Fuentes v New York & Presbyt. Hosp.
2025 NY Slip Op 30750(U)
February 28, 2025
Supreme Court, New York County
Docket Number: Index No. 805208/2022
Judge: John J. Kelley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** — ***Justice*** | **PART** **IAS MOTION 56EFM**

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SERGEI FUENTES,

Plaintiff,

- v -

THE NEW YORK AND PRESBYTERIAN HOSPITAL and RUSSELL E. MILLER, M.D.,

Defendants.

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INDEX NO. 805208/2022

MOTION DATE 01/27/2025

MOTION SEQ. NO. 001

DECISION AND ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45

were read on this motion to/for SUMMARY JUDGMENT .

In this action to recover damages for medical malpractice based on alleged departures from good and accepted medical practice and lack of informed consent, the defendants move pursuant to CPLR 3212 for summary judgment dismissing the complaint. The plaintiff opposes the motion. The motion is granted to the extent that the defendants are awarded summary judgment dismissing the lack of informed consent cause of action, and so much of the medical malpractice action as was premised upon their alleged failure to take a proper medical history or perform a proper predelivery examination, and upon alleged departures from good practice during the delivery itself. The motion is otherwise denied, since there are triable issues of fact as to whether the defendants departed from good and accepted practice in their performance of a postpartum procedure to repair a vaginal and labial tear, and in examining and providing care to the plaintiff subsequent to the repair procedure.

The crux of the plaintiff's claims against the defendants is that, on October 24, 2021, the defendant obstetrician/gynecologist (OB/GYN) Russell E. Miller, M.D., departed from good and accepted obstetrical practice in the course of overseeing the natural spontaneous vaginal delivery of her infant daughter at the defendant The New York and Presbyterian Hospital

(NYPH), and improperly performing and/or supervising a repair of a vaginal and labial tear, thus causing the plaintiff to sustain vaginal and other iatrogenic injuries arising from the delivery and repair. She alleged that NYPH was vicariously liable both for Miller's malpractice and that of the resident under his supervision. The plaintiff further asserted that the defendants failed to obtain her fully informed consent to proceeding with a natural spontaneous vaginal delivery and the subsequent repair of the tear.

In her bills of particulars, the plaintiff averred that the defendants departed from good and accepted standards of obstetrical practice by failing to take a proper medical history, in ignoring and failing to appreciate the significance of, and to act upon, the medical history that they did elicit, in failing to perform a proper physical examination, and in ignoring and failing to appreciate the significance of, and to act upon, the findings of the physical examination that they did conduct. She further contended that the defendant failed properly to control the delivery of her daughter's head and, thus, failed to perform a proper delivery and employed improper surgical technique, inasmuch as they failed to avoid vaginal tearing during the delivery. The plaintiff also alleged that the defendants failed properly to suture the vaginal tearing, applied excessive force with respect to the suturing materials, misdirected those materials, and failed properly to approximate the extent of the tissue that needed to be sutured. Specifically, she averred that the defendants sutured the vaginal tear in an excessively tight fashion, without an adequate opening, and did not realize that they had done so, thus failing to diagnose her condition going forward. She alleged that, as such, the defendants also committed malpractice in failing properly to "reapproximate" the tissue and rectify the improper suturing of the vaginal tear. Moreover, the plaintiff claimed that the defendants failed properly to instruct and advise her, failed to direct her to return for follow-up care at appropriate intervals, and failed to arrange for appropriate consultations with other specialists.

The plaintiff alleged in her bills of particulars that, as a consequence of these alleged departures from good and accepted practice, she suffered stenosed vaginal hiatus fibrosis in

the vulvar fourchette, and the coalescence of the labia minora, causing her to experience the absence of an opening of the vaginal hiatus, and the impossibility of accessing her vagina. She claimed that these conditions, in turn, caused her to experience cervix dyspareunia, that is, painful sexual intercourse, verging on a complete inability to engage in sexual intercourse and penetration of the vagina, the inability to use a tampon, vaginal deformity, and the need for gynecological reconstructive surgery, leading to scarring, pain, and psychological damage.

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr*., 64 NY2d 851, 853 [1985] [citations omitted]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), as well as the pleadings and other proof such as affidavits, depositions, and written admissions (*see* CPLR 3212). The facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp*., 18 NY3d 499, 503 [2012]). In other words, "[i]n determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility" (*Garcia v J.C. Duggan, Inc*., 180 AD2d 579, 580 [1st Dept 1992]). Once the movant meets his or her burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*see Vega v Restani Constr. Corp*., 18 NY3d at 503). A movant's failure to make a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see id.; Medina v Fischer Mills Condo Assn*., 181 AD3d 448, 449 [1st Dept 2020]).

"The drastic remedy of summary judgment, which deprives a party of his [or her] day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even 'arguable'" (*De Paris v Women's Natl. Republican Club, Inc.,* 148 AD3d 401, 403-404 [1st Dept 2017]; *see Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr*., 161 AD2d 480, 480 [1st Dept 1990]). Thus, a moving defendant does not meet his or her burden of affirmatively

establishing entitlement to judgment as a matter of law merely by pointing to gaps in the plaintiff's case. He or she must affirmatively demonstrate the merit of his or her defense (*see Koulermos v A.O. Smith Water Prods*., 137 AD3d 575, 576 [1st Dept 2016]; *Katz v United Synagogue of Conservative Judaism*, 135 AD3d 458, 462 [1st Dept 2016]).

"To sustain a cause of action for medical malpractice, a plaintiff must prove two essential elements: (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of plaintiff's injury" (*Frye v Montefiore Med. Ctr*., 70 AD3d 15, 24 [1st Dept 2009]; *see Foster-Sturrup v Long,* 95 AD3d 726, 727 [1st Dept 2012]; *Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Elias v Bash*, 54 AD3d 354, 357 [2d Dept 2008]; *DeFilippo v New York Downtown Hosp*., 10 AD3d 521, 522 [1st Dept 2004]). Where a physician fails properly to diagnose a patient's condition, thus providing less than optimal treatment or delaying appropriate treatment, and the insufficiency of or delay in treatment proximately causes injury, he or she will be deemed to have departed from good and accepted medical practice (*see Perez v Fitzgerald,* 115 AD3d 177, 178 [1st Dept 2014]; *Perlin v King*, 36 AD3d 495, 495 [1st Dept 2007]; *see generally Zabary v North Shore Hosp. in Plainview,* 190 AD3d 790, 795 [2d Dept 2021]; *Lewis v Rutkovsky*, 153 AD3d 450, 451 [1st Dept 2017]; *Monzon v Chiaramonte*, 140 AD3d 1126, 1128 [2d Dept 2016] ["(c)ases . . . which allege medical malpractice for failure to diagnose a condition . . . pertain to the level or standard of care expected of a physician in the community"]; *O'Sullivan v Presbyterian Hosp. at Columbia Presbyterian Med. Ctr.*, 217 AD2d 98, 101 [1st Dept 1995]).

To make a prima facie showing of entitlement to judgment as a matter of law, a defendant physician moving for summary judgment must establish the absence of a triable issue of fact as to his or her alleged departure from accepted standards of medical practice (*Alvarez v Prospect Hosp*., 68 NY2d 320, 324 [1986]; *Barry v Lee*, 180 AD3d 103, 107 [1st Dept 2019]; *Frye v Montefiore Med. Ctr*., 70 AD3d at 24) or establish that the plaintiff was not injured by such treatment (*see Pullman v Silverman,* 28 NY3d 1060, 1063 [2016]; *McGuigan v*

Centereach Mgt. Group, Inc., 94 AD3d 955 [2d Dept 2012]; *Sharp v Weber*, 77 AD3d 812 [2d Dept 2010]; *see generally Stukas v Streiter*, 83 AD3d 18 [2d Dept 2011]). To satisfy this burden, a defendant must present expert opinion testimony that is supported by the facts in the record, addresses the essential allegations in the complaint or the bill of particulars, and is detailed, specific, and factual in nature (*see Roques v Noble*, 73 AD3d at 206; *Joyner-Pack v Sykes*, 54 AD3d 727, 729 [2d Dept 2008]; *Koi Hou Chan v Yeung*, 66 AD3d 642 [2d Dept 2009]; *Jones v Ricciardelli*, 40 AD3d 935 [2d Dept 2007]). If the expert's opinion is not based on facts in the record, the facts must be personally known to the expert and, in any event, the opinion of a defendant's expert should specify "in what way" the patient's treatment was proper and "elucidate the standard of care" (*Ocasio-Gary v Lawrence Hospital,* 69 AD3d 403, 404 [1st Dept 2010]). Stated another way, the defendant's expert's opinion must "explain 'what defendant did and why'" (*id*., quoting *Wasserman v Carella*, 307 AD2d 225, 226 [1st Dept 2003]). Moreover, as noted, to satisfy his or her burden on a motion for summary judgment, a defendant must address and rebut specific allegations of malpractice set forth in the plaintiff's bill of particulars (*see Wall v Flushing Hosp. Med. Ctr*., 78 AD3d 1043 [2d Dept 2010]; *Grant v Hudson Val. Hosp. Ctr.*, 55 AD3d 874 [2d Dept 2008]; *Terranova v Finklea*, 45 AD3d 572 [2d Dept 2007]).

Once satisfied by the defendant, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact by submitting an expert's affidavit or affirmation attesting to a departure from accepted medical practice and/or opining that the defendant's acts or omissions were a competent producing cause of the plaintiff's injuries (*see Roques v Noble*, 73 AD3d at 207; *Landry v Jakubowitz*, 68 AD3d 728 [2d Dept 2009]; *Luu v Paskowski*, 57 AD3d 856 [2d Dept 2008]). Thus, to defeat a defendant's prima facie showing of entitlement to judgment as a matter of law, a plaintiff must produce expert testimony regarding specific acts of malpractice, and not just testimony that contains "[g]eneral allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice" (*Alvarez v Prospect Hosp.,* 68 NY2d at 325; *see Frye v Montefiore Med.*

Ctr., 70 AD3d at 24). In most instances, the opinion of a qualified expert that the plaintiff's injuries resulted from a deviation from relevant industry or medical standards is sufficient to preclude an award of summary judgment in a defendant's favor (*see Murphy v Conner*, 84 NY2d 969, 972 [1994]; *Frye v Montefiore Med. Ctr.*, 70 AD3d at 24).

In support of their motion, the defendants submitted the pleadings, the plaintiff's bills of particulars, transcripts of the parties' depositions, relevant medical and hospital records, the note of issue, a statement of allegedly undisputed material facts, an attorney's affirmation, and the expert affirmation of board-certified OB/GYN Jonathan Lanzkowsky, M.D.

Dr. Lanzkowsky opined that neither defendant departed from good and accepted practice in treating the plaintiff and that nothing that they did or did not do caused or contributed to the injuries claimed by the plaintiff.

According to Dr. Lanzkowsky's interpretation of NYPH's medical records, on October 24, 2021, at 8:16 a.m., the plaintiff, who was then 31 years old, presented to NYPH's Emergency Department with delivery-related contractions, at which time NYPH personnel obtained her medical history. The NYPH chart reflected that the plaintiff had recently flown to New York from Venezuela, had resided with her cousin in the United States only for the three preceding weeks, and did not provide NYPH with any medical records. She did, however, inform NYPH staff that she previously had experienced one spontaneous abortion. The plaintiff reportedly denied decreased fetal movement, vaginal bleeding, or loss of fluid. NYPH OB/GYN resident Dib Sassine, M.D., reported in the relevant chart that the plaintiff was 38 weeks and 2 days pregnant, that the plaintiff was experiencing an uneventful pregnancy, and that her blood type was Rh-negative, but was not receiving Rh immunoglobulin, also known as RhoGAM, to prevent RhD isoimmunization during pregnancy. Dr. Lanzkowsky characterized NYPH's review of the plaintiff's systems and prenatal test panel results as "unremarkable." The plaintiff's chart reported that the plaintiff weighed 158 pounds, that her blood pressure was 123/75, that her cervix was 90% effaced and dilated to five centimeters (cm), with bulging membranes, and that

she experienced contractions every two to three minutes. The chart further indicated that her infant's fetal heart rate was 140 beats per minute.

According to the chart and relevant deposition testimony, Dr. Sassine discussed the plaintiff's case with NYPH attending OB/GYN Jessica Fiorelli, M.D., who formulated a plan to admit the plaintiff to NYPH's labor and delivery unit, upon which the plaintiff consented to an epidural injection of painkillers and to deliver her child at NYPH. At 11:58 a.m. on October 24, 2021, NYPH anesthesiologist Ruth Landau Cahana, M.D., administered labor analgesia to the plaintiff, which Dr. Lanzkowsky described as being "with good effect." At 12:56 p.m. on that date, the plaintiff was dilated to six cm, and was 100% effaced, with the fetal head station at -1, and fetal heart rate reflecting positive accelerations and no decelerations. According to Dr. Lanzkowsky, the plaintiff was at that time transitioning to active labor, while "artificial rupture of membranes was clear." At 3:00 p.m. on October 24, 2021, the plaintiff was 10 cm dilated and 100% effaced, with the fetal head station at 0, the infant's fetal heart rate at 125 beats permit, and evidence of Category I fetal heart race tracings, at which time the plaintiff began pushing. At 5:02 p.m. on that date, NYPH OB/GYN resident Nicole M. Krenitsky, M.D., observed the plaintiff and spoke with Dr. Fiorelli, who confirmed that the plaintiff was ready for delivery, inasmuch as she had been pushing for two hours, with "good maternal effort," while the infant's head was at a +2 station, and her fetal hear rate was 140 beats per minute. According to the NYPH chart, the plaintiff had a fever of 100.5 degrees Fahrenheit, upon which NYPH staff administered the antibiotics Ampicillin and Gentamicin, and the nonsteroidal analgesic Tylenol, and summoned NYPH pediatricians to the delivery room.

At 5:35 p.m. on October 24, 2021, with assistance from Dr. Sassine, the defendant Miller delivered a female infant to the plaintiff via natural spontaneous vaginal delivery. According to Dr. Lanzkowsky, Miller "was present, supervised the delivery and would have observed, instructed, and/or been hands on." At the time of delivery, the plaintiff was in the dorsal lithotomy position, the infant was delivered in the vertex occiput position, and her shoulders

reportedly were delivered "without difficulty," while she weighed 7 pounds, 6.7 ounces, with Apgar scores of nine at one minute and nine at five minutes. As Dr. Lanzkowsky characterized the plaintiff's deposition testimony, the plaintiff reported that everything was normal and her baby was healthy. Shortly after delivery, NYPH personnel performed a fundal massage, finding the fundus to be "firm," and delivered the placenta at 5:39 p.m., reporting a quantitative blood loss of 223 milliliters.

Dr. Lanzkowsky opined that the treatment that Miller and NYPH health-care personnel rendered to the plaintiff during the labor and delivery was appropriate, that the medical history that they took from the plaintiff was appropriate and appreciated, and that the physical examinations they performed and the delivery of the fetal head were effectuated pursuant to the applicable standard of care. He asserted that the delivery was performed without complication and without any difficulty in delivering the infant's shoulders or head, and that there was no arrest of labor. Hence, Dr. Lanzkowsky concluded that there was no indication to perform any further intervention. He further asserted that Miller appropriately supervised Dr. Sassine in the course of the delivery procedure.

Although Dr. Lanzkowsky conceded that, during the course of the delivery, the plaintiff sustained a second-degree perineal laceration, involving a tear to the skin and muscle layers of the perineum, as well as a laceration to her left labium, he opined that these conditions are "known risks of a vaginal delivery, especially in a woman who is delivering vaginally for the first time," and that they occurred here in the absence of negligence.

Moreover, Dr. Lanzkowsky concluded that the repairs to the perineal and left labial laceration that Dr. Sassine performed under Miller's supervision were conducted in "standard fashion pursuant to the standard of care." As he explained it, there are many ways to perform a laceration repair pursuant to the standard of care. In this respect, he asserted that the

> "[r]epair of a second-degree laceration requires approximation of the vaginal tissues, muscles of the perineal body, and perineal skin. The apex of the vaginal laceration is identified. An anchoring suture is placed and the vaginal mucosa

> and underlying rectovaginal fascia are closed using a running 3-0 suture. If the skin requires suturing, running subcuticular sutures are used. An alternative approach to repair of the perineal body muscles is a running suture that is continued from the vaginal mucosa repair and brought underneath the hymenal ring."

Dr. Lanzkowsky asserted that Dr. Sassine, under Miller's supervision, identified the apex, placed and tied an anchor stitch, and placed a continuous running stitch to reapproximate both sides of the vaginal mucosa. He averred that those physicians brought the running stitch to the hymnal ring, dropped down the stitch, and repaired the perineal body, employing stitches to *pre*-approximate the muscles, then stitched the overlying skin. Dr. Lanzkowsky noted that neither Miller nor Dr. Sassine performed a re-approximation of the labia, agreeing with Miller's deposition testimony that that they did not stitch the labia together to join the left side of the labia to the right. Rather, as Dr. Lanzkowsky explained it, following the repair, and consistent with the standard of care, Dr. Sassine performed a digital exam by placing two fingers in the plaintiff's vagina and determining that, contrary to the plaintiff's contentions, the plaintiff was not suffering from a tight vagina, and that there was no overlapping at the level of the introitus or at the level of the vagina. He opined that the size 3-0 Velosorb suture that Dr. Sassine employed was a thin, rapidly absorbing suture that was appropriate for the repair of vaginal mucosa.

Dr. Lanzkowsky expressly opined that Dr. Sassine, under Miller's supervision, did not fail properly to suture the vaginal tearing, did not use excessive force or misdirection in his use of suturing materials, did not fail properly to approximate the tissue being sutured, did not suture the vaginal tear in an excessively tight fashion or leave an inadequate opening, did not fail to observe or recognize such condition because it did not exist, and did not fail to utilize proper surgical technique in the repair of the vaginal tear that had developed during the delivery. He averred that Dr. Sassine "took due care to ensure the integrity of the repair and ensure the vaginal opening was appropriate by performing a digital exam by inserting two fingers," and that the postpartum care provided to the plaintiff by NYPH personnel was appropriate.

Dr. Lanzkowsky asserted that the medical conditions complained of the plaintiff, including stenosed vaginal hiatus with fibrosis in the vulvar fourchette, and the joinder of the labial minora, are conditions that “can and do occur in the absence of medical malpractice.” Upon his review of the plaintiff’s medical records referable to her postpartum treatment in Venezuela, he concluded that these diagnoses were made six to eight months after the delivery and repair. As he framed the issue, “[s]tenosed vaginal hiatus fibrosis in the vulvar fourchette and joining of the labial minora can occur due to labial adhesions or poor healing,” and were not caused by the laceration repair that Dr. Sassine had performed, which he reiterated was done pursuant to the applicable standard of care. Rather, Dr. Lanzkowsky opined that,

> “[l]abial adhesions and poor healing occur in the absence of malpractice and may result from decreased estrogen, particularly in breastfeeding mothers. Labial adhesions, also known as labial agglutination, occur when the labia minora (inner lips of the vulva) are stuck together covering the vaginal opening. Low levels of estrogen, as can occur in breastfeeding mothers, may cause labial tissue to be very fragile. Any irritant against tissue can cause tissue to become inflamed and lead to labial adhesions.”

He concluded that, based upon his review of the plaintiff’s NYPH records from October 24, 2021 until October 26, 2021, and the records of her follow-up visit at NYPH on November 5, 2021, there was no indication, “or even suggestion,” that the plaintiff had experienced either stenosed vaginal hiatus fibrosis in the vulvar fourchette, or the joinder of her labial minora during her treatment at NYPH, and he asserted that there was no evidence of any improper suturing technique. Instead, he opined that, if, subsequent to the repair procedure at NYPH, the plaintiff did in fact develop stenosed vaginal hiatus fibrosis in the vulvar fourchette, and the joinder of the labial minora, she developed these conditions “due to labial adhesions and/or poor healing that was not due to any negligence or medical malpractice.” He further opined that the alleged sequelae of these conditions, including dyspareunia, the impossibility of vaginal penetration, the inability to use a tampon, the inability to engage in sexual intercourse, vaginal deformity, scarring, and psychological damage, as well as the need for future reconstructive gynecological surgery, were not proximately caused by the defendants.

In addition, Dr. Lanzkowsky explained that the standard of care applicable to the treatment of labial adhesions, and/or poor healing following a vaginal delivery, is primarily to recommend conservative treatment, including the administration of supplemental estrogen, such as Premarin, "and/or a manual separation with a local anesthetic prior to consideration of reconstructive gynecological surgery." He asserted that, inasmuch as the plaintiff never returned to NYPH for her four-to-six-week postpartum check-up, as directed and documented in the NYPH medical records, but instead returned to Venezuela, "there is no documentation that she had the alleged condition in the United States." As he described it, "[e]ven if she started to develop labial adhesions or had poor healing, her failure to return for follow-up care in the United States "deprived the defendants of diagnosing and treating the condition," and that, as such, the defendants could not be held liable for their alleged failure to instruct, advise, or examine the plaintiff at appropriate intervals, or for their alleged failure to call for appropriate consultations. Dr. Lanzkowsky suggested that, even if the plaintiff's conditions did in fact develop after she returned to Venezuela as she continued to breastfeed, she did not seek medical treatment in Venezuela until approximately six months after the delivery and repair procedure at NYPH. He further asserted that, although the plaintiff claimed that, as a consequence of her treatment at NYPH, her vaginal opening had been closed, that there was no opening of her vaginal hiatus, and that it was impossible for her to access or penetrate her vagina, he interpreted the April 2022 medical records from her Venezuelan physician as contradicting these allegations. In this respect, Dr. Lanzkowsky asserted that these records indicated that a transvaginal sonogram was performed upon the plaintiff, and that a cytology sample was obtained, and that a "transvaginal sonogram by definition requires that a tranducer (device that records images) is inserted into the vagina with a probe and a cytology sample is typically obtained by inserting a swab into the vagina."

Although, in April 2022, the plaintiff's Venezuelan OB/GYN Marieugenia Martucci, M.D., recommended that the plaintiff undergo reconstructive gynecological surgery, Dr. Lanzkowsky

averred that there was no indication that Dr. Martucci or any other Venezuelan physician ever discussed conservative measures with the plaintiff, or attempted to treat her condition in any other fashion. In any event, Dr. Lanzkowsky opined that there was no causal connection between the "appropriately performed laceration repair in October 2021" and Dr. Martucci's diagnosis of joined labial minora in a mother who had been breastfeeding for six months.

In opposition to the defendants' motion, the plaintiff relied on the same documentation that the defendants submitted, and she also submitted a counter statement of material facts, an attorney's affirmation, and the expert affirmation of a board-certified OB/GYN, who opined that the defendants departed from good and accepted standards of obstetrical/gynecological practice in failing to properly suture postpartum vaginal tearing, in failing properly to observe and recognize that the vaginal tear was sutured too tightly, in failing properly to observe and recognize that the suturing was too tight and, thus, in effect, in failing to diagnose an existing condition. The expert also concluded that the defendants committed malpractice in failing properly to reapproximate the tissue, and in using improper suturing technique in the repair of vaginal tearing during delivery. The plaintiff's expert OB/GYN further concluded that these departures proximately caused the plaintiff to sustain stenosed vaginal opening, fibrosis in vulvar fourchette, coalescence of the labia minora, dyspareunia, inability to use a tampon, inability to engage in sexual intercourse, vaginal deformity, scarring, and pain and suffering.

The plaintiff's expert first noted that, in November 2021, and, thus, after the plaintiff's delivery and repair procedure at NYPH, but before she returned to Venezuela, the plaintiff had a telephonic or remote video discussion with Dr. Martucci, and complained to that physician that she had a burning sensation in her genitals that had lasted for a little more than one month. The expert explained that, based on his review of the plaintiff's deposition testimony and Dr. Martucci's records, the plaintiff's first postpartum appointment with Dr. Martucci was in January 2022, not in April 2002. The expert asserted that, at the January 2022 visit, Dr. Martucci performed a vaginal examination but, according to the plaintiff's deposition testimony, was

unable to insert anything into the plaintiff's vagina, except a small Q-tip cotton swab, could not insert anything larger than that, and was unable to insert a speculum. According to the plaintiff, Dr. Martucci commented that the doctors at NYPH "stitched her up too much, all the way up to the top portion of [her] vagina," and that, "if the damage was not as bad as it was [, she] would be able to treat it with steroids, but that at that point the only solution was going to be surgery." According to the plaintiff's testimony, she next met with Dr. Martucci in February or March 2022, complaining of her inability to have sexual intercourse with her husband, in response to which Dr. Martucci allegedly responded that she should not continue trying to have sexual intercourse.

As the plaintiff's expert interpreted her medical records, on or about June 8, 2022, the plaintiff again presented to Dr. Martucci, after which Dr. Martucci reported that the reason for the consultation was to conduct a gynecological evaluation, based upon the plaintiff's complaints of intense pain and impediments to sexual intercourse since November 2021. As the plaintiff's expert OB/GYN summarized the relevant chart, Dr. Martucci conducted a physical examination of the plaintiff, diagnosing stenosed vaginal hiatus fibrosis in the vulvar fourchette, measuring approximately 1.5 cm, the coalescence of the labia minora, reflecting a small vaginal opening, and dyspareunia. In that chart, Dr. Martucci reported that it was impossible for her to assess the condition of the plaintiff's vagina and cervix via the placement of speculum. According to the plaintiff's expert, Dr. Martucci concluded that this inaccessibility was the consequence of the suturing technique employed to repair the vaginal tearing during delivery. The expert further noted that Dr. Martucci suggested that the plaintiff consider reconstructive gynecological surgery. The chart entry further stated that the patient

> "cannot continue sexual relations with her partner until she has the surgery. Insofar as it prevents evaluation, examination, and any diagnosis of possible vaginal and cervical pathologies, the surgery is recommended as soon as possible."

The plaintiff's expert adverted to her deposition testimony, in which testified that, as late as May 2022, she continued to be unable to use even "very slim tampon[s]" or period cups, and

that "the hole to [her] vagina is thinner or smaller than the nail on [her] pinky." Although Dr. Lanzkowsky had opined in his affirmation that the plaintiff's vaginal opening had not been sutured too tightly, the plaintiff's expert noted that Dr. Sassine, who was the doctor who actually repaired the tear, testified "that there was no note regarding how loosely or tightly the laceration was repaired." Rather, the expert asserted that, at his deposition, Dr. Sassine described the manner in which he *typically* repaired a tear under circumstances similar to those presented by the plaintiff, but could not confirm or remember whether he employed that typical approach in the plaintiff's case. The expert quoted Dr. Sassine's testimony that,

> "approximately at the level of the apex of the vagina an anchor stitch is done and tied. And then vaginal mucosa or epithelium is approximated all the way through the hymenal ring. At the level of the hymenal ring I would take my stitch out towards the perineum when I start performing approximation of the muscle of the perineum in a continuous manner down all the way to the other apex and then go back with a stitch to the skin and then tie the stitch at the level of the hymen."

The plaintiff's expert asserted that Dr. Sassine "admitted," at his deposition, that if, during the repair procedure, a patient's skin is overapproximated, or overlapped, it could reduce the size of the opening of the vagina. As the expert explained it, a second-degree perineal tear, such as the one that the plaintiff sustained, involves a laceration to the skin and muscle layers of the perineum, that such lacerations require repair, that that the traditional manner for performing such a procedure requires the tissue to be repaired in layers, employing a series of continuous suture techniques. In this respect, the expert asserted that,

> "[t]he repair begins at the apex of the vaginal laceration and ends with a closure that ends just above the level of the posterior fourchette (the posterior part of the labia minora).
>
> "In repairing a vaginal tear, care should be taken to identify and incorporate the apex of the tear. If the apex of the tear extends beyond the field of vision, a suture can be placed below the apex and the suture tail used as a purchase to pull the apex into view. An absorbable suture is usually used for the repair. The anatomical landmarks should be identified and reapproximated."

The expert opined that Miller and Dr. Sassine made an over-approximation, as well as a repair based on that over-approximation, that those acts constituted departures from the standard of

care, and that they likely led to the plaintiff's stenosed vaginal hiatus fibrosis in the vulvar fourchette and the coalescence of the labia minora, which, in turn caused her to suffer from dyspareunia, the inability to use a tampon, the inability to engage in sexual intercourse, vaginal deformity, scarring, and pain, among other injuries.

The plaintiff's expert generally agreed with Dr. Lanzkowsky that the plaintiff's conditions could have occurred in the absence of medical malpractice, but explicitly opined that,

> "the extent of the stenosis and reduction in size of the vaginal opening claimed by Ms. Fuentes following her October 24, 2021 repair, and corroborated by Dr. Martucci's June 2022 note, would not occur in the absence of a departure from the standard of care."

Specifically, the expert explained that the particular conditions memorialized in Dr. Martucci's note, including both the extremely diminished size of the plaintiff's vaginal opening, and the inability to access it, "are not conditions one would expect following proper repair of a second-degree perineal laceration," and, based on the nature and limited extent of the plaintiff's tear, he expressly disagreed with Dr. Lanzkowsky's opinion that the plaintiff's condition occurred due to adhesions or poor healing. As the expert phrased it, "more likely than not," the postpartum difficulties that the plaintiff experienced were "the result of an improperly performed repair; i.e., a repair based on an overapproximation of the anatomical landmarks used to guide the repair, rather than the patient's poor healing." The plaintiff's expert characterized Dr. Lanzkowsky's attribution of the plaintiff's injuries to poor healing as "mere speculation." In this respect, the expert noted that there was no mention of scar tissue or healing issues in any of the plaintiff's medical records upon which Dr. Lanzkowsky could predicate his opinion.

The plaintiff's expert explained that,

> "Dr. Lanzkowsky further states that labial adhesions can occur when the labia minora (inner lips of the vulva) are stuck together covering the vaginal opening, and that these may result from decreased estrogen, particularly in breastfeeding mothers such as Ms. Fuentes. . . Again, however, the fact that labial adhesions can and do occur as the result of decreased estrogen does not rule out that such adhesions can result from an improperly performed repair."

In fact, the plaintiff's expert asserted that, in over 35 years of experience, he or she had not encountered a patient who developed such poor healing and extensive adhesions subsequent to a second-degree perineal laceration to the extent that she could not resume intercourse or insert even a very slim tampon six months after delivery.

The plaintiff's expert further characterized Dr. Lanzkowsky's assertion that the plaintiff's condition developed in Venezuela as she continued to breastfeed as "based on nothing other than speculation" and as "contradicted by the records and testimony in this case." The expert rejected Dr. Lanzkowsky's presumption that the plaintiff did not seek medical treatment in Venezuela until approximately five months following the delivery and repair, inasmuch as the plaintiff, in fact, testified that she had seen Dr. Martucci in Venezuela for an examination in early January 2022. In addition, the plaintiff's expert challenged Dr. Lanzkowsky's assumption that the plaintiff and Dr. Martucci never discussed or attempted conservative treatments in Venezuela, inasmuch as the plaintiff testified that Dr. Martucci told her that, if the damage had not been as bad as it was, she would have been able to treat it with steroids, but that, at that juncture, the only solution was to perform surgery.

Ultimately, the plaintiff's expert opined that the defendants' improper over-approximation of the plaintiff's vaginal and labial tissue, and the improper, excessively tight suturing, not only were departures from good and accepted practice, but that this improper repair

> "was likely to have significantly contributed to Ms. Fuentes' injuries, including stenosed vaginal opening, fibrosis in vulvar fourchette, coalescence of the labia minora, dyspareunia, inability to use a tampon, inability to engage in sexual intercourse, vaginal deformity, scarring, pain and suffering, among other injuries."

The plaintiff's expert did not address Dr. Lanzkowsky's opinions with respect to the propriety of the medical history taken by the defendants, the appropriateness of the predelivery examination that they performed, or the correctness of those techniques that the defendants employed during the delivery itself.

In reply, the defendants submitted an attorney's affirmation, in which counsel argued that the expert affirmation of the plaintiff's expert was conclusory and speculative, and not supported by the plaintiff's medical records.

The court concludes that, although some of Dr. Lanzkowsky's opinions were premised upon assumptions and disputed facts, they nonetheless made a prima facie showing, with his affirmation, that neither Miller nor Dr. Sassine departed from good and accepted medical practice, and that nothing that they did or did not do caused or contributed to the injuries claimed by the plaintiff. Nonetheless, the plaintiff raised triable issues of fact with her submissions, including her expert's affirmation, that Miller, while supervising the repair procedure, and Dr. Sassine, while acting under Miller's supervision, over-approximated the vaginal and labial tissue, and improperly sutured the vaginal tear, thus causing or contributing to the plaintiff's injuries. By failing to address the defendants' showings in connection with taking a medical history, performing a predelivery examination, and performing the delivery itself, the plaintiff failed to raise a triable issue of fact as to whether the defendants committed malpractice in connection with any of that conduct.

"'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'" (*Valerio v Liberty Behavioral Mgt. Corp*., 188 AD3d 948, 949 [2d Dept 2020], quoting *Seiden v Sonstein*, 127 AD3d 1158, 1160 [2d Dept 2015]; *see Hill v St. Clare's Hosp*., 67 NY2d 72, 79 [1986]; *Dupree v Westchester County Health Care Corp*., 164 AD3d 1211, 1213 [2d Dept 2018]). Nonetheless,

> "a hospital cannot ordinarily be held vicariously liable for the malpractice of a private attending physician who is not its employee unless a patient comes to the emergency room seeking treatment from the hospital, and not from a particular physician of the patient's choosing, and there is created an apparent or ostensible agency by estoppel"

(*Suits v Wyckoff Heights Med. Ctr.,* 84 AD3d 487, 488 [1st Dept 2011]). Moreover, a hospital may not be held concurrently liable for injuries sustained by a patient who is under care of

private attending physician expressly chosen by the patient, and the resident physicians employed by the hospital merely carry out the orders of the private attending physician, unless hospital staff commits independent acts of negligence, or unless the attending physician's orders are contradicted by normal practice (*see id.*). It is undisputed, however, that the plaintiff did not expressly choose to be treated by Miller, and that the hospital randomly assigned Miller to the plaintiff's case. It also is undisputed that both Miller and Dr. Sassine were employed by NYPH at the time of the alleged malpractice. Inasmuch as the plaintiff raised triable issues of fact as to whether Miller departed from good and accepted practice that proximately caused her injuries, that branch of the defendants' motion seeking summary judgment dismissing the medical malpractice cause of action insofar as asserted against both Miller and NYPH must be granted only to the extent of dismissing the plaintiff's claims that they committed malpractice in connection with the medical history that they took from her, with the predelivery examination that they performed upon her, or with those techniques that they employed during the delivery itself, and that branch of the motion is otherwise denied.

The elements of a cause of action to recover for lack of informed consent are:

> "(1) 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, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury"

(*Spano v Bertocci*, 299 AD2d 335, 337-338 [2d Dept 2002]; *see Zapata v Buitriago*, 107 AD3d 977, 979 [2d Dept 2013]; *Balzola v Giese*, 107 AD3d 587, 588 [1st Dept 2013]; *Shkolnik v Hospital for Joint Diseases Orthopaedic Inst.*, 211 AD2d 347, 350 [1st Dept 1995]). For a statutory claim of lack of informed consent to be actionable, a defendant must have engaged in a "non-emergency treatment, procedure or surgery" or "a diagnostic procedure which involved invasion or disruption of the integrity of the body" (Public Health Law § 2805-d[2]). "'[T]his showing of qualitative insufficiency of the consent [is] required to be supported by expert

medical testimony'" (*King v Jordan*, 265 AD2d at 260, quoting *Hylick v Halweil*, 112 AD2d 400, 401 [2d Dept 1985]; *see* CPLR 4401-a; *Gardner v Wider*, 32 AD3d 728, 730 [1st Dept 2006]). Hence, where a defendant establishes his or her prima facie entitlement to judgment as a matter of law in connection with a lack of informed consent cause of action by submitting an expert affirmation from a physician, a plaintiff can only raise a triable issue of fact by submitting "an expert affirmation stating with certainty that the information defendant[ ] allegedly provided to plaintiff before the [medical] procedures at issue departed from what a reasonable practitioner would have disclosed" (*Leighton v Lowenberg*, 103 AD3d 530, 530 [1st Dept 2013]).

"'The mere fact that the plaintiff signed a consent form does not establish the defendants' prima facie entitlement to judgment as a matter of law'" (*Huichun Feng v Accord Physicians*, 194 AD3d 795, 797 [2d Dept 2021], quoting *Schussheim v Barazani*, 136 AD3d 787, 789 [2d Dept 2016]; *see Godel v Goldstein*, 155 AD3d 939, 942 [2d Dept 2017]). Nonetheless, a defendant may satisfy his or her burden of demonstrating a prima facie entitlement to judgment as a matter of law in connection with such a claim where a patient signs a detailed consent form, and there is also evidence that the necessity and benefits of the procedure, along with known risks and dangers, were discussed prior to the procedure (*see Bamberg-Taylor v Strauch*, 192 AD3d 401, 401-402 [1st Dept 2021]).

The defendants established their prima facie entitlement to judgment as a matter of law in connection with the lack of informed consent cause of action. Specifically, Dr. Lanzkowsky established that the plaintiff signed hard-copy consent forms for treatment, that she consented to delivery and an epidural injection, and that she was advised and understood that she had a natural tear that was being repaired. He further concluded that the type of laceration that she sustained was expected, that the repair was an indicated procedure, and that any reasonable person would have consented to that treatment. Accordingly, Dr. Lanzkowsky opined that there was no lack of informed consent. Since the plaintiff's expert did not address this issue, the

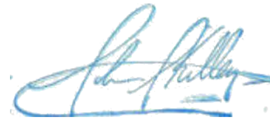
plaintiff did not raise a triable issue of fact with respect thereto, and the defendants must be awarded summary judgment dismissing the lack of informed consent cause of action.

Accordingly, it is,

ORDERED that the defendants' motion for summary judgment is granted only to the extent that they are awarded summary judgment dismissing the lack of informed consent cause of action, and so much of the medical malpractice action as was premised upon their alleged failure to take a proper medical history, their alleged failure to perform a proper predelivery examination, and their alleged departures during the delivery itself, that cause of action and those claims are dismissed, and the motion is otherwise denied; and it is further,

ORDERED that that, on the court's own motion, the attorneys for all of the parties shall appear for an initial pretrial settlement conference before the court, in Room 204 at 71 Thomas Street, New York, New York 10013, on March 26, 2025, at 10:30 a.m.., at which time they shall be prepared to discuss resolution of the action and the scheduling of a firm date for the commencement of jury selection.

This constitutes the Decision and Order of the court.



2/28/2025	
DATE	JOHN J. KELLEY, J.S.C.

CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION	
	[ ] GRANTED	[ ] DENIED	[X] GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN		[ ] FIDUCIARY APPOINTMENT	[ ] REFERENCE