

Robinson v Choudhary

2023 NY Slip Op 31768(U)

May 23, 2023

Supreme Court, Kings County

Docket Number: Index No. 517345/2019

Judge: Consuelo Mallafre Melendez

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SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS:

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TEDESHIA ROBINSON, Individually and as
Administrator of the Estate of S.M., Deceased,

Plaintiff,

-against-

DECISION AND ORDER

Index No. 517345/2019

Motion Sequence: 002

MOHAMMAD CHOUDHARY, M.D., BIENVENIDO
JONGCO, M.D., LAMBROS ANGUS, M.D.,
MOHAMMAD ZALALA, M.D., and NEW YORK
CITY HEALTH & HOSPITALS CORPORATION,
Defendants.

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HON. CONSUELO MALLAFRE MELENDEZ, J.S.C

Recitation, as required by CPLR §2219 [a], of the papers considered in the review: NYSCEF #s: 34, 35, 36-50; 54, 55, 56-59; 60, 61.

Defendants MOHAMMAD CHOUDHARY, M.D., BIENVENIDO JONGCO, M.D., LAMBROS ANGUS, M.D., MOHAMMAD ZALZALA, M.D. s/h/a “MOHAMMAD ZALALA, M.D.” and NEW YORK CITY HEALTH AND HOSPITALS CORPORATION move this court Pursuant to CPLR R 3212, granting summary judgment in favor of Dr. Choudhary, Dr. Jongco, Dr. Angus, Dr. Zalzal, and New York City Health and Hospitals Corporation and dismissing the complaint in its entirety; and pursuant to CPLR R 3211(a)(7) dismissing claims of negligent hiring, retention and credentialing, and loss of services for failure to state a cause of action. Plaintiff submitted opposition to these motions. Plaintiff does not oppose that portion of defendant’s motion seeking dismissal of claims relating to the alleged negligent care rendered by resident Mohammad Choudhary, M.D. Accordingly, summary judgment is granted and all claims relating to Mohammad Choudhary, M.D. are dismissed, as unopposed by the plaintiff.

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist, and the movant is entitled to judgment as a matter of law. *Owens v. City of New York*, 183 AD3d 903, 906 [2d Dept. 2020] citing *Pizzo-Juliano v. Southside Hosp.*, 129 AD3d 695, 696 [2d Dept. 2015], quoting *Andre v. Pomeroy*, 35 NY2d 361, 364 [1974]. “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.” *Hutchinson v. New York City Health and Hosps. Corp.*, 172 AD3d 1037, 1039 [2d Dept. 2019] citing *Stukas v. Streiter*, 83 AD3d 18, 23 [2d Dept. 2011]. “Thus, in moving for summary judgment, a physician defendant must establish, prima facie, ‘either that there was no departure or that any departure was not a proximate cause of the plaintiff's injuries.’” *Hutchinson*, 132 AD3d at 1039, citing *Lesniak v. Stockholm Obstetrics & Gynecological Servs., P.C.*, 132 AD3d 959, 960 [2d Dept. 2015]. “Once this showing has been made, the burden shifts to the plaintiff to rebut the defendant's prima facie showing with evidentiary facts or materials ‘so as to demonstrate the existence of a triable issue of fact.’” *Paglinawan v. Ing-Yann Jeng*, 211 AD3d 743, 744 [2d Dept. 2022] citing *Assunta v. Rubin*, 189 AD3d 1321, 1323 [2d Dept. 2020].

“When experts offer conflicting opinions, a credibility question is presented requiring a jury's resolution.” *Stewart v. North Shore University Hospital at Syosset*, 204 AD3d 858, 860 [2d Dept. 2022] citing *Russell v. Garafalo*, 189 A.D.3d 1100, 1102, [2d Dept. 2020] [internal citations omitted]. As relevant here, “[a]ny conflicts in the testimony merely raised an issue of fact for the fact-finder to resolve.” *Palmiero v. Luchs*, 202 AD3d 989, 992 [2d Dept. 2022] citing *Lavi v. NYU Hosps. Ctr.*, 133 A.D.3d 830, 832 [2d Dept. 2015]. Case law is clear that “mere conclusions, expressions of hope or unsubstantiated allegations are insufficient” to

raise a triable issue of fact to defeat a motion for summary judgment on the issue of liability. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]. “General allegations that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat summary judgment.” *Salvia v. St. Catherine of Sienna Med. Ctr.*, 84 A.D.3d at 1054, citing *Heller v. Weinberg*, 77 AD3d 622, 623 [2d dept. 2010].

