

Lico v Schwartz

2011 NY Slip Op 32359(U)

August 23, 2011

Supreme Court, Suffolk County

Docket Number: 09-9457

Judge: Peter H. Mayer

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SHORT FORM ORDER

INDEX No. 09-9457
CAL No. 11-00391MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 7-18-11
ADJ. DATE _____
Mot. Seq. # 001 - MG
 # 002 - MG

OLEZIA LICO and RUSSELL LICO,
Plaintiffs,

SHEARER & ESSNER, LLP
Attorney for Plaintiffs
50 Broadway
New York, New York 10004

- against -

LAWRENCE WORDEN & RAINIS & BARD
Attorney for Defendants Schwartz, Orthopedic
Spine Care and Frendo
225 Broad Hollow Road, Suite 105E
Melville, New York 11747

ARNOLD N. SCHWARTZ, M.D.,
ORTHOPEDIC SPINE ASE OF LONG
ISLAND, P.C., CHRISTOPER FRENDO, D.O.,
JOSEPH LODATO, and HUNTINGTON
HOSPITAL,

CATALANO GALLARDO & PETROPOULOS
Attorney for Defendant Lodato
100 Jericho Quadrangle Suite 214
Jericho, New York 11753

Defendants.

MCHENRY, HORAN & LAPPING, P.C.
Attorney for Defendant Huntington Hospital
6800 Jericho Turnpike, Suite 202E
Syosset, New York 11791

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by defendant Huntington Hospital, dated June 22, 2011, and supporting papers; (2) Notice of Motion by defendant Joseph Lodato, dated June 27, 2011, and supporting papers; (3) Affirmation in Opposition by the , dated , and supporting papers; (4) Reply Affirmation by the , dated , and supporting papers; (5) Other ____ (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

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ORDERED that the motions (001, 002) are consolidated for the purpose of this determination; and it is further

ORDERED that the motion (001) by defendant Huntington Hospital for summary judgment dismissing the complaint pursuant to CPLR 3212 is granted; and it is further

ORDERED that the motion (002) by defendant Joseph Lodato for summary judgment dismissing the complaint pursuant to CPLR 3212 is granted.

In this medical malpractice action, plaintiffs Olesia Lico and Russell Lico seek damages for alleged departures in accepted medical practice in the care and treatment of plaintiff Olesia Lico from February 5, 2008 to February 19, 2008, and derivatively. The record reveals that plaintiff Olesia Lico (hereinafter "plaintiff"), 65 years of age, had a history of degenerative scoliosis and spondylosis in the thoracic spine. Plaintiff was admitted to defendant Huntington Hospital (hereinafter "the hospital") on February 7, 2008 to undergo spinal surgery. Defendant Arnold N. Schwartz, M.D. performed the surgery and defendant Christopher Frendo, D.O. assisted. Defendant Joseph Lodato, a chiropractor, was the spinal cord monitoring technician. The surgery was to be performed in two stages. The first stage, consisting of an anterior interbody fusion of the lower spine, was performed on February 5, 2008. The surgery was uneventful. The second stage, consisting of the insertion of hardware in the posterior spine, was scheduled for February 8, 2008. On that day, complications were encountered. The operative report reveals that defendant Lodato noted a change in plaintiff's motor nerve testing. In addition, two small lacerations were found in the dura, which is a membrane surrounding the spinal cord, that were repaired. Anesthesia was stopped, a "wake up test" was performed and the anesthesiologist noted that plaintiff could not move her left foot. The procedure was aborted and all hardware was removed. Plaintiff developed a left foot drop.

In the bill of particulars, plaintiff alleges that defendants departed from accepted medical practice by failing to properly perform a L5/S1 discectomy and stabilization of the spine; properly assess her condition; maintain adequate notes and records; recommend aborting the second procedure in a timely manner given neurological changes; heed recommendations of the intra-operative neurophysiologist; and recognize the significance of intra-operative somatosensory evoked potentials ("SSEP") monitoring results. Plaintiff further alleges that defendants performed contraindicated surgery causing injury to the spinal cord during decompression, the nerve root sheath during surgery, and permanent neurological disability.

The hospital and Lodato now move separately for summary judgment dismissing the complaint. The hospital contends that none of its employees were negligent and that it was not vicariously liable for the acts or omissions of Schwartz, Frendo, and Lodato, who were private attending physicians. Lodato contends that he acted within the standard of care in his recording, interpreting and reporting of the neurophysiological monitoring readings to the surgeons.

The requisite elements of proof in a medical malpractice case are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage

(*Gross v Friedman*, 73 NY2d 721, 535 NYS2d 586 [1988], *Amsler v Verrilli*, 119 AD2d 786, 501 NYS2d 411 [2d Dept 1986]; *De Stefano v Immerman*, 188 AD2d 448, 591 NYS2d 47 [2d Dept 1992]). 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 (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; *Zuckerman v New York*, 49 NY2d 557, 562, 427 NYS2d 595 [1980]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404, 165 NYS2d 498 [1957]). On a motion for summary judgment, a defendant doctor has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby (*Williams v Sahay*, 12 AD3d 366, 783 NYS2d 664 [2d Dept., 2004]). A plaintiff, in opposition to a defendant physician's summary judgment motion, must submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Stukas v Streiter*, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury (see, *Fiore v Galang*, 64 NY2d 999, 489 NYS2d 47 [1985]; *Lyons v McCauley*, 252 AD2d 516, 675 NYS2d 375 [2d Dept 1998]).

Under the doctrine of respondeat superior, a hospital may be vicariously liable for the medical malpractice of physicians who act in an employment or agency capacity (see, *Hill v St. Clare's Hosp.*, 67 NY2d 72, 79, 499 NYS2d 904 [1986]; *Fiorentino v Wenger*, 19 NY2d 407, 414, 280 NYS2d 373 [1967]). The premise for imputing liability is the element of control (see, *Kavanaugh v Nussbaum*, 71 NY2d 535, 528 NYS2d 8 [1988]). In addition, the law is clear that a hospital is protected from liability when it follows the direct and explicit orders of the attending physician unless its staff knows that the doctor's orders are so clearly contraindicated by normal practice that ordinary prudence requires inquiry into their correctness (*Killeen v Reinhardt*, 71 AD2d 851, 419 NYS2d 175 [2d Dept 1979]).

The evidence submitted by defendants demonstrates their *prima facie* entitlement to summary judgment dismissing the complaint. In support of its motion, the hospital submits, *inter alia*, the pleadings, the bill of particulars, the plaintiff's medical records, and the affidavit of Jeffrey Goldstein, M.D. Dr. Goldstein avers that he is duly licensed to practice medicine in the State of New York and is board certified in orthopedic surgery. He states that the care rendered to the plaintiff by the hospital staff was appropriate and that there were no departures from good and accepted hospital care that caused her injury. He states that the nursing preoperative record for each surgery is complete and appropriate. The intra-operative record is also complete and appropriately reports, *inter alia*, the type of surgery to be performed, the medications, the sponge and sharps count, which conforms to good and accepted practice. There is also a detailed nursing care plan, which demonstrates that the nursing staff anticipated plaintiff's needs and rendered appropriate care in conformance with the anticipated plan. The record also documents that the nurses timely and appropriately carried out all orders and that all medications were timely and properly administered. The hospital had no responsibility for overseeing the performance of the surgeries by plaintiff's private, attending physicians and had no duty to intervene in the treatment that they rendered. In addition, discussing potential treatment options for plaintiff was the responsibility of her private, attending orthopedic surgeon. Dr. Goldstein concludes that the record

documents that there were no departures from good and accepted hospital, medical and/or nursing staff practice on the part of the hospital staff that caused any of the injuries claimed in this case.

In support of his motion, Lodato submits, *inter alia*, his personal affidavit, his deposition transcript, and Schwartz' deposition transcript. Lodato testified that he was assigned by his employer, Physiologic Assessment Services, to perform electrