

AJP v New York City Health & Hosp. Corp.

2025 NY Slip Op 34675(U)

December 3, 2025

Supreme Court, New York County

Docket Number: Index No. 805147/2018

Judge: Arthur F. Engoron

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. ARTHUR F. ENGORON PART 37

Justice

-----X

<p>AJP AN INFANT,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> <p>NEW YORK CITY HEALTH AND HOSPITAL CORPORATION, BELLEVUE HOSPITAL CENTER,</p> <p style="text-align: center;">Defendants.</p> <p>-----X</p>	<p>INDEX NO. <u>805147/2018</u></p> <p>MOTION DATE <u>05/29/2025</u></p> <p>MOTION SEQ. NO. <u>003</u></p>
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**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, were read on this motion for SUMMARY JUDGMENT.

In this medical malpractice action, Johanna Monte, on behalf of her grandchild, infant plaintiff A.J.P., alleges that doctors employed by defendant Bellevue Hospital Center, a unit of New York City Health and Hospitals Corporation, negligently lacerated his cheek while delivering him by a Caesarean section (“C-section”).

Defendants now move (1), pursuant to CPLR 3211(a)(7), to strike from plaintiff’s Bill of Particulars the allegation that defendants mistreated the laceration, on the ground that this claim was not in the statutory General Municipal Law § 50-e Notice of Claim (or in the Complaint); (2), also pursuant to CPLR 3211(a)(7), to dismiss the cause of action for negligent hiring and supervision, on the ground that defendants are liable under respondeat superior; (3), pursuant to CPLR 3212, for summary judgment dismissing plaintiff’s claim of medical malpractice during the delivery, in particular lacerating plaintiff’s cheek, basically on the ground that a laceration is a recognized risk of C-sections and is not evidence of negligence; and (4), also pursuant to CPLR 3212, to dismiss plaintiff’s informed consent cause of action, on the ground that A.J.P.’s mother, Destiny Pierson, signed an informed consent form. NYSCEF Doc. No. 65.

Background

Approximately a month before the events here in issue, Ms. Pierson, then 16-years-old and pregnant, presented to Bellevue, as the hospital was prepared to care for A.J.P., whom Ms. Pierson’s doctors believed had a tracheoesophageal fistula (a condition where the trachea does not connect to the esophagus due to abnormal anatomy). NYSCEF Doc. No. 68 9:4-21. On June 23, 2015, Ms. Pierson executed an “informed consent form” that included birth by C-section. NYSCEF Doc. No. 75 at 488-9. On July 22, 2015, Ms. Pierson was taken to the Operating Room for delivery of her fetus via C-section, due to various high-risk factors to both of them.

NYSCEF Doc. No. 73. Dr. Sepideh Mehri, the attending obstetrician, performed the subject C-section, assisted by Drs. Zachary Schwartz and Meagan Campol Haynes, two senior residents whom Dr. Mehri supervised during the procedure. Id.

The patient entered the Operating Room at 5:03 a.m.; the procedure started at 5:13 a.m.; and the infant was born one minute later, at 5:14 a.m., with a 5 cm facial laceration to the right cheek, also known as “a 2-inch cut” (the medical records describe a 3cm laceration). NYSCEF Doc. No. 73 at 956.

Defendants immediately applied “Steri-Strips” and gauze to the laceration. Within six hours after birth, a facial trauma team was consulted for evaluation and treatment. They irrigated the cut and closed it with the use of Dermabond and Steri-Strips. NYSCEF Doc. No. 76.

Bellevue discharged the patients on August 11, 2015.

A General Municipal Law § 50-e Notice of Claim was subsequently filed on behalf of plaintiff. NYSCEF Doc. No. 19. The Notice essentially alleges malpractice during the C-section, particularly in inflicting the laceration. Id. The complaint largely follows suit. NYSCEF Doc. No. 1.

On or about January 8, 2020, a Bill of Particulars was served, alleging negligence in the delivery and failure properly to treat the wound and being evasive about it. NYSCEF Doc. No. 22.

Argument

The Delivery and the Laceration

The gravamen of this action is that medical malpractice caused the cut. Generally, “a plaintiff asserting a medical malpractice claim must demonstrate that the doctor deviated from acceptable medical practice, and that such deviation was a proximate cause of the plaintiff’s injury.” James v Wormuth, 21 NY3d 540, 545 (2013).

According to defendants, a laceration is a known risk of what the medical world calls a “STAT,” and the rest of the world calls an “emergency,” C-section, performed because a normal vaginal birth is not a viable option, and that such lacerations cannot always be prevented. NYSCEF Doc. No. 66. Defendants’ expert obstetrician, Dr. Jodi Lerner, opines that the surgical team here employed appropriate precautions and an acceptable surgical technique, and that the laceration could not have been prevented. NYSCEF Doc. No. 78.

Plaintiff’s board-certified obstetrician/gynecologist opines that the injury was not a known, unavoidable risk, but, rather, the direct result of departures from accepted standards of obstetrical practice. In particular, after reviewing the records of the delivery, plaintiff’s expert opines that the surgical team failed to perform standard safety checks and procedures, including determining fetal position, palpating the uterine wall, applying pressure to the uterus, moving the wall away from the fetus prior to the incision, sweeping the incision site before each pass of the scalpel, and pausing before making the cut. Plaintiff’s expert opines that the foregoing precautions and

procedures are well-known to obstetrical surgeons, as they are the standard of obstetrical care. NYSCEF Doc. No. 83.

Plaintiff's expert also states that "[i]t is speculative for Dr. Lerner to have concluded that the C-section was properly performed in accordance with good and accepted standards of obstetrical care when she could not determine which surgeon made the uterine incision and, more importantly, how that incision was made and what specific precautions were employed to avoid injury to the fetus." Further, plaintiff's expert notes that Dr. Mehri only testified that "we preformed the ... uterine incision, slowly and carefully," (NYSCEF Doc. No. 71 43:2-6) and that such steps are "routine in every Cesarean delivery and should not be taken as preventative measures to avoid a fetal laceration." Plaintiff's expert also points out that there is no mention in the operative report, nor any testimony, that finger sweeps were done prior to each pass of the scalpel in order to determine if the fetus was directly below where the incision was to be made. Plaintiff's expert also notes that the anesthesia, incision and delivery all occurred within a single minute. NYSCEF Doc. No. 83.

The parties argue vociferously whether the C-section had to be done on an emergency basis. That issue can be resolved at a trial (if one is necessary) and need not be decided now. Plaintiff's expert opines that even if haste was necessary, the doctors still had time to take the precautions that he claims would have avoided injuring the fetus. NYSCEF Doc. No. 83.

Plaintiff's expert also disagrees with Dr. Lerner's opinion that it was appropriate for a new third-year resident (residencies started July 1, so the resident was just two weeks into the third year) to make the incision. Plaintiff's expert opines that the C-section needed to be performed by an experienced surgeon and not by a new third-year resident. Finally, plaintiff's expert disagrees with Dr. Lerner's opinion that the fetal laceration was not preventable, noting that whether it is a scheduled C-section or a stat C-section, fetal lacerations do not occur absent negligence in the technique of the surgeon. Plaintiff's expert claims that he has performed thousands of such procedures without ever causing a laceration. NYSCEF Doc. No. 83.

Defendants reply that had the surgeons taken even longer to perform the subject C-section, as plaintiff's expert suggested, the infant's outcome could have been drastically worse. Clearly, "prioritizing the infant's life and brain health over the risk of a laceration was in accordance with the standard of care, as Dr. Lerner opined." NYSCEF Doc. No. 87. How much haste was required, and how much haste caused the laceration, are disputed issues of expert opinion.

Defendants argue that the scar was superficial, but this court agrees with plaintiff that a scar is a scar, which is logic, not semantics.

Thus, an issue of fact exists as to whether the surgeons performed the procedure properly.

The Treatment of the Laceration

The main purpose of a Notice of Claim is to allow a defendant to investigate the allegations. Defendants correctly argue that plaintiff's claim that defendants negligently treated the laceration and failed to disclose it were not included in the General Municipal Law § 50-e Notice of Claim. Thus, the Court must dismiss these claims. A Bill of Particulars cannot assert new

claims, of which a defendant was not on notice. Valentine v 2147 Second Ave. LLC, 203 AD3d 531 (1st Dept 2022) (“the purpose of a bill of particulars is to amplify pleadings, not add a new theory or cause of action”).

Although not necessary to the instant Decision and Order, the Court notes that defendants argue that there were no departures from the standard of care during the course of treating the laceration, as opined by defendant’s plastic surgery expert, Dr. John E. Sherman. NYSCEF Doc. No. 79.

Plaintiff asserts that defendants’ failure properly to treat the wound, disclose the extent of the injury, and provide truthful communication to the family after the incident constitute ongoing acts of negligence. NYSCEF Doc. No. 82 ¶ 34. However, this Court agrees with defendants that merely stating in the Notice of Claim that defendants’ negligence occurred “before, during, and after” the C-Section does not notify defendants of these claims. Prospective, nonspecific, and open-ended language is insufficient to place a defendant on notice of additional claims. See Carroll v. New York City Health and Hosps. Corp., 177 AD3d 560, 561 (1st Dept 2019) (“Plaintiffs’ papers were insufficient to put defendant on notice of plaintiffs’ new theory of liability—raised for the first time in her expert’s opinion—that he deviated from the standard of care.”). Here, Plaintiff’s Notice of Claim failed to specify negligence in the manner of the treatment of the laceration or disclosure of the wound.

Informed Consent

Plaintiff’s informed consent claim fails for several reasons. First, Ms. Pierson signed an informed consent form for a non-emergency C-Section. Second, in an emergency, there’s no time to fuss with administrative forms. And third, in any event, a reasonable person in Ms. Pierson’s position clearly would have consented to the C-Section. Obviously, plaintiff could not have consented to the procedure while *in utero*.

Negligent Hiring and Supervision

“Where an employee is acting within the scope of his or her employment, thereby rendering the employer liable for any damages caused by the employee’s negligence under a theory of respondeat superior, no claim may proceed against the employer for negligent hiring or retention.” Karoon v New York City Transit Auth., 241 AD2d 323 (1st Dept 1997). In any event, Plaintiff does not oppose dismissal of this claim.

Miscellaneous

To rely on the doctrine of *res ipsa loquitur*, a plaintiff must demonstrate that (1) the event must be of a kind that ordinarily does not occur in the absence of someone’s negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant, and (3) the plaintiff has not through her own actions caused or contributed to the occurrence. See Morejon v Rais Constr. Co., 7 NY3d 203, 209 (2006). In the case at bar, plaintiff cannot establish the first element, as Dr. Lerner raises a material question of fact as to whether this laceration can occur in the absence of negligence.

Conclusion

Thus, for the reasons stated hereinabove, plaintiff's claim of medical malpractice survives the instant motion; plaintiff's claims of failure properly to treat the wound, failure to own up to it, lack of informed consent, and negligent hiring and supervision (and any other claims) are dismissed; and the Clerk is hereby directed to enter judgement accordingly.

HON. ARTHUR F. ENGORON



12/3/2025

DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE