

S.B.Z. v Oronsaye

2025 NY Slip Op 35332(U)

April 11, 2025

Supreme Court, Queens County

Docket Number: Index No. 709379/2021

Judge: Tracy Catapano-Fox

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Short Form Order
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

-----X
S.B.Z., an infant by his father and natural guardian
MD ZIAUR RAHMAN, and MD ZIAUR RAHMAN,
Individually,

Index No. 709379/2021

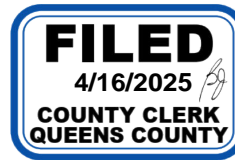
Part MDP
Motion Date: March 5, 2025

-against-

Calendar No. 36
Sequence No. 3

ERONMWON ORONSAYE M.D. M.S. and
LONG ISLAND JEWISH MEDICAL CENTER,

Defendants.
-----X



The following papers numbered EF-70 to EF-106 read on this motion by defendant LONG ISLAND JEWISH MEDICAL CENTER for summary judgment and dismissal of plaintiffs’ Complaint pursuant to CPLR §3212, and plaintiffs’ cross-motion for summary judgment pursuant to CPLR §3212.

	Papers <u>Numbered</u>
Notice of Motion, Affirmation, Exhibits.....	EF70-EF89
Notice of Cross-Motion, Affirmation, Exhibits.....	EF98-EF101
Reply Affirmation.....	EF106

Upon the foregoing papers, it is ordered that these motions are determined as follows:

Defendant Long Island Jewish Medical Center (“LIJMC”)’s motion for summary judgment and dismissal of plaintiffs’ Complaint pursuant to CPLR §3212 is granted, and plaintiffs’ cross-motion for summary judgment on the theory of *res ipsa loquitor* pursuant to CPLR §3212 is denied.

Plaintiffs commenced this action for medical malpractice and lack of informed consent against defendants for injuries alleged during infant plaintiff’s delivery. Plaintiffs filed the Summons and Complaint on April 23, 2021, and issue was joined via the filing of moving defendant’s Answer on May 28, 2021.

Defendant LIJMC argues summary judgment is warranted, as its staff did not deviate from the applicable standard of care and none of its actions or inactions proximately caused infant plaintiff's injuries. LIJMC presents the pleadings, medical records, deposition testimony, affidavit of Nurse Sarah Grosser, and affirmation of Dr. Jonathan Lanzkowsky in support of the motion. Defendant argues plaintiffs failed to assert any direct causes against it, and it cannot be vicarious liability for Dr. Oronsaye's care and treatment, as she was not an LIJMC employee but the private attending doctor for plaintiffs. Defendant argues LIJMC staff provided appropriate support and care during the delivery in accordance with the standard of care, and co-defendant Dr. Oronsaye was responsible for all aspects of infant plaintiff's delivery. LIJMC argues plaintiffs' cross-motion for summary judgment as to the theory of *res ipsa loquitur* should be denied, as plaintiffs cannot establish infant plaintiff's injuries were caused by an instrumentality within the exclusive control of LIJMC staff.

Defendant LIJMC presents the affidavit of Nurse Sarah Grosser, who was present and has an independent recollection of infant plaintiff's delivery. She attested to recalling a tight nuchal cord was encountered during delivery, and was cut by plaintiffs' private physician Dr. Oronsaye. Nurse Grosser further attested Dr. Oronsaye handed infant plaintiff to her, and she observed a laceration when placing him on the warming table. She attested she did not know how the laceration occurred and infant plaintiff's father asked about the laceration. Nurse Grosser noted infant plaintiff required resuscitation at birth, and the umbilical cord trimming would have been postponed until after the resuscitation was completed.

Defendant LIJMC presented the affirmation of Dr. Jonathan Lanzkowsky in support of the motion. Dr. Lanzkowsky affirmed he is a licensed physician in New York who is board certified in Obstetrics and Gynecology. He affirmed to be fully familiar with the standard of care in 2020 and applicable to this case based upon his training and experience, and reviewed the pleadings, medical records, and deposition testimony. Dr. Lanzkowsky opined LIJMC staff's care and treatment was within the standard of care and none of its actions or inactions proximately caused infant plaintiff's injuries. He noted plaintiffs' Bill of Particulars did not identify any LIJMC staff who are acted recklessly or negligently, and opined Dr. Oronsaye was responsible for infant plaintiff's delivery. Dr. Lanzkowsky opined Dr. Oronsaye was responsible for the manner in which infant plaintiff's nuchal cord was cut, and LIJMC staff merely followed her orders and did not perform any independent acts of negligence.

Dr. Lanzkowsky opined there was no evidence anyone other than Dr. Oronsaye was involved in the cutting of the nuchal cord or was in possession of scissors prior to infant plaintiff sustaining the laceration. He opined the only time LIJMC staff may have utilized scissors would be during the trimming of the umbilical cord post-delivery, but infant plaintiff had already sustained the laceration. Dr. Lanzkowsky opined neonatal resuscitation takes priority over trimming an umbilical cord, and by the time Dr. Bai resuscitated infant plaintiff, he had noticed

and documented the laceration. He opined there was no evidence the trimming of the umbilical cord was performed negligently or caused injury, and therefore none of LIJMC staff could have caused infant plaintiff's laceration. Dr. Lanzkowsky opined the photographs show infant plaintiff's laceration were consistent with the cutting of the nuchal cord and inconsistent with trimming the umbilical cord. Dr. Lanzkowsky further opined plaintiffs' claim for lack of informed consent should be dismissed, as Dr. Sasson discussed the risks, benefits and alternatives of performing a laceration repair and obtained plaintiffs' informed consent before successfully performing it.

Plaintiffs oppose defendant LIJMC's motion and cross-move for summary judgment on the theory of *res ipsa loquitor*. Plaintiffs present the submissions in LIJMC's motion, and an affirmation of Dr. John M. Garofalo in support of the cross-motion. They argue infant plaintiff sustained a laceration to his lower neck/sternum which does not occur in the absence of negligence. Plaintiffs further argue nurse Sarah Grosser, R.N. testified she observed the laceration after Dr. Oronsaye handed infant plaintiff to her. They further argue infant plaintiff's father testified he witnessed Dr. Oronsaye with a scissor during delivery and Dr. Oronsaye apologized to him about the laceration.

Plaintiffs present the affirmation of Dr. John M. Garofalo in support of their cross-motion. Dr. Garofalo affirmed to be a physician licensed to practice medicine in Connecticut and board certified in Obstetric and Gynecology. He affirmed to be fully familiar with good and accepted standards of care relative to Obstetrics and Gynecology in 2020 and presently, and reviewed the pleadings, deposition testimony and medical records in rendering opinions. Dr. Garofalo opined infant plaintiff's laceration is not one that occurs in the absence of negligence. He further opined to a reasonable degree of medical certainty that infant plaintiff's laceration is not a known or accepted risk or complication of childbirth but an injury only caused as a result of negligence.

Dr. Garofalo opined to a reasonable degree of medical certainty that infant plaintiff's laceration was caused during the cutting of the nuchal cord by Dr. Oronsaye as a result of Dr. Oronsaye's failure to act in accordance with good and accepted standards of care. He noted LIJMC's employee nurse Sarah Grosser attested infant plaintiff had a tight nuchal cord which Dr. Oronsaye cut. She further attested she observed the laceration on infant plaintiff's chest after Dr. Oronsaye handed infant plaintiff to her. He also noted Dr. Tianyu Bai testified to observing the laceration when first encountering infant plaintiff when called into the delivery room for cardiopulmonary resuscitation. Dr. Garofalo further noted the medical records show infant plaintiff had a chest laceration, as noted by Dr. Oronsaye in the OB Provider Delivery Summary and confirmed by Dr. Sasson, the surgeon who repaired the laceration. Plaintiff MD Ziaur Rahman testified he observed the laceration on infant plaintiff while in the warming tray, and Dr. Oronsaye said it was common, not a cause for worry and would be addressed. Dr. Garofalo opined the laceration was present only moments after birth, and the injury was caused during the birth.

Dr. Garofalo opined to a reasonable degree of medical certainty that Dr. Oronsaye was the only person with exclusive control over infant plaintiff during the course of delivery. He noted Dr. Oronsaye testified she was the individual who delivered infant plaintiff, cut the nuchal cord and performed suction after the birth. He opined the next person to handle infant plaintiff was Nurse Grosser, who observed the laceration. Dr. Garofalo opined based upon the photographs of the injury and operative report that the laceration occurred during the cutting of the nuchal cord. He opined Dr. Oronsaye's failure to lift the cord away from the skin before cutting the nuchal cord was a deviation from the standard of care, and cutting the cord without lifting it away from the skin is a departure from the standard of care because it creates an unreasonable risk of laceration. Dr. Garofalo further opined it is more likely than not that the laceration was caused as a result of Dr. Oronsaye not using her fingers to lift the nuchal cord before she cut it.

Dr. Garofalo opined in order to cut the nuchal cord in accordance with the standard of care, the entire area to be cut and surrounding anatomy needs to be visualized and therefore would need to be delivered. He further opined that cutting the nuchal cord without visualizing the entire cord and surrounding area would be a departure from the standard of care. Dr. Garofalo further opined the laceration was caused by the scissor used by Dr. Oronsaye, who was the only person to have exclusive control of the scissor during delivery. He further opined plaintiffs did not cause or contribute to the laceration, and Dr. Oronsaye departed from the standard of care in causing the laceration to infant plaintiff. Based upon the above, plaintiffs argue defendant's motion should be denied, and plaintiffs' cross-motion should be granted.