Defendants’ expert Lawrence Bodenstein, M.D., a physician board-certified in surgery and pediatric surgery, established that he is qualified to opine as to the medical treatment rendered by Dr. Bienvenido Jongco and New York City Health and Hospitals Corporation (“NYCHHC”). Defendants’ expert Joanna Rothstein, M.D., a physician board-certified in anesthesiology and pediatric anesthesiology established expertise to opine as to the treatment rendered by Dr. Mohammad Zalzala and NYCHHC. Defendants’ expert, Dan Reiner, M.D., a physician board-certified in surgery and surgical critical care has established that he is qualified to opine as to the medical treatment rendered by Dr. Lambros Angus and NYCHHC. Plaintiff’s expert, a physician board-certified in surgery and thoracic surgery has established that they are qualified to opine as to the treatment rendered in this case.

Defendants’ expert, Dr. Bodenstein, opines that patients with congenital cystic adenoid malformation (“CCAM”) are rarely free of inflammation in the lung tissue and so inflammation is not a contraindication to performing this surgery. Further, according to the expert, the timing of the CCAM removal after an active infection, here pneumonia, is a matter of physician judgment. In opposition, plaintiff’s expert opines that this surgery was not emergent and that due to the inflammation that was present and active in the patient’s lung, this patient was not a suitable candidate for this procedure. Plaintiff’s expert further opines that performing this

surgery under these circumstances was a deviation from the standard of care. Therefore, plaintiff's expert raises a question of fact as to whether it was within the standard of care to perform this surgery at the time that it was performed.

Defendants argue that Dr. Jongco consulted with Dr. Velcek, who had been Chief of Pediatric Surgery at Long Island College Hospital but that there were no pediatric cardiothoracic surgeons at Kings County Hospital in November 2018 and, as defense expert opines, it was not standard management "to obtain unnecessary consult with a physician at an outside facility." Defendants' expert, Dr. Bodenstein, states that "[t]here are no separately boarded pediatric thoracic surgeons and pediatric cardiothoracic surgeons generally are more focused on heart surgery," and that thoracic surgeries in children, such as CCAM removals are performed by pediatric surgeons. The expert opines that the standard of care does not require Dr. Jongco, a pediatric surgeon, to consult with a cardiothoracic surgeon or a thoracic surgeon before performing a CCAM removal. Plaintiff's expert opines that Dr. Jongco was not qualified to perform this type of surgery and so the standard of care and the medical ethics rules required that Dr. Jongco at least consult with a surgeon who had specialized training and experience in performing CCAM procedures. This expert states that Dr. Jongco's board certification in any surgery has been expired since 1992, his certification in pediatric surgery since 1998 and that Dr. Jongco has performed approximately eight CCAM removal surgeries in his career, and approximately five of them were between 2013 and 2018. Plaintiff's expert opines that this does not constitute experience. Plaintiff's expert further opines this was a deviation from the standard of care, raising a question of fact as to whether Dr. Jongco was qualified to perform this surgery without consulting a surgeon with specialized training.

Defendants' expert opines that Dr. Jongco used the appropriate surgical technique which required the pulmonary artery and pulmonary vein to be fully visualized and that there is nothing to indicate that the surgical team had any difficulty visualizing these structures intra-operatively. This is refuted by the conflicting affirmation of plaintiff's expert in opposition. Plaintiff's expert opines that Dr. Jongco had difficulty visualizing the pulmonary artery and the pulmonary vein as evidenced by attending anesthesiologist, Dr. Zalzala's, postoperative note. The note stated that the source of the bleeding was unknown and 'turned out to be the PA and PV.' Notwithstanding what was written in the postoperative note entered by Dr. Zalzala, he testified at his deposition that he never learned the source of the bleed. Plaintiff's expert further opines that Dr. Jongco improperly used surgical instruments, evidenced by Dr. Jongco cutting and rupturing both the patient's pulmonary artery and pulmonary vein in the same surgery and that this was a deviation from the standard of care. Defendant's expert, Dr. Bodenstein, indicates that attending cardiothoracic surgeon Dr. Reyes, and trauma surgery attending Dr. Angus, sutured the area of bleeding, including blood vessels, to stop the bleeding and that the bleeding stopped after 30 minutes. Defendant references the autopsy report which described the pulmonary artery and pulmonary vein as having well-positioned sutures and staples, that "the pulmonary artery and vein are over sewn," and that the large vessels showed no injuries/defects. However, as supported by the record, the vessels were sutured to stop the bleeding and therefore this does not indicate that the pulmonary artery and vein were not punctured during surgery. Therefore, plaintiff's expert raises a question of fact as to whether the pulmonary artery and the pulmonary vein were punctured during the surgery due to Dr. Jongco's improper use of surgical instruments, causing the massive bleed. Further, the difference in the postoperative note entered by Dr.

Zalzala and his deposition testimony raises a question as to Dr. Zalzala's credibility thereby raising an issue of fact as to claims against Dr. Zalzala.

Plaintiff's expert opines that the standard of care required both Dr. Jongco and Dr. Zalzala to "make sure that properly typed and crossmatched blood is inside the operating room and ready for immediate use during the surgery." Plaintiff's expert further opines that it was a deviation from the standard of care for Drs. Jongco and Zalzala to fail to have proper bloods immediately available in the operating room when performing a thoracic surgery on a five-year-old who weighed 36 pounds. Plaintiff's expert explains that the blood loss in a child S.M.'s size is much greater in ratio than the same amount of blood loss in an adult and there is a risk that a patient will bleed to death "while waiting for the blood to arrive from outside of the operating room," which is what happened here. Defendant's expert, Dr. Bodenstein, indicates that two units of PRBC, blood replacement product, were ordered to the operating room prior to the surgery. Defendants' anesthesiologist expert, Dr. Rothstein, does not discuss whether the standard of care required Dr. Zalzala to have a certain amount of blood in the operating room. According to defendants' expert Dr. Reiner, when the trauma team responded to the trauma code, as plaintiff's expert asserts was twenty-five minutes later, the infant patient's heart was empty of blood.

Plaintiff's expert states that Dr. Jongco and Dr. Zalzala assessed that there was no risk of blood loss greater than 500 ml in the preoperative assessment of risk. However, the infant plaintiff in this case required more than 4000 ml of PRBC, 3000 ml of other blood product and 3000 ml of crystalloid fluids. Through their submissions, plaintiff's expert raises a question of fact as to whether defendants Dr. Jongco and Dr. Zalzala deviated from the standard of care by "failing to realize and/or acknowledge preoperatively the risk of blood loss greater than 500 ml

on a five year old of 36 pounds” and failing to have the proper bloods in the operating room during the surgery in the event of a blood transfusion.

Considering the foregoing conflicting opinions, which are detailed and not speculative, summary judgment is denied as to claims sounding in medical malpractice relating to Bienvenido Jongco, M.D. and Mohammad Zalzal, M.D. See *Shields v. Baktidy*, 11 AD3d 671, 672 [2d Dept. 2004].

It is well settled that to recover damages based on a claim of lack of informed consent, one of the elements a plaintiff must prove is “that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances.” *Schussheim v. Barazani*, 136 AD3d 787, 789 [2d Dept. 2016]. Defendants’ expert anesthesiologist, Dr. Rothstein, opines that Dr. Zalzal properly obtained plaintiff’s informed consent by advising the patient’s mother and father of the general risks associated with anesthesia, as well as unforeseen risks including massive bleeding and death during surgery. Dr. Bodenstein opines that the standard of care requires that pediatric surgeon Dr. Jongco inform the patient of the risks, benefits, and alternatives and to answer any of the patient’s questions but does not specifically require the surgeon advise the patient of the possibility of death to obtain informed consent. Dr. Jongco testified at his deposition that he did not remember what he told the family about the risks, benefits, and alternatives of the surgery. Although plaintiff signed the consent form, she testified that Dr. Jongco did not review risks, benefits, or alternatives with her before proceeding with the surgery. Plaintiff has raised a question of fact as to whether pediatric surgeon Dr. Jongco properly obtained plaintiff’s informed consent by reviewing the risks, benefits, and alternatives with the plaintiff prior to

surgery and requires denial of summary judgment on this issue. Summary judgment is denied as to the lack of informed consent claim relative to Dr. Jongco.

Plaintiff does not address the lack of informed consent claim against Dr. Zalzalala in their opposition. Accordingly, summary judgment is granted and the lack of informed consent claim relating to Mohammad Zalzalala, M.D. is dismissed.

The court finds that defendant New York City Health and Hospitals Corporation has established that plaintiff failed to state a cause of action for the claim of Negligent Hiring, Negligent Credentials, and Negligent Retention. “Generally, where an employee is acting within the scope of his or her employment, the employer is liable for the employee's negligence under a theory of respondeat superior and no claim may proceed against the employer for negligent hiring, retention, supervision or training [internal citations omitted].” *S.W. v. Catskill Regional Med. Ctr.*, 211 AD3d 890, 891 [2d Dept. 2022]. Where an employee is acting outside the scope of their employment, and “the hospital was aware of, or reasonably should have foreseen, the employee's propensity to commit such an act,” the hospital may be found liable on a negligent hiring and retention claim. *Seiden v. Sonstein*, 127AD3d 1158, 1161 [2d Dept. 2015]. Additionally, a hospital may be held liable when “the injured plaintiff seeks punitive damages from the employer based on gross negligence in the negligent hiring or retention of the employee.” *Id. at 891*. Here, defendant New York City Health and Hospitals Corporation established that plaintiff failed to submit evidence identifying what qualifications Kings County Hospital failed to review and it established that Dr. Jongco was acting within the scope of his employment as a pediatric surgeon. In opposition, plaintiff has failed to raise an issue of fact as to this showing. Additionally, the plaintiff has not alleged gross negligence on the part of

defendant New York City Health and Hospitals Corporation and is not seeking punitive damages. Accordingly, this claim must be dismissed.

The court finds that defendant New York City Health and Hospitals Corporation has established that plaintiff failed to state a cause of action for the loss of services claim for loss of society and companionship only to the extent that claims for loss of society, affection, and loss of fellowship from the child to the parent must be dismissed. “Since damages for wrongful death are limited to pecuniary loss, damages for loss of society, affection, conjugal fellowship and consortium are not recoverable.” *Scheider v. Hanasab*, 209 AD3d 684, 688 [2d Dept. 2022] citing *Motelson v. Ford Motor Co.*, 101 AD3d 957, 962 [2d Dept. 2012]. All other aspects of the wrongful death claim that are for pecuniary loss remain viable and left to be established at trial.

Although plaintiff’s expert states that defendant Dr. Angus and the trauma team took twenty-five minutes to respond to the trauma code called by Dr. Zalzala, plaintiff’s expert does not include an opinion that Dr. Angus deviated from the standard of care. Therefore, summary judgment is granted and all claims relating to Lambros Angus, M.D. are dismissed as unopposed by plaintiff.

Defendants’ motion for summary judgment is denied as to New York City Health and Hospitals Corporation based on the actions of Dr. Jongco and Dr. Zalzala under a theory of respondeat superior.

Based upon the aforementioned,

Summary Judgment is DENIED as to all claims against Bienvenido Jongco, M.D.; and

Summary Judgment is DENIED as to the medical malpractice claims against Mohammad Zalzala, M.D., and GRANTED as to the informed consent claim against Mohammad Zalzala, M.D.; and

Summary Judgment is GRANTED as to New York City Health and Hospitals Corporation only to the extent that summary judgment was granted herein to certain individual medical defendants; and

Summary Judgment is GRANTED as to the Negligent Hiring, Negligent Credentials, and Negligent Retention claims against New York City Health and Hospitals Corporation; and

Summary Judgment is GRANTED only to the extent of dismissing claims for loss of society, affection, and loss of fellowship; the cause of action for Wrongful Death remains viable in all other respects and

Summary judgment is GRANTED as to all claims against Mohammad Choudhary, M.D., and Lambros Angus, M.D. The Clerk is directed to enter judgment accordingly as to these defendants.

This constitutes the decision and order of the court.

Dated: May 23, 2023

ENTER.



Hon. Consuelo Mallafre Melendez,
J.S.C.