

D'Anna v Benson

2022 NY Slip Op 32173(U)

January 20, 2022

Supreme Court, Richmond County

Docket Number: Index No. 153402/2018

Judge: Judith N. McMahon

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

x

IAS PART 6

DOREEN D'ANNA and CHRISTOPHER D'ANNA,

ORDER

Plaintiffs,

- against -

Index Number:
153402/2018

MICHAEL BENSON, M.D., JOSEPH MOTTA,
M.D., MICHAEL MORETTI, M.D., DAVID
SARKANY, M.D., RON O. CHAY, M.D.,
RICHMOND UNIVERSITY MEDICAL CENTER,
STATEN ISLAND UNIVERSITY HOSPITAL,
ANNA C. PAVLIDES, M.D., RITA SHATS, M.D.,
and PAVLIDES & BENSON OB/GYN
ASSOCIATES, P.C. a/k/a PAVLIDES, BENSON
& SHATS OB/GYN ASSOCIATES, P.C.,

Hon. Justice
Judith N. McMahon

Defendants.

x

Defendants' motion (sequence # 001), pursuant to CPLR § 3212, for an Order granting summary judgment in favor of and dismissing all claims against Defendants Michael Benson, M.D., Anna C. Pavlides, M.D., Rita Shats, M.D., and Pavlides & Benson OB/GYN Associates, P.C., a/k/a Pavlides, Benson & Shats OB/GYN Associates, P.C., is granted unopposed as detailed herein.

Defendant's motion (sequence # 002), pursuant to CPLR § 3212, for an Order granting summary judgment in favor of and dismissing all claims against Defendant Joseph Motta, M.D. is denied as detailed herein.

Defendant's motion (sequence # 003), pursuant to CPLR § 3212, for an Order granting summary judgment in favor of and dismissing all claims against Defendant Michael Moretti, M.D., is denied as detailed herein.

Defendants' motion (sequence # 004), pursuant to CPLR § 3212, for an Order granting summary judgment in favor of and dismissing all claims against Defendants David Sarkany, M.D. and Staten Island University Hospital, is granted in part and denied in part as detailed herein.

Defendant's motion (sequence # 005), pursuant to CPLR § 3212, for an Order granting summary judgment in favor of and dismissing all claims against Defendant Richmond University Medical Center is granted as detailed herein.

This is a medical malpractice action in which Plaintiff, generally, is alleging that between July 19, 2017 and March 27, 2018, Defendants negligently caused injury to Plaintiff's bladder and ureter during and subsequent to the performance of a cesarean section and hysterectomy on July 19, 2017. Plaintiff further alleges that Defendants failed to appreciate signs and symptoms of renal dysfunction thereafter, resulting in, inter alia, a non-viable kidney.

Plaintiff, Doreen D'Anna sought prenatal treatment from Defendants' practice, Pavlides, Benson & Shats and was referred to Defendant and maternal fetal medicine specialist, Dr. Michael Moretti to undergo detailed sonogram studies. Throughout the course of her prenatal care treatment, Plaintiff was diagnosed with placenta previa, placenta accrete and potential placenta percreta. Dr. Moretti noted his discussions with Ms. D'Anna regarding the risks associated with the diagnoses and recommended premature delivery at 34 to 35 weeks gestation to prevent catastrophic bleeding and complications, as well as steroid therapy prior to delivery for fetal lung maturity.

Ms. D'Anna presented to RUMC on July 19, 2017 to undergo a scheduled cesarean hysterectomy at 34.5 weeks gestation, given her diagnosis of placenta accreta. Dr. Moretti and Dr. Benson performed the cesarean delivery with the assistance of Chief Resident, Dr. Catherine Meleka (f/k/a Catherine Abied). Urologist, Dr. Joseph Motta was on standby to evaluate the integrity of Plaintiff's bladder during the procedure.

Plaintiff remained admitted to RUMC until July 23, 2017.

Ms. D'Anna was seen for post-operative visits on July 26, 2017 and August 2, 2017 by Defendant Dr. Shats. On August 31, 2017, Ms. D'Anna was seen by Defendant Dr. Palvides and made no complaints.

Ms. D'Anna presented to the Emergency Department of SIUH on September 7, 2017, with complaints of headaches for the past approximately 7 weeks after her C-section with neck pain and stiffness and nausea. From the Emergency Department, Ms. D'Anna was admitted to the hospital. During Plaintiff's hospital admission, and at the request of the Emergency Room Physician, Defendant Nephrologist Dr. Chay rendered a renal consultation, and his impression was hypertensive crisis, left renal artery stenosis, and fibromuscular dysplasia. Plaintiff continued testing and treatment at SIUH, until she was discharged on September 12, 2017.

Ms. D'Anna was seen by Defendant Dr. Chay in his private office on September 18, 2017, and Plaintiff had complaints of dizziness and lightheadedness.

Plaintiff followed up with Dr. Chay in his private office on October 11, 2017. At this time, Ms. D'Anna was noted to have hypertension, left renal artery stenosis, right carotid dissection and fibromuscular dysplasia.

On November 8, 2017, a bilateral renal artery duplex scan performed by non-party vascular surgeon, Dr. Frank Tarantini revealed no evidence of right artery stenosis. There were elevated velocities at the mid left renal artery possible consistent with fibromuscular dysplasia. No surgical intervention was deemed necessary; however, the plan included continuing with close follow-up and repeating the bilateral renal artery duplex scan in 6 months.

On January 15, 2018, Plaintiff again was seen by Dr. Chay in his private office. Dr. Chay referenced that Plaintiff was seen by vascular physician and renal studies were suggested. Following examination, Dr. Chay assessed Ms. D'Anna as having stage 3 chronic kidney disease, fibromuscular dysplasia, carotid / vertebral stenosis, hypertension, questionable left renal artery stenosis / dissection, and renal artery stenosis. The plan at this time was to check her BP three-days per week, Cozaar for BP greater than 130/85, follow up with vascular consultation, undergo renal studies in March 2018, receive chronic kidney disease education, and follow up in three months.

On March 15, 2018, Ms. D'Anna returned to the SIUH South Emergency Department with left flank pain for two to three days and frequent urination. An abdominal and pelvis CT scan was ordered, which revealed moderate left hydronephrosis with abrupt cut off at the distal ureter, without definite obstructive etiology delineated. Urology indicated that the findings reflect a ureteral injury from the cesarean section and hysterectomy surgery performed the prior year, and that Plaintiff likely needed stenting on a non-emergency basis.

Thereafter, Ms. D'Anna was transferred to SIUH North with a diagnosis of hydronephrosis for which she was to have a consult with Interventional Radiology and Urology, a possible urogram, and a nephrology consult with Dr. Chay. Interventional Radiology consulted on March 16, 2018 for evaluation of a left percutaneous nephrostomy secondary to hydronephrosis. In addition, evaluation for a ureteral stent was recommended.

Following discharge from SIUH on March 16, 2018, Ms. D'Anna continued to treat with various medical providers and specialists. A March 26, 2018 nuclear renogram revealed normal perfusion and

borderline excretory function in the right kidney without evidence of obstruction as well as severely diminished perfusion and function in the left kidney. The nuclear renogram report further indicated that the split function calculation demonstrated 6% of total function (uptake) in the left kidney and 94% total function in the right kidney.

On March 29, 2018, Ms. D'Anna was seen by non-party urologist, Michael Stifelman, M.D. Dr. Stifelman discussed Plaintiff's options with her including nephrectomy versus reimplantation, although Dr. Stifelman did not believe she would benefit from reimplantation.

A June 6, 2018 bilateral renal artery duplex scan revealed no evidence of renal artery stenosis bilaterally, but the left kidney size was diminished.

On June 19, 2018, Ms. D'Anna followed up with Dr. Stifelman who noted that Plaintiff's left kidney had only 4% function.

On December 5, 2018, Plaintiff presented to Dr. Tarantini at which time a bilateral renal artery duplex scan was reviewed. Dr. Tarantini, in referring to Ms. D'Anna's history, indicated that she had a nonfunctioning left kidney at this time. Dr. Tarantini's impression was no evidence of bilateral renal artery stenosis; however, there was no flow visualized in the left segmental renal artery.

On December 18, 2018, Dr. Stifelman's exam was unremarkable, he did not believe intervention was needed, and he recommended a renal ultrasound in one year.

Plaintiff claims to have sustained damages, including a non-viable left kidney and severely diminished perfusion and function to the left kidney; left ureteral obstruction; chronic distal arterial dissection; left hydroureteronephrosis extending to the mid-pelvis; left proximal-to-mid renal artery stenosis with post stenotic dilation; carotid and vertebral artery dissection and extremely elevated blood pressure.

Defendants now move for summary judgment to dismiss Plaintiff's case as against them.

"The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted standard of care and evidence that the deviation or departure was a proximate cause of injury or damage. In order to establish prima facie entitlement to judgment as a matter of law, a defendant in a medical malpractice action must negate either of these two elements." *Arocho v. Kruger*, 110 A.D.3d 749, 973 N.Y.S.2d 252 (N.Y.A.D. 2nd Dept 2013).

Defendants Michael Benson, M.D., Anna C. Pavlides, M.D., Rita Shats, M.D., and Pavlides & Benson OB/GYN Associates, P.C., a/k/a Pavlides, Benson & Shats OB/GYN Associates, P.C. established a prima facie entitlement to judgment by showing there was no departure from good and accepted medical practice via the Affirmation of Dr. Frank A. Chervenak. *See Stukas v. Streiter*, 83 A.D.3d 18, (N.Y.A.D. 2nd Dept. 2011); *See also Joyner-Pack v. Sykes*, 54 A.D.3d 727, (N.Y.A.D. 2nd Dept. 2008).

In support of Defendants Michael Benson, M.D., Anna C. Pavlides, M.D., Rita Shats, M.D., and Pavlides & Benson OB/GYN Associates, P.C., a/k/a Pavlides, Benson & Shats OB/GYN Associates, P.C.'s motion, Dr. Chervenak opined "that Dr. Benson appropriately treated the plaintiff during the cesarean delivery, cesarean hysterectomy and bilateral salpingectomy. His participation in the cesarean hysterectomy and delivery was limited to suctioning, retracting and cutting sutures as the case was directed by Dr. Moretti who performed the majority of the procedure and performed the wide and careful dissection as needed to carefully remove the uterus. It is obvious that Dr. Benson could not have negligently performed surgery he did not undertake. Additionally, Dr. Benson appropriately performed a salpingectomy and could not have injured the ureters since, anatomically, they are not in the operative field. Additionally, the plaintiff had no post-operative complications, complaints or symptoms that could be associated with a ureteral obstruction and any follow up regarding the patency of the ureters would be left to the sound discretion of the urologist. Dr. Benson did not depart from accepted standards of care and none of his treatment was causally related to any injury."

Dr. Chervenak also opined that, "The office records document and Dr. Shats confirmed at her deposition that the plaintiff returned for a follow up evaluation on August 2, 2017. Once again, her blood pressure was not elevated and completely within normal range at 110/80. The records document and Dr. Shats confirmed that during this second post-operative visit the plaintiff presented with no complaints. Furthermore, there was no observable or reported swelling which indicates that the Lasix was effective in reducing and eliminating the edema that was noted during the previous examination. Moreover, the plaintiff made no complaints of pain, headache or anything that would warrant a further investigation or referral to specialists. According to this record and Dr. Shats' testimony, the plaintiff did not complain of any symptoms which might suggest that she had an obstructed ureter. Additionally, she did not present with complaints of high blood pressure, headaches, neck pain, confusion, visual disturbances, carotid and vertebral arterial dissections, renal artery stenosis, urinary tract infection symptoms or flank pain. It is my opinion within a reasonable degree of medical certainty that Dr. Shats did not depart from accepted standards of care for the reasons stated above."

Finally, Dr. Chervenak opined “that Dr. Pavlides did not depart from accepted standards of care and none of the treatment she provided was causally related to any claimed injury. Dr. Pavlides saw the plaintiff in connection with post-operative follow up at which time the plaintiff reported that she was feeling well. Her blood pressure was normal and there was no swelling. The only issue the plaintiff was suffering from was the continued ecchymosis on her abdomen.”

Defendant Joseph Motta, M.D. established a prima facie entitlement to judgment by showing there was no departure from good and accepted medical practice via the Affirmation of Dr. Gary S. Oshinsky.

In support of Defendant Joseph Motta, M.D.’s motion, Dr. Oshinsky opined that, “There is no evidence that any of the maneuvers accomplished by Dr. Motta caused or contributed to an injury to the ureter or the kidneys, or that he failed to detect an injury to the ureters or the kidneys. In fact, before closing, Dr. Motta inspected the pelvis and was able to palpate the ureters, and determined that they were functioning. There was no blood in the Foley catheter. Therefore, it is my opinion with a reasonable degree of medical certainty that Dr. Motta did not cause, and did not negligently fail to detect, an injury to the plaintiff’s ureters or the kidneys.”

Dr. Oshinsky concluded that, “I have reviewed the relevant reports and films. I believe that the most likely cause of the obstruction was postoperative adhesions/scarring. Formation of scarring and adhesions is a dynamic process which occurs in the weeks following surgery. As they form, tissue near the ureters can contract, causing narrowing. This would have gradually obstructed the ureter until it was sufficiently obstructed to cause hypertension around September 7, 2017, and continued until the left ureter became acutely obstructed around March 15, 2018, when plaintiff finally presented to the SIUH ED with nausea and flank pain...It is my opinion, within a reasonable degree of medical certainty, that no ureteral injury or obstruction was present or occurred on July 19, 2017. It is my further opinion that the obstruction that eventually presented was due to postoperative adhesions/scarring, especially given the delayed onset of left side flank pain, nausea, and the postoperative imaging.”

Defendant Michael Moretti, M.D. established a prima facie entitlement to judgment by showing there was no departure from good and accepted medical practice via the Affirmation of Dr. Iffath Abbasi Hoskins.

In support of Defendant Michael Moretti, M.D.’s motion, Dr. Hoskins opined that, “By virtue of their location within the pelvis and being closely adjacent to the uterus, bladder, bowel, and ureter injuries are well-known and accepted risks to a C-section/hysterectomy procedure involving placenta previa and placenta percreta and do not indicate malpractice. The standard of care does not require that ureteral stents be placed to

identify or trace the ureters during a C-section/hysterectomy. If clinically indicated, the OB/GYNs take steps to avoid injury to the ureters by visualizing and/or palpating the ureters during the procedure. In general, a cystoscopy and/or ureteroscopy is not required pursuant to the standard of obstetrical/gynecological care in the course of a C-section/hysterectomy. It is also within the standard of care for the OB/GYN to request that a urologist evaluate the patient during surgery in a patient with possible percreta because the bladder is one of the organs that the placenta can attach to when it grows through the wall of the uterus. It is standard and appropriate for an OB/GYN to rely on a urologist to evaluate the bladder, repair any defects, and inspect the bladder and ureter for any abnormalities or injuries before the C-section/hysterectomy procedure is concluded.”

Dr. Hoskins elaborated, “that Dr. Moretti had a limited duty based upon the medical functions undertaken by him that day, namely to perform the C-section/hysterectomy procedure jointly with Dr. Benson. After the substantive portion of the procedure was completed, Dr. Moretti appropriately relied upon the urologist Dr. Motta to evaluate the bladder (since intraoperatively it was determined that the placenta percreta extended into the bladder) and Dr. Benson to complete the remainder of the procedure including removal of the fallopian tubes. Prior to leaving the operating room, Dr. Moretti confirmed that Dr. Benson would complete the remainder of the surgery. Indeed, the record and testimony reveals that Dr. Benson completed the remainder of the surgery. Dr. Moretti did not have a duty to monitor the patient after his participation in the surgery since the patient was a private patient of Dr. Benson’s practice. Dr. Moretti was not following Ms. D’Anna, and she had no expectation that he would render care and treatment to her on a continuing basis. Accordingly, Dr. Moretti had no duty to monitor the patient post-operatively for satisfactory post-operative bladder/ureter/kidney functioning nor order cystoscopy, or post-operative imaging and/or testing after the surgery, as the patient’s care was being overseen by other physicians. Further, Dr. Moretti was not involved in any follow-up visits between July 20, 2017 to March 2018 and therefore any failure to appreciate the patient’s post-operative condition including high blood pressure, headaches, neck pain, confusion, visual disturbances, carotid and vertebral artery dissections, renal artery stenosis, urinary tract infection symptoms and flank pain cannot be attributed to Dr. Moretti.”

Dr. Hoskins concluded, “that the alleged deficits and injuries experienced by Mrs. D’Anna were not caused by any negligence on the part of Dr. Moretti. Nothing that Dr. Moretti did, or did not do, caused or contributed to Mrs. D’Anna’s alleged injuries.”

Defendants David Sarkany, M.D. and Staten Island University Hospital established a prima facie entitlement to judgment by showing there was no departure from good and accepted medical practice via the Affirmation of Dr. Alexander Kagen and the Affirmation of Dr. Alan M. Weinstein.

In support of Defendants David Sarkany, M.D. and Staten Island University Hospital's motion, Dr. Kagen opined, "that Dr. Sarkany cannot be a proximate cause of plaintiff's injuries as his review and interpretation of the September 9, 2017 CTA of the abdomen and pelvis was performed properly, was accurate, and consistent with the standard of care. Dr. Sarkany's review and interpretation reveals that plaintiff was experiencing, among other things, left renal dysfunction and hydroureteronephrosis at the time she presented for the September 9, 2017 CTA of the abdomen and pelvis. Further, Dr. Sarkany prepared his report and transmitted it to the patient's clinical file for review and recommendation by the other medical personnel involved in plaintiff's treatment. In light of the above, it is apparent that any injuries claimed by plaintiffs cannot be attributed to the review and interpretation of the September 9, 2017 CTA of the abdomen and pelvis by Dr. Sarkany."

In support of Defendants David Sarkany, M.D. and Staten Island University Hospital's motion, Dr. Weinstein opined that, "The staff at Staten Island University Hospital performed a full clinical examination and work up and took account of plaintiff's prior history as evidenced by the medical records and testimony in this matter. Despite plaintiff's allegations listed in the Bill of Particulars, it is clear that Staten Island University Hospital and its staff took note of plaintiff's complaints related to high blood pressure, headaches, and neck pain; considered plaintiff's prior history related to her bladder, cesarean section, and ureter issues; and performed clinical and diagnostic examinations to identify and diagnosis the arterial dissections, stenosis, and kidney-related issues including hydroureteronephrosis."

Dr. Weinstein concluded that, "I have reviewed the allegations raised by the plaintiffs as against DAVID SARKANY, M.D. and STATEN ISLAND UNIVERSITY HOSPITAL as outlined in the Verified Bills of Particulars. As noted throughout my Affirmation, I find these allegations, in their entirety, to be without merit. These defendants acted appropriately and within the standards of accepted medical care in the community at that time. All issues were either addressed, or assessed to be amenable to outpatient follow-up. Therefore, it is apparent that these defendants did not cause or contribute to the injuries plaintiff is alleging to have suffered."

Defendant Richmond University Medical Center established a prima facie entitlement to judgment by showing there was no departure from good and accepted medical practice via the Affirmation of Dr. Howard G. Nathanson and the Affirmation of Dr. Elliot M. Paul.

In support of Defendant Richmond University Medical Center's motion, Dr. Nathanson opined, "that the physicians, nurses and medical staff at RUMC acted within the standard of care at all times when rendered care to the plaintiff during her July 14, 2017 presentation, July 15, 2017 presentation, July 19, 2017 cesarean hysterectomy and admission. Plaintiff was properly advised of the risks and benefits associated with the cesarean hysterectomy and the necessity to proceed with same. Dr. Moretti, Dr. Benson, Dr. Motta and the staff at RUMC all took the appropriate measures during plaintiff's July 19, 2017 cesarean delivery to ensure that no injuries were caused to plaintiff's bladder or ureters during the course of her procedure. A proper urology consult was requested of Dr. Motta, who properly assessed and examined plaintiff's bladder and ureters for any injuries and treated the small defect to the serosa of plaintiff's bladder, which was directedly caused by plaintiff's placenta accreta and the fact that her placenta adhered to the serosa of her bladder."

In support of Defendant Richmond University Medical Center's motion, Dr. Paul opined, "that there was no medical justification for the physicians, nurses or medical staff at RUMC to consider that plaintiff sustained any ureteral injury during her July 19, 2017 cesarean hysterectomy as plaintiff manifested no signs or symptoms of same. Further, it is my opinion within a reasonable degree of medical certainty that the staff at RUMC, including chief resident, Catherine Meleka (Abied) at all times acted in accordance with the reasonable directives of the medical attendings who performed plaintiff's cesarean hysterectomy. For all these foregoing reasons, it is my opinion, to a reasonable degree of medical certainty that neither the physicians, nurses or medical staff at RUMC departed from good and accepted medical practice, in any way, in their care and treatment of the plaintiff during the course of her presentations and subsequent admission between July 14 - July 23, 2017. It is also my opinion, to a reasonable degree of medical certainty, that nothing the physicians, nurses or medical staff at RUMC did or did not do caused plaintiff's alleged injuries."

"Once this showing has been made [by Defendants], a Plaintiff, in opposition, need only demonstrate the existence of a triable issue of fact as to those elements on which the Defendant met the prima facie burden." *Reid v. Soultz*, 138 A.D.3d 1087, 31 N.Y.S.3d 527 (N.Y.A.D. 2nd Dept. 2016); *See also Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718 (1980).

Accordingly, the burden shifts to Plaintiff "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Alvarez v. Prospect*

Hosp., 68 N.Y.2d 320, 501 N.E.2d 572 (1986). In a medical malpractice action, this requires that a plaintiff "submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact... General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat defendant[‘s]... summary judgment motion." *Id.*

"A plaintiff's expert opinion must demonstrate the requisite nexus between the malpractice allegedly committed and the harm suffered." *Dallas-Stephenson v. Waisman*, 39 A.D.3d 303, 833 N.Y.S.2d 89 (N.Y.A.D. 1st Dept. 2007).

"Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions." *Rosario v. Our Lady of Consolation Nursing & Rehab. Care Ctr.*, 186 A.D.3d 1426, 128 N.Y.S.3d 906 (N.Y.A.D. 2nd Dept. 2020); *see also Boston v. Weissbart*, 62 A.D.3d 517, 879 N.Y.S.2d 108 (N.Y.A.D. 1st Dept. 2009).

Plaintiff affirmatively stated that they did not oppose the motions of Defendants Michael Benson, M.D., Anna C. Pavlides, M.D., Rita Shats, M.D., and Pavlides & Benson OB/GYN Associates, P.C., a/k/a Pavlides, Benson & Shats OB/GYN Associates, P.C., nor did Plaintiff oppose the motion of Defendant David Sarkany, M.D., so those motions are granted unopposed.

As to the remainder of Defendants' motions, Plaintiff submitted an Affirmation from a Nephrologist, another from a Urologist, and also an Affirmation from an OB/GYN in Opposition to Defendants' motions.

Plaintiff's Nephrologist opined "it is my opinion that MS. D'ANNA sustained a laceration/ligation to her left ureter during the July 19, 2017 operation. This injury resulted in the development of hydroureteronephrosis over the next several weeks, which in turn contributed to increased blood renin levels and the hypertensive crisis in September 2017. This hypertensive crisis contributed to and unmasked the carotid and vertebral dissections. The hydroureteronephrosis, despite being clearly identified on radiographic imaging during her September 2017 hospitalization, continued to remain untreated, resulting in progressive diminution in kidney function in her left kidney and ultimately a totally non-viable left kidney by March 2018."

Plaintiff's Nephrologist did not specify any departures of the standard of care by any of the Defendants.

Plaintiff's Urologist opined, "It is my opinion that MS. D'ANNA suffered an intra-operative injury to her left ureter during the July 19, 2017 c-section/hysterectomy, either by way of a laceration (cutting of the ureter) or a ligation (stitching of the ureter), which caused complete obstruction of the ureter. Defendant's [Expert's] contention that plaintiff did not suffer an intra-operative injury, but rather, post-operative adhesions/scarring caused tissue near the ureter to contract, which caused narrowing of the ureter to the point of an obstruction, is highly unlikely. In my review of the post-operative abdominal CT scans from September 2017 and March 2018, it is very likely that there was a complete obstruction of the ureter. Scar tissue from outside the ureters may cause narrowing of the ureter, but would not cause a complete obstruction to the point of total loss of kidney function."

Plaintiff's Urologist further opined, "that DR. MOTTA departed from good and accepted standards of medical and urological practice, in failing to properly inspect [Plaintiff's] ureters intra-operatively on July 19, 2017, by failing to ensure the integrity of the ureters through performance of a cystoscopy and a left retrograde study intra-operatively. This departure resulted in failing to detect an intra-operative injury to the left ureter. The intra-operative injury to the left ureter caused a blockage of the ureter. Over time, this blockage caused hydroureteronephrosis and kidney dysfunction, and likely contributed to the high blood pressure, which likely contributed to the arterial dissections."

Plaintiff's Urologist concluded that, "As the urological consultant, it was Dr. MOTTA's responsibility to not only fix the bladder, but to ensure as best he could, integrity of the urinary tract structures in the operative field, which included the ureters. The only way DR. MOTTA could have definitively ensured the integrity of the ureters was through performance of a cystoscopy and a left retrograde study intra-operatively. This involves putting a scope through the urethra, injecting contrast material through the ureteral orifice, up the ureter, and taking x-rays. DR. MOTTA's failure to perform this study, constituted a departure from good and accepted medical and urological practice. If the ureteral injury had been diagnosed intra-operatively, the ureter could have been repaired intra-operatively, avoiding the subsequent consequences."

Plaintiff's OB/GYN opined, "that MS. D'ANNA's left ureter was injured during the July 19, 2017 cesarean section/hysterectomy operation, and this injury was undetected intra-operatively by defendants DR. MORETTI and DR. MOTTA. It is further my opinion that the failure to detect the ureteral injury intra-operatively was a departure from good and accepted standards of obstetrical practice, and that this departure proximately caused MS. D'ANNA's injuries."

Plaintiff's OB/GYN elaborated, "that during the July 19, 2017 cesarean/hysterectomy procedure, DR. MORETTI either lacerated (cut) or ligated (stitched) MS. D'ANNA's left ureter. In a cesarean/hysterectomy with placenta percreta and significant blood loss of 3500cc's, it is highly likely that visualization of the ureters intra-operatively would be obscured. As a result, the ureters are at an increased risk of being either lacerated (cut) or ligated (stitched), during the cesarean/hysterectomy procedure."

Plaintiff's OB/GYN concluded, "that had DR. MORETTI actually visualized and palpated the ureters, he would have recognized that mere palpation and visualization is not sufficient to rule out ureteral injury in a patient such as MS. D'ANNA, who had a complicated case, extensive blood loss, and a high risk of injury to the ureters. As such, DR. MORETTI was required to order and/or perform further work-up, including a cystoscopy, and a left retrograde study intra-operatively or if Ms. D' ANNA was considered to be unstable on the OR table evaluation should have occurred shortly thereafter. This was the only way to have definitively ruled out an intra-operative ureteral injury in this patient."

"In opposition, Plaintiff raised a triable issue of fact by submitting an expert affirmation from a physician, who opined with a reasonable degree of medical certainty that Defendant[s] departed from the accepted standard of care." *Cummings v. Brooklyn Hosp. Ctr.*, 147 A.D.3d 902, 48 N.Y.S.3d 420 (N.Y.A.D. 2nd Dept. 2017).

Plaintiff's Experts offered opinions as to breaches of the standard of care attributable to Defendants Dr. Motta and Dr. Moretti, but not the other Defendants, namely Dr. Sarkany, Staten Island University Hospital (directly), or Richmond University Medical Center.

In addition to opposition based on the opinions as to breaches of the standard of care by their experts, Plaintiff argued that Defendant Staten Island University Hospital is vicariously liable for the acts of co-Defendant Dr. Chay pursuant to the theory of apparent agency. Defendant Dr. Chay did not move for summary judgment. Dr. Chay was assigned to treat Ms. D'Anna while she was admitted to SIUH through the Emergency Department. "In general, under the doctrine of respondeat superior, a hospital may be held vicariously liable for the negligence or malpractice of its employees acting within the scope of employment, but not for the negligence or malpractice of an independent physician, as when the physician is retained by the patient himself or herself. However, as an exception to this rule, a hospital may be held vicariously liable for the acts of independent physicians if the patient enters the hospital through the emergency room and seeks treatment from the hospital, not from a particular physician." *Goffredo v. St. Luke's Cornwall Hosp.*, 194 A.D.3d 699, 700, 143 N.Y.S.3d 597, 598 (N.Y.A.D. 2nd Dept. 2021). The Court notes that the individual need only enter the

hospital through the emergency department, not, as argued by Defendants on Reply, that the independent physician must treat or be assigned to the patient while they are in the emergency room. However, Defendants are correct that there can be no vicarious liability for subsequent visits where Ms. D'Anna sought treatment from Dr. Chay outside the hospital. Therefore, SIUH is vicariously liable for Dr. Chay for treatment Ms. D'Anna received at the Hospital between September 7, 2017 and September 12, 2017. Once Ms. D'Anna sought treatment from Dr. Chay outside the Hospital at Dr. Chay's private office, SIUH is not vicariously liable for such treatment by Dr. Chay.

There are questions of fact including, but not limited to breaches of the standard of care by Dr. Motta, Dr. Moretti, and the vicarious liability of Staten Island University Hospital for the acts and omissions of Dr. Chay limited to the period of time when Ms. D'Anna was admitted to the hospital.

“Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions.” *Joyner v. Middletown Med., P.C.*, 183 A.D.3d 593, 123 N.Y.S.3d 169 (N.Y.A.D. 2nd Dept. 2020).

ORDERED Defendants' motion (sequence # 001), pursuant to CPLR § 3212, for an Order granting summary judgment in favor of and dismissing all claims against Defendants Michael Benson, M.D., Anna C. Pavlides, M.D., Rita Shats, M.D., and Pavlides & Benson OB/GYN Associates, P.C., a/k/a Pavlides, Benson & Shats OB/GYN Associates, P.C., is granted unopposed; and it is further

ORDERED that Plaintiff's claims against Defendants Michael Benson, M.D., Anna C. Pavlides, M.D., Rita Shats, M.D., and Pavlides & Benson OB/GYN Associates, P.C., a/k/a Pavlides, Benson & Shats OB/GYN Associates, P.C., are severed and dismissed; and it is further

ORDERED that Defendant's motion (sequence # 002), pursuant to CPLR § 3212, for an Order granting summary judgment in favor of and dismissing all claims against Defendant Joseph Motta, M.D. is denied; and it is further

ORDERED that Defendant's motion (sequence # 003), pursuant to CPLR § 3212, for an Order granting summary judgment in favor of and dismissing all claims against Defendant Michael Moretti, M.D., is denied; and it is further

ORDERED that Defendants' motion (sequence # 004), pursuant to CPLR § 3212, for an Order granting summary judgment in favor of and dismissing all claims against Defendants David Sarkany, M.D.

and Staten Island University Hospital, is denied as to Plaintiff's allegations against Staten Island University Hospital related to vicarious liability limited to Plaintiff's admission to Staten Island University Hospital from September 7, 2017 through discharge on September 12, 2017; and it is further

ORDERED that the remainder of Defendants' motion (sequence # 004), pursuant to CPLR § 3212, for an Order granting summary judgment in favor of and dismissing all claims against Defendants David Sarkany, M.D. and Staten Island University Hospital, including those claims against Staten Island University Hospital for vicarious liability after September 12, 2017, is granted; and it is further

ORDERED that Plaintiff's claims against Defendants David Sarkany, M.D. and Staten Island University Hospital, with the exception of the vicarious liability claims against Staten Island University Hospital between September 7, 2017 and September 12, 2017, are severed and dismissed; and it is further

ORDERED that Defendant's motion (sequence # 005), pursuant to CPLR § 3212, for an Order granting summary judgment in favor of and dismissing all claims against Defendant Richmond University Medical Center is granted; and it is further

ORDERED that Plaintiffs' claims against Richmond University Medical Center are severed and dismissed; and it is further

ORDERED that any and all other requested relief is denied; and it is further

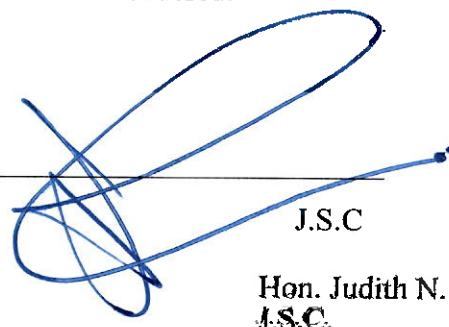
ORDERED that all parties shall appear for a conference, to be conducted via Microsoft Teams, on March 28, 2022, at 2:00 PM; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly.

Dated: January 20, 2022

So Ordered.

ENTER:



J.S.C.

Hon. Judith N. McMahon
J.S.C.