Pursuant to CPLR §3212, a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." (*Smith v. City of New York*, 210 A.D.3d 53, 68 [2d Dept. 2022].) The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. (*Morejon v. New York City Tr. Auth.*, 216 A.D.3d 134, 136 [2d Dept. 2023].) If there is any doubt as to the existence of a triable issue of fact, the motion must be denied. (*Id.*) The failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposition papers. (*Winegrad v. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]; *see also Antonyuk v. Brightwater Towers Condo Homeowners' Assn., Inc.*, 147 A.D.3d 711, 712 [2d Dept. 2017].) In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party. (*Matter of New York City Asbestos Litig.*, 33 N.Y.3d 20, 25 [2019].) Additionally, the court's function in determining a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. (*Reyes v. S. Nicolina & Sons Realty Corp.*, 212 A.D.3d 851, 852-853 [2d Dept. 2023].) Once the moving party

has demonstrated a prima facie entitlement to summary judgment, the burden then shifts to the non-moving party to demonstrate the existence of material issues of fact. (*See generally Coscia v. Mosca*, 203 A.D.3d 695 [2d Dept. 2022].)

In moving for summary judgment in a medical malpractice action, the defendant must establish a prima facie case that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby, and the plaintiff in opposition must submit evidentiary facts or materials to demonstrate the existence of a triable issue of fact. (*Stukas v. Streiter*, 83 A.D.3d 18, 24 [2d Dept. 2011].) In presenting opposition to raise a triable issue of fact, the plaintiff is required to provide an affidavit of merit by a medical expert, and the failure to submit an affidavit by a medical expert competent to attest to the meritorious nature of the plaintiff's claims requires dismissal of the Complaint. (*Id.* at 28.) Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. (*Buch v. Tenner*, 204 A.D.3d 635, 638 [2d Dept. 2022].)

To establish a cause of action to recover damages based upon lack of informed consent, a plaintiff must prove “(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.” (*Gilmore v. Mihail*, 174 A.D.3d 686, 688 [2d Dept. 2019].)

To establish liability under the doctrine of *res ipsa loquitur*, a plaintiff must establish that the event must be of a kind that ordinarily does not occur in the absence of negligence, that it must be caused by an agency or instrumentality within the exclusive control of the defendant, and the injury must not be due to any voluntary act or contribution by plaintiff. (*Frank v. Smith*, 127 A.D.3d 1301, 1302 [3d Dept. 2015].)

Defendant LIJMC established a prima facie entitlement to summary judgment through the documentary evidence and expert opinion of Dr. Lanzkowsky that the staff did not depart from good and accepted standards of care and did not proximately cause or contribute to infant plaintiff's injuries. Defendant established the staff followed Dr. Oronsaye's directions, as she was plaintiff's private attending physician, and was not involved in the cutting of infant plaintiff's nuchal cord. LIJMC further established it did not depart from the standard of care in treating infant plaintiff and none of its actions or inactions proximately caused infant plaintiff. Defendant established plaintiffs failed to assert direct claims against individually named LIJMC staff, and it is not vicariously liable for Dr. Oronsaye's care and treatment. It further demonstrated through Dr. Lanzkowsky's affirmation that the laceration occurred while Dr. Oronsaye cut the nuchal cord,

and none of the LIJMC staff were involved in this procedure. It further established the injury did not occur while trimming the umbilical cord since the laceration was observed prior to the trimming. Defendant LIJMC further established there are no valid claims for lack of informed consent or negligence hiring against it, and therefore summary judgment is warranted.

Plaintiffs failed to raise a triable issue of fact in dispute with regard to their claims of lack of informed consent and negligent hiring, as they presented no evidence in support of these claims against defendant LIJMC. They further failed to present issues of fact with regard to LIJMC staff, as plaintiffs' counsel's affirmation stated Dr. Oronsaye was solely liable for infant plaintiff's injuries, and plaintiffs' expert failed to articulate any departures from the standard of care by LIJMC and failed to articulate how LIJMC staff's inactions or omissions proximately caused infant plaintiff's injuries.

Plaintiffs' cross-motion for summary judgment on the doctrine of *res ipsa loquitur* is denied, as plaintiffs failed to present a prima facie case that LIJMC staff was in exclusive control of the instrument that caused infant plaintiff's injuries. (*See Montagnino v. Inamed Corp.*, 120 A.D.3d 1317 [2d Dept. 2014].) As plaintiffs' expert articulated no opinions against defendant LIJMC staff, plaintiff's cross-motion is denied. (*See Masik v. Lutheran Med. Ctr.*, 92 A.D.3d 733 [2d Dept. 2012]; *Kruck v. St. John's Episcopal Hosp.*, 228 A.D.2d 565 [2d Dept. 1996].)

Accordingly, defendant Long Island Jewish Medical Center's motion for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212 is granted, and plaintiffs' cross-motion for summary judgment pursuant to CPLR §3212 is denied. Plaintiffs' Complaint is dismissed as to defendant Long Island Jewish Medical Center.

This constitutes the decision and Order of the Court.

Dated: April 11, 2025



Hon. Tracy Catapano-Fox, J.S.C.

