., P.C., d/b/a The Women’s Health Pavilion (WHP) separately moves for an order granting summary judgment dismissing the complaint with prejudice, on the grounds of failure to state a cause of action; granting summary judgment dismissing this action and any and all claims arising therefrom and relating thereto entirely with prejudice; granting summary judgment and dismissing any and all of the claims of lack of informed consent and any and all claims arising therefrom and relating thereto in their entirety with prejudice; granting summary judgment and dismissing any and all claims of negligence per se and any and all claims arising therefrom and relating thereto in their entirety; granting summary judgment and dismissing any and all claims for punitive damages and any and all claims arising therefrom and relating thereto with prejudice in their entirety; and granting summary judgment and dismissing any and all claims which WHP has made a prima facie showing and which plaintiffs fail to sufficiently rebut.

Motion Seq No. 3

Notice of Motion-Statement of Material Facts-Affirmations-Exhibits.. EF 62-93
 Notice of Cross Motion-Statement of Material Facts-Affirmation-
 -Affidavits-Exhibits..... EF 125-129,145-157
 Amended Opposing Affirmation..... EF 172
 Reply Affirmation-Exhibits..... EF 175-186
 Counter Statement of Material Facts..... EF 187
 Reply Affirmation..... EF 121

Motion Seq. No. 4

Notice of Motion-Statement of Material Facts-Affirmations-Exhibits.. EF 95-113
 Counter Statement of Material Facts-Affirmation-Affidavits-Exhibits EF 130-132
 158-170
 Reply Affirmation..... EF 176

Upon the foregoing papers these motions and cross motions are consolidated for the purposes of a single decision and order and are determined as follows:

Plaintiffs’ commenced this action on January 25, 2019, and assert causes of action against all defendants for negligence, medical malpractice, lack of informed consent, negligence per se, negligent infliction of emotional distress, intentional infliction of emotional distress, assault, battery and loss of services. In addition, plaintiffs allege a cause of action against LIJMC for negligent retention and supervision, the failure to formulate rules and regulations and the failure to supervise the treatment of plaintiff Krisztina Staab.

Plaintiffs, in essence, allege that defendants misdiagnosed an ectopic pregnancy in Ms. Staab’s left fallopian tube based, in part, on an ultrasound performed in the Emergency Department of LIJMC that resulted in the performance of an unnecessary and unauthorized bilateral salpingectomy. Plaintiffs also allege that the defendants failed to obtain proper informed consent from the patient prior to the procedure. It is alleged that defendants’ acts of negligence and/or omissions occurred approximately from March 12, 2018 through March 28, 2018.

With respect to WHP, the bills of particulars allege that said defendant was negligent by failing to adequately and properly document plaintiff’s history of present illness; by failing to arrive at a proper, appropriate, and reasonable plan to properly manage pre-natal care; by failing to appreciate plaintiff’s episodes of bleeding, spotting, and abdominal pain in March 2018; failing to appreciate plaintiff’s symptoms; by failing to heed plaintiff’s complaints; failing to communicate plaintiff’s signs, symptoms, complaints, and wishes with respect to the pregnancy with the co-defendants; by failing to take appropriate blood tests; failing to measure plaintiff’s beta hCG levels; failing to take serial measurements of plaintiff’s beta hCG levels; failing to take obtain copies of plaintiff’s beta hCG levels from other providers; untimely and inadequately taking note of, following, observing, recording, determining, monitoring, or responding to plaintiff’s

signs, symptoms, conditions, or complaints or in doing so in a careless or negligent manner contrary to the standard and expected medical and obstetrical practices; failing to diagnose, treat, care for, and manage potential ectopic pregnancy; failing or neglecting to take, perform, order, render, provide, or recommend timely, proper, adequate, or necessary diagnostic tests or procedures to rule out ectopic pregnancy; failing to offer the plaintiff all known alternatives to surgical treatments of ectopic pregnancies; failing to properly and/or timely order the proper consultants; improperly causing plaintiff to suffer from depression and anxiety; improperly causing plaintiff's loss of enjoyment of life and physical pain and suffering; failing to render proper care in light of plaintiff's history; failing to take, obtain, and record a full, proper, and informative history of the plaintiff; rendering medical care in a careless or negligent manner contrary to standard and accepted medical, pre-natal, and obstetrical procedures; failing to properly examine the plaintiff; failing to render good and proper obstetric, gynecologic, radiographic, surgical, and/or medical care; failing to timely and/or properly obtain plaintiff's medical history; failing to timely and/or properly appreciate plaintiff's medical history; negligently failing to timely and/or properly perform a transvaginal ultrasound; negligently and/or carelessly failing to timely and/or properly appreciate the results of the plaintiff's transvaginal ultrasound; failing to timely order a CT scan to clarify the findings of plaintiff's ultrasound; failing to timely and/or properly read radiographic imaging of said CT scan; failing to timely and/or properly find the location of the pregnancy; failing to recognize the presence of an intrauterine pregnancy; failing to offer Methotrexate to terminate a potential ectopic pregnancy; failing to document that there was an not ectopic pregnancy; by unskillfully, negligently, and carelessly permitting unnecessary medical procedures on plaintiff without obtaining proper and/or timely informed consent; by negligently, recklessly, and/or carelessly causing plaintiff to be infertile; by failing to have proper supervision of affiliated physicians, including but not limited to Dr. Piboon, an employee of WHP; in failing to promulgate and/or enforce rules, regulations, and guidelines as to the proper care of the plaintiff's medical condition then and there existing at the time; by failing to make available a physician with requisite expertise to address, diagnose, treat, consult with, and/or manage the plaintiff's medical condition; by failing or neglecting to abide by or enforce the policies, procedures, protocols, and/or guidelines of the Department or Division of Maternal Fetal Medicine, Gynecology, and/or Obstetrics; by failing to comply with the guidelines set forth or promulgated by the American College of Obstetrics and Gynecology with respect to recognition of signs, symptoms, and treatment of ectopic pregnancy; by failing to provide adequate consultations and attending physicians; and in allowing unqualified, unskilled, unfit and/or incompetent physicians to perform surgical procedures and render medical treatment

With respect to Dr. Piboon, the bill of particulars is nearly identical. It is also alleged that Dr. Piboon failed to timely and properly find the location of the pregnancy prior to performing a laparoscopic removal of the ectopic pregnancy bilateral salpingectomy; negligently, recklessly, and/or carelessly sterilized plaintiff; blatantly, carelessly, and deliberately failed to comply with New York State statutory requirements regarding the requisite informed consent needed for sterilization nor the mandatory thirty day waiting period between the date of signed informed consent by the individual to be sterilized in the sterilization procedure; blatantly, carelessly, and deliberately falsified the

operative report in that there was no documentation of the intrauterine pregnancy; falsely documented an ectopic pregnancy; created a danger of serious and/or severe injury to the plaintiff; and negligently, recklessly, or carelessly, and without consent, terminated plaintiff's pregnancy without warning.

As to all defendants it is alleged that plaintiff Krisztina Staab sustained the following injuries and complications as a result of the defendants' alleged negligence: unnecessary sterilization; removal of both fallopian tubes; loss of her child; excruciating uterine pain; effects of morphine administrations; surgery; inability to have children; severe emotional distress and anguish; severe physical distress and anguish; physical impairment; shock and trauma; excruciating abdominal pain; internal bleeding and blood loss; severe chest pain; uterine rupture; internal muscle tears; mental and emotional anguish; emotional trauma; depression; anxiety; and severe physical pain and suffering.

Issue has been joined as to all defendants.

Defendant Lynda S. Piboon, M.D., in support of the within motion for summary judgment (motion sequence number 3) submits, among other things, an affirmation from her medical expert, Gary L. Mucciolo, a physician licensed to practice medicine in the State of New York, who is Board Certified in Obstetrics and Gynecology.

Plaintiffs cross move in opposition and seek summary judgment on their cause of action for negligence per se against defendants Lynda Piboon, M.D., Lauren Scanlon, M.D. and LIJMC. In opposition to the defendants motion, plaintiffs submit an affidavit from a name-redacted physician who is licensed to practice medicine in the State of Massachusetts and is Board Certified in Obstetrics and Gynecology. Plaintiffs also submit an audio CD of a conversation between the plaintiffs, Ms. Staab's sister and Piboon, that was recorded by Mr. Staab on his cell phone, without Piboon's knowledge.

Defendant in her reply asserts, among other things, that the affidavit of the plaintiffs' medical expert is defective in that said physician has failed to state that he or she is familiar with the standard of care in the State of New York, as it existed in 2018.

Defendant Saad, d/b/a WHP separately moves for summary judgment (motion sequence number 4). This defendant relies upon the affirmation of Dr. Piboon's medical expert, Dr. Mucciolo. In opposition, plaintiffs submit the identical affidavit from a name-redacted physician who is licensed to practice medicine in the State of Massachusetts and is Board Certified in Obstetrics and Gynecology, and the audio cd, that was submitted in opposition to motion sequence numbers 2 and 3. WHP in its reply asserts, among other things, that the affidavit of plaintiffs' medical expert is defective and is insufficient and improperly relies upon the audio cd.

“ ‘In order to establish the liability of a physician for medical malpractice, a plaintiff must prove that the physician deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries’ ” (*M.C. v Huntington Hosp.*, 175 AD3d 578, 579 [2d Dept 2019], quoting *Stukas v Streiter*, 83 AD3d 18, 23 [2d Dept 2011]; see

Joyner v Middletown Med., P.C., 183 AD3d 593 [2d Dept 2020]; *Simpson v Edghill*, 169 AD3d 737, 738 [2d Dept 2019]). “A defendant seeking summary judgment in a medical malpractice action must make a prima facie showing either that he or she did not depart from the accepted standard of care or that any departure was not a proximate cause of the plaintiff’s injuries” (*M.C. v Huntington Hosp.*, 175 AD3d at 579). “Where the defendant has satisfied that burden, a plaintiff must ‘submit evidentiary facts or materials to rebut the defendant’s prima facie showing’” (id., quoting *Stukas v Streiter*, 83 A.D.3d at 30; see *Carradice v Jamaica Hosp. Med. Ctr.*, AD3d , 2021 NY Slip Op 05688 [2d Dept 2021]). “‘Expert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause’ ” (*M.C. v Huntington Hosp.*, 175 AD3d at 579, quoting *Novick v South Nassau Communities Hosp.*, 136 AD3d 999, 1000 [internal quotation marks omitted]). In order not to be considered speculative or conclusory, expert opinions in opposition should address specific assertions made by the movant’s experts, setting forth an explanation of the reasoning and relying on “specifically cited evidence in the record” (*Tsitrin v New York Community Hosp.*, 154 AD3d 994, 995-96 [2d Dept 2017], quoting *Roca v Perel*, 51 AD3d 757, 759 [2d Dept 2008]; see *Brinkley v Nassau Health Care Corp.*, 120 AD3d 1287, 1290 [2d Dept 2014]).

Defendant Dr. Piboon has established her prima facie entitlement to judgment as a matter of law dismissing the complaint, by submitting among other things, the affirmation of her expert Dr. Mucciolo, who opines, with a degree a medical certainty that all of the care and treatment rendered by Dr. Piboon was at all times in accordance with the standard of care that existed at the time and did not in any way deviate from said standards. He also opines that none of the claimed departures proximately caused plaintiff’s injuries as the left salpingectomy was indicated and necessary and the pregnancy in question was a non-viable pregnancy. He further opines, to a reasonable degree of medical certainty, that Dr. Piboon properly obtained the informed consent of plaintiff in connection with the desired bilateral salpingectomy performed on March 17, 2018, and therefore said surgery was not the proximate cause of the claimed injury, including an inability to have children, and that plaintiff, through artificial reproductive means, can still have children.

Dr. Mucciolo opines that based upon an email received on the afternoon of March 16, 2018, Dr. Piboon was aware of the concern regarding a possible ectopic pregnancy as well as the beta hCGs as of March 12, 2018 and March 14, 2018, 13,812 and 14,100 mIU/mL, respectively, prior to plaintiff’s presenting to LIJMC; that Dr. Scanlon , a OB/GYN resident, contacted Dr. Piboon to inform her of plaintiff’s presentation to LIJMC’s emergency department and a diagnosis of ectopic pregnancy based upon plaintiff’s symptoms, and the sonogram that had been performed and interpreted, which evidenced an ectopic pregnancy; that Dr. Piboon, upon arriving to LIJMC, obtained a full and complete history from Dr. Scanlon, reviewed the pertinent records, and met with plaintiff Dr. Piboon was apprised of and read the radiology report containing the diagnosis of a left ectopic pregnancy, as evidenced by a lack of gestational sac identified in the endometrial cavity, marked dilation of the left fallopian tube with ill-defined echogenic material within the tube concerning for the hemorrhagic material. A round anechoic focus was identified within the left tube, which was likely to represent an ectopic pregnancy. He opines that Dr. Piboon relied upon the impression of “no intrauterine gestational sac, left tubal ectopic pregnancy”, and that given the findings on the sonogram

in addition to plaintiff's reported complaints of abdominal pain and bleeding, an appropriate diagnosis of a left ectopic pregnancy was made with an indication for surgery to remove the left fallopian tube.

Dr. Mucciolo opines that Dr. Piboon had absolutely no obligation to question the radiological interpretation or order further testing; that the presenting complaints and findings on the sonogram indicated either an already ruptured or impending ruptured left fallopian tube necessitating surgery; that it was not incumbent upon Dr. Piboon to read and interpret the imaging studies taken at LIJMC prior to surgery, and she appropriately relied upon the radiological interpretation. He further opines that the failure to perform surgery in the context of plaintiff's presentation would have placed plaintiff at risk for hemorrhage and death. He opines that given the presence of abdominal pain, vaginal bleeding, and ultrasound findings, it was entirely appropriate for Dr. Piboon to plan for surgery to remove the left fallopian tube, and this was consistent with good and accepted standards of medical care at the time. Dr. Mucciolo also opines that plaintiff's prior and most recent beta hCG levels in the context of a 6-week gestation, rendered conservative management, as well as use of methotrexate, non-viable options for plaintiff in terms of treatment of an ectopic pregnancy confirmed on sonogram, and that Dr. Piboon appropriately did not offer methotrexate as an option.

Dr. Mucciolo opines that there is no evidence in the record that Dr. Piboon did not timely document her findings, and any claim that there was any alteration of the record or misstatement of the findings is without merit. He also opines that there was no indication for Dr. Piboon to take serial beta hCG levels or recommend any further diagnostic tests or procedures to rule out an ectopic pregnancy, or offer alternatives to surgery for the ectopic pregnancy, as no other treatment was medically indicated at the time. In addition, he opines that any claim that Dr. Piboon should have been aware of plaintiff's history of a uterine septum or bicornuate uterus is meritless, as surgery was indicated and necessary based upon the presenting symptoms and more importantly, the findings on sonogram, and that having that knowledge would not in any way have changed the diagnosis Dr. Piboon relied upon nor the treatment plan.

Dr. Mucciolo opines that the claim that Dr. Piboon failed to obtain the informed consent is meritless. With respect to the issue of the surgery for the removal of the left fallopian tube, he opines that given plaintiff's presenting symptoms and the diagnosis of an ectopic pregnancy based on ultrasound, Dr. Piboon appropriately recommended surgery to remove the left fallopian tube. Dr. Mucciolo states that Dr. Piboon fully explained to the plaintiff that there was risk of rupture, and that surgery was indicated was fully explained to plaintiff, and that a reasonable person, under these circumstances, would consent to surgery given the risk associated with not operating to remove the left fallopian tube. He states that there is a significant mortality associated with pregnancy in general, and a recognized mortality associated with a delay in diagnosis and treatment of an ectopic pregnancy; that surgery was necessary and failure to operate would have placed plaintiff in danger and that this was appropriately explained to the plaintiff.

With respect to plaintiff's claim that there was a failure to obtain the proper informed consent

to remove the right fallopian tube, Dr. Mucciolo states that this claim is also without merit as proper consent was obtained. He states that plaintiff testified, prior to Dr. Piboon arriving to LIJMC, that she had already decided that she wished removal of both fallopian tubes/voluntary sterilization; that her wishes are reflected, in quotation marks, in the medical record; and that there was no separate consent form for an elective sterilization, there was no failure to have plaintiff sign a separate form nor was there a mandatory waiting period that was violated. He states that the consent for removal of both tubes is described in the consent form signed by plaintiff.

Defendant's expert states that Dr. Piboon and Dr. Scanlon both testified that prior to surgery, Dr. Piboon discussed the planned surgery with plaintiff, and said discussion is documented in the medical record. He states that the consent obtained by Dr. Piboon appropriately includes the possible removal of bilateral fallopian tubes, a procedure intended to be performed, but the word possible was appropriately included to advise that said procedure would only be performed if the intraoperative findings demonstrated it could be performed safely. He states that Dr. Piboon testified she specifically advised plaintiff of the permanent and irreversible nature of the surgery which plaintiff desired and consented to; that plaintiff was appropriately told that a future pregnancy could be accomplished via in vitro fertilization only; and that hospital's record reflects at all times there were documented normal vital signs, and plaintiff did not receive any medications prior to surgery that would affect her ability to understand conversations she had regarding the risks/benefits/alternatives of/to the planned treatment. Dr. Mucciolo states that Dr. Piboon authored a note entered at 12:06 a.m., reflecting that the problem was a left tubal pregnancy without intrauterine pregnancy as well as planned surgery was diagnostic laparoscopic removal of ectopic and fallopian tubes, and that said note reflects that all questions, answers and risks/benefits explained; and that the consent was signed in advance of the surgery which took place an hour later.

With respect to the claim that Dr. Piboon failed to adhere to a state or federal thirty-day waiting period prior to performing the procedure, Dr. Mucciolo states that said claim is likewise without merit; that there is no requirement of a thirty-day waiting period for the performance of a sterilization for a privately insured patient; that federal mandate is inapplicable for such a patient; and that there was no such waiting period at LIJMC at that time. He states that plaintiff identified her signature on the consent form and acknowledged that she was fully aware that the surgery included the removal of both fallopian tubes.

Dr. Mucciolo states that there were no departures from the standard of care with respect to the indications for surgery and the surgical procedure performed by Dr. Piboon. He states that as regards the pathologic confirmation that in fact this was not a left tubal pregnancy, this was in no way due to any departures by Dr. Piboon in terms of her pre-operative diagnosis or intraoperative findings. He states that given the beta hCG levels, physical complaints on presentation to the emergency department, including but not limited to extreme pain and bleeding, and most importantly the unequivocal diagnosis of an ectopic on sonogram, Dr. Piboon appropriately performed the surgery and felt assured there was a left ectopic pregnancy based upon the intraoperative findings.

Dr. Mucciolo states that plaintiff's beta hCG levels following the surgery were not rising in

light of the gestational age, and were values of a missed abortion, that was occurring independent of the diagnosis and surgery for what was believed to be a left ectopic pregnancy. Plaintiff sought a second opinion at Garden OB/GYN on March 27, 2018. Dr. Mucciolo states that the March 27, 2018 records of Garden OB/GYN provide additional proof that this was not a viable pregnancy and document plaintiff's prior request that both tubes be removed at the time of the March 17, 2018 surgery, as said records document the following history: **"SUSPECTED LEFT ECTOPIC, BUT REQUESTED RIGHT REMOVED DURING THAT SURGERY FOR STERILIZATION. HAS D&C SET UP TOMORROW."** He states that the, ultrasound taken at Garden OB/GYN on March 27, 2018, with no yolk sac or fetal pole, clearly evidenced a non-viable pregnancy likely due to a blighted ovum (empty sac) which would without question result in a missed abortion or miscarriage necessitating a D&C.

Dr. Mucciolo states that Dr. Piboon appropriately recommended plaintiff for an ultrasound-guided suction D & C for a failed pregnancy which was found in the fundus of right horn of the uterus. He states that the pathology revealed hydropic degeneration, further confirming a non-viable fetus. He further states that any claim that it was necessary to know that plaintiff had a septate or bicornuate uterus prior to the surgery is without merit, as it would not have altered the recommendation for the left laparoscopic salpingectomy. He states that plaintiff's history of pain and bleeding, and most importantly, diagnosis of an ectopic pregnancy on imaging, required the recommended surgery. He opines to a reasonable degree of medical certainty, that at all times Dr. Piboon obtained a full and accurate history, was aware of the unequivocal findings of an ectopic pregnancy on sonogram and obtained the full and proper informed consent with respect to the surgical management of an ectopic pregnancy, and plaintiff's desire for a voluntary sterilization.

Dr. Mucciolo states that the standard of care for treatment of an ectopic pregnancy is dependent upon several factors including the beta hCG level, gestational age, patient symptoms, and findings on sonogram. He states that good and accepted practice required a left salpingectomy in light of the hCG levels with a gestational sac not located, a left tube dilated with hemorrhage and an echogenic area, and pain and bleeding. He further states that there were no alternatives consistent with the standard of care in light of those circumstances, and that standard of care in the community at the time required surgery.

Dr. Mucciolo opines, to a reasonable degree of medical certainty, that Dr. Piboon performed an indicated surgery, and, consistent with her obligation as a physician, carried out the plaintiff's wishes following a full informed consent as it pertained to the removal of the right fallopian tube and that a proper informed consent was obtained and documented in the medical record. He opines that at no time was there indication for further diagnostic studies, imaging or waiting, and that at all times there was a proper basis upon which to recommend and perform the left salpingectomy as well as removal of the other tube at the time of the surgery, especially given the patient's documented wishes.

Dr. Mucciolo states that any claim that the care and treatment by Dr. Piboon resulted in the loss of a viable fetus is without merit. He states that the beta hCGs, continued to rise inappropriately as the gestational age progressed; that the findings on sonogram at Garden OB/GYN on March 27,

2018, and the intraoperative and pathology findings of March 28, 2018, all indicate that this was not a viable pregnancy; and that the hydriodic degeneration evidenced a non-viable pregnancy already evidenced by the lack of a fetal pole or yolk on the Garden OB/GYN sonogram and the hCG levels. He further states that any claim that the care and treatment by Dr. Piboon resulted in an inability for her to have children is meritless; that the removal of the fallopian tubes, while admittedly recognized as sterilization, does not negate the plaintiff's ability to have children through artificial reproductive technologies (ART), such as in vitro fertilization; and notes that plaintiff's ability to become pregnant, and carry a pregnancy to term, is independently affected by her age, history of miscarriages, presence of fibrils and other factors.

Dr. Mucciolo opines, to a reasonable degree of medical certainty, that the care and treatment rendered to plaintiff by Dr. Piboon was at all times in accordance with the standard of care that existed at the time. He further opines that at no time did Dr. Piboon fail to obtain plaintiff's informed consent in connection with the March 17, 2018 surgery nor did she violate any statutory requirements in terms of a federal or state waiting period. Finally, he opines that none of the claimed departures with respect to the care and treatment by Dr. Piboon proximately caused plaintiff's claimed injuries.

Plaintiffs' in opposition proffer a name redacted affidavit from a physician licensed in Massachusetts. An expert need not be from the exact same locality where the occurrence took place. "It is sufficient if the expert attests to familiarity with either the standard of care in the locality or to a minimum standard applicable locally, statewide, or nationally" (*M.C. v Huntington Hosp.*, 175 AD3d at 580-581; *see McCullough v University of Rochester Strong Mem. Hosp.*, 17 AD3d 1063 [4d Dept 2005]; *Payant v Imobersteg*, 256 AD2d 702 [3d Dept 1998]; *Hoagland v Kamp*, 150 AD2d 148 [2d Dept 1990]). Plaintiffs' expert states in his/her affidavit that he/she is familiar with "the standard of care" without attesting to a familiarity with the standard of care in New York, or to a minimum standard applicably locally, statewide or nationally, as it existed in 2018. The affidavit of plaintiffs' expert therefore is deficient and is rejected.

This Court further finds that plaintiffs' expert improperly relies upon an audio cd submitted by plaintiffs' in support of the motion. Said audio cd does not constitute evidence in the record. Moreover, this Court will not consider said audio cd, as there is no evidence that the conversation recorded by Mr. Staab on his cell phone is accurate or that it was fairly and accurately reproduced (*see generally Oi Tai E1 Entertainment U.S. LP v Real Talk Entertainment, Inc.*, 42 Misc 3d 1210(A) [Sup Ct New York County 2013]; *Chan v Socy. of Shaolin Temple, Inc.*, 30 Misc.3d 244, 252-53 [Sup Ct, Queens County 2010]). Plaintiffs' thus have failed to raise a triable issue of fact with respect to the causes of action against Dr. Piboon for medical malpractice and lack of informed consent.

Plaintiffs' claims against Dr. Piboon's employer WHP for medical malpractice and lack of informed consent are based upon vicarious liability. WHP has established prima facie, its entitlement to the dismissal of said claims, as said claims against Dr. Piboon are dismissed. Plaintiffs, for the reasons stated above have also failed to raise a triable issue of fact with respect to WHP.

Plaintiffs' first cause of action against Dr. Piboon and WHP for negligence is based upon the alleged medical malpractice and lack of informed consent. As no other independent acts of a negligence can be established, the first cause of action for negligence is dismissed as to both Dr. Piboon and WHP.

Defendant Piboon and WHP each seek to dismiss the sixth cause of action for negligent infliction of emotional distress and the seventh cause of action for intentional infliction of emotional distress and the claims for punitive damages. A cause of action for negligent infliction of emotional distress requires a showing that a breach of duty resulted in unreasonable endangerment of the plaintiff's safety, or fear for the plaintiff's safety (*Sacino v Warwick Valley Cent. School Dist.*, 138 AD3d 717 [2nd Dept 2016]). There must be a direct link between the mental injury and the defendant's negligence, together with a genuine emotional injury (*Taggart v Costabile*, 131 AD3d 243 [2nd Dept. 2015]). Here, as to Mr. Staab, this claim must be dismissed as he cannot reasonably claim that his safety was endangered or that he was in fear for his safety based upon his wife treatment and surgery at LIJMC. As to Ms. Staab, this claim also must be dismissed. Since plaintiff cannot sustain her claims for medical malpractice or lack of informed consent against these defendants, she cannot establish any breach of a duty on the part of Dr. Piboon or WHP which endangered her safety or placed her in fear of her safety.

"The elements of intentional infliction of emotional distress are (1) extreme and outrageous conduct; (2) the intent to cause, or the disregard of a substantial likelihood of causing, severe emotional distress; (3) causation; and (4) severe emotional distress" (*Klein v Metropolitan Child Servs., Inc.*, 100 AD3d 708, 710 [2d Dept 2012]; see *Marmelstein v Kehillat New Hempstead: Rav Aron Jofen Community Synagogue*, 11 NY3d 15, 22–23 [2008]; *Howell v New York Post Co.*, 81 NY2d 115, 121 [1993]; *Petkewicz v Dutchess County Dept. of Community & Family Services*, 137 AD3d 990, 990-91 [2d Dept 2016]; *Taggart v Costabile*, 131 AD3d at 243). Here, as plaintiffs cannot sustain their claims against Dr. Piboon and WHP for medical malpractice and lack of informed consent, they cannot establish that defendants' conduct was so extreme or outrageous as to satisfy the first element of intentional infliction of emotional distress.

Turning now to the fifth cause of action and plaintiffs' cross motion against Dr. Piboon, said cause of action for negligence per se, is based upon violations of 18 NYCRR § 505.13(e) and 42 CFR §§ 50.203, 50.204 and 50.205. Plaintiffs' in their cross motion for summary judgment assert violations of the 30 day waiting period for elective sterilizations set forth in 18 NYCRR § 505.13(e) and Section 17-404 of the Administrative Code of the City of New York. In their reply, plaintiffs' also seek relief based upon a violation of 42 C.F.R. §50.203.

Both 18 NYCRR § 505.13(e) and 42 C.F.R. §50.203 provide that absent a premature delivery or emergency abdominal surgery, any consent to an elective sterilization by Medicaid patients must be given at least 30 but no more than 180 days before the procedure is performed (see also *Hare v Parsley*, 157 Misc 2d 277 [Sup Ct, Albany County 1993]). Here, plaintiffs neither allege nor have they established that Ms. Staab was a Medicaid patient at the time she received treatment from the moving defendants. Notably, Ms. Staab testified at her deposition that she was never a Medicaid

recipient (Tr 28). Therefore, as Ms. Staab is not a member of the class of persons that the Federal and State regulations are intended to protect, plaintiffs cannot establish prima facie their entitlement to summary judgment on the fifth cause of action for negligence per se. In addition, neither plaintiffs' verified complaint nor the bills of particulars allege a violation of Section 17-404 of the Administrative Code of the City of New York, and plaintiffs have not sought to amend their complaint or bills of particulars. Plaintiffs therefore may not seek relief based upon an unpled claim. Defendants, however, are entitled to summary judgment dismissing this cause of action (*see also* CPLR 3212[b]).

As regards defendants LIJMC and Dr. Scanlon, said defendants have not moved for relief under motion sequence number 3. Therefore, plaintiffs' cross motion is an improper vehicle to seek relief against these defendants within the context of this motion (*see* CPLR 2215; *Mango v Long Island Jewish-Hillside Medical Center*, 123 AD2d 843 [2d Dept 1986]).

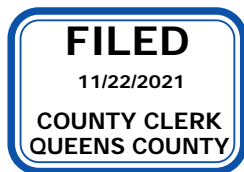
Plaintiffs' eighth and ninth causes of action are for assault and battery. "To sustain a cause of action to recover damages for assault, there must be proof of physical conduct placing the plaintiff in imminent apprehension of harmful contact" (*Cayruth v City of Mount Vernon*, 188 AD3d at 1140-41 quoting, *Cotter v Summit Sec. Servs., Inc.*, 14 AD3d 475, 475 [2d Dept 2005] [internal quotation marks omitted]). "To recover damages for battery, a plaintiff must prove that there was bodily contact, made with intent, and offensive in nature" (*Cotter v Summit Sec. Servs. Inc.*, 14 AD3d at 475). Notwithstanding the Ms. Saab's allegations and testimony that she never gave permission for the removal of both of her fallopian tubes, the signed consent form clearly authorized such a procedure, and she admitted that she signed the consent form. Therefore, these causes of action must be dismissed as to both Dr. Piboon and WHP (*see Thaw v N. Shore Univ. Hosp.*, 129 AD3d 937, 939 [2d Dept 2015]).


Finally, as all of the causes of action asserted by Ms. Staab have been dismissed, the tenth cause of action for loss of services is also dismissed as to Dr. Piboon and WHP.

In view of the foregoing, defendant Lynda Piboon M.D.'s motion for summary judgment dismissing the complaint with prejudice is granted in its entirety and plaintiffs' cross motion for summary judgment on the fifth cause of action for negligence per se is denied.

Defendant WHP's separate motion for summary judgment dismissing the complaint in its entirety with prejudice, is granted.

Dated: November 19, 2021




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Peter J. O'Donoghue, J.S.C.