

S.B.Z. v Oronsaye

2025 NY Slip Op 35333(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

FILED
4/14/2025
COUNTY CLERK
QUEENS COUNTY

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

709379/2021
Index No. ~~704954/2021~~

Part MDP
Motion Date: March 5, 2025

-against-

Calendar No. 37
Sequence No. 2

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

Defendants.

-----X

The following papers numbered EF-55 to EF-109 read on this motion by defendant ERONMWON ORONSAYE M.D. M.S. 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.....	EF55-EF69
Notice of Cross-Motion, Affirmation, Exhibits.....	EF98-EF101
Affirmation in Opposition.....	EF108
Reply Affirmation.....	EF109

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

Defendant Eronmwon Oronsaye M.D. M.S.' motion for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212 is denied, 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 12, 2021.

Defendant argues summary judgment is warranted as she did not deviate from good and accepted standards of medical care and none of her actions or inactions proximately caused plaintiffs' injuries. Dr. Oronsaye presents the pleadings, parties' deposition testimony, medical records and affirmation of Joshua Holden, M.D. in support of her motion. Defendant argues she did not deviate from good and accepted standards in delivering infant plaintiff, and due to a tight nuchal cord, had to cut the umbilical cord to deliver infant plaintiff. She further argues she did not cause a laceration to infant plaintiff's upper to mid chest, as she delivered infant plaintiff successfully and handed infant plaintiff over to staff. Defendant further argues plaintiffs' theory of *res ipsa loquitur* must be dismissed, as she was not in exclusive control of infant plaintiff before the laceration was noted and there were five other people in the room during infant plaintiff's birth. Defendant further argues plaintiffs' claim for lack of informed consent must be dismissed as she was not required to obtain informed consent from infant plaintiff's parents to remove the nuchal cord.

Defendant Dr. Oronsaye presents the affirmation of Dr. Joshua Holden in support of her motion. Dr. Holden affirmed to be a physician licensed in New York and board certified in Obstetrics & Gynecology. He affirmed to be fully familiar with the applicable standard of care in 2020 based upon his experience and training. Dr. Holden reviewed the pleadings, parties' deposition testimony and plaintiffs' medical records in rendering opinions. Dr. Holden opined Dr. Oronsaye's care and treatment was consistent with the standard of care in 2020, and none of her actions or inactions proximately caused plaintiffs' injuries.

Dr. Holden noted Dr. Oronsaye was the attending OB/GYN from Women's Health Pavilion on November 2, 2020 when mother gave birth to infant plaintiff at co-defendant Long Island Jewish Medical Center (LIJMC). Dr. Holden opined when there is a tight nuchal cord, the standard of care required the OB/GYN to remove it prior to delivering the rest of the infant's body to prevent suffocation. He noted Dr. Oronsaye testified she delivered the infant, suctioned him but did not cut infant plaintiff or further cut down the umbilical cord. Dr. Holden opined within a reasonable degree of medical certainty that Dr. Oronsaye did not deviate from the standard of care in delivering infant plaintiff and did not cause any laceration alleged by plaintiffs. He opined Dr. Oronsaye appropriately identified and removed a nuchal cord before delivering the entirety of infant plaintiff successfully and handing infant plaintiff to LIJMC staff. Dr. Holden opined based upon infant plaintiff's position inside plaintiff's mother when the nuchal cord was removed, it is highly unlikely that infant plaintiff's chest would be lacerated.

Dr. Holden opined to a reasonable degree of medical certainty that Dr. Oronsaye did not have exclusive control over infant plaintiff directly after birth, as there were other parties in the room who could have caused the laceration. He noted the injury to infant plaintiff's chest was not noticed by hospital staff until infant plaintiff was in the warming tray, and no evidence to indicate the instrumentality of the laceration. Dr. Holden opined to a reasonable degree of medical certainty

that the care provided to infant plaintiff by Dr. Oronsaye did not cause or contribute to infant plaintiff's laceration, as there is no evidence Dr. Oronsaye caused the injury while removing the nuchal cord.

Dr. Holden opined to a reasonable degree of medical certainty that the laceration was not caused in utero or during the episiotomy, as infant plaintiff's chest was not outside the birth canal and any laceration during the episiotomy would be on infant plaintiff's head. He opined Dr. Oronsaye was not required to obtain informed consent from plaintiff, as removal of a nuchal cord is a procedure that a reasonably prudent patient would agree to if fully informed that infant plaintiff could not be safely delivered without its removal. Dr. Holden opined Dr. Oronsaye properly cared and treated infant plaintiff during delivery using sound judgment and none of her actions or inactions proximately caused infant plaintiff's chest laceration. Based upon the above, defendant argues summary judgment is warranted.

Plaintiffs oppose defendant's motion and cross-move for summary judgment on the theory of *res ipsa loquitor*. Plaintiffs present the submissions in defendant's motion affidavits from co-defendant 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 further argue defendant failed to present a prima facie case, as she failed to submit an affidavit in support of her motion and failed to sufficiently refute the evidence demonstrating she caused the laceration to infant plaintiff during delivery.

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. Nicolio & 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 established a prima facie entitlement to summary judgment through the documentary evidence and expert opinion of Dr. Holden that Dr. Oronsaye did not depart from

good and accepted standards of care and did not proximately cause or contribute to infant plaintiff's injuries. Dr. Oronsaye demonstrated through her deposition and Dr. Holden's affirmation that she performed the delivery of infant plaintiff appropriately and did not cause or contribute to the laceration on infant plaintiff's chest. Dr. Holden demonstrated Dr. Oronsaye properly cut the nuchal cord according to the standard of care and did not cause a laceration to infant plaintiff's chest, as the cut was not in the same location as the nuchal cord. Dr. Oronsaye also demonstrated plaintiffs' claim for lack of informed consent is without merit, as no reasonable person would not cut the nuchal cord and ensure infant plaintiff's breathing was not obstructed.

Plaintiffs failed to raise a triable issue of fact in dispute with regard to their claim of lack of informed consent, as they presented no evidence that Dr. Oronsaye performed a procedure for which she was required to discuss the risks, benefits and alternatives with the mother of the infant. (*See Guctas v. Pessolano*, 132 A.D.3d 632 [2d Dept. 2015].)

However, plaintiffs raised a triable issue of fact whether Dr. Oronsaye departed from the standard of care in cutting the nuchal cord and whether the departure proximately caused infant plaintiff's laceration to the chest. Plaintiffs demonstrated through the sworn affidavits, deposition testimony and Dr. Garofalo's affirmation that there are issues of fact whether Dr. Oronsaye caused the laceration to infant plaintiff during the delivery, as the laceration was observed within minutes of the birth of infant plaintiff and Dr. Oronsaye used the scissors to cut the nuchal cord.

Plaintiffs' cross-motion for summary judgment on the doctrine of *res ipsa loquitur* is denied, as plaintiffs failed to present a prima facie case. (*See Montagnino v. Inamed Corp.*, 120 A.D.3d 1317 [2d Dept. 2014].) Plaintiffs' evidence failed to establish that Dr. Oronsaye was in exclusive control of the instrument that caused infant plaintiff's injuries, as there were numerous persons in the delivery room for which plaintiffs failed to demonstrate their actions or inactions did not cause the laceration. (*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].) Further, the sworn testimony did not demonstrate that Dr. Oronsaye was in exclusive control of scissors, or that scissors were the instrument that caused infant plaintiff's injuries, as required to proceed under a theory of *res ipsa loquitur*.

Accordingly, defendant Eronmwon Oronsaye M.D. M.S.' motion for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212 is denied, and plaintiff's cross-motion for summary judgment pursuant to CPLR §3212 is denied.

This constitutes the decision and Order of the Court.

Dated: April 11, 2025



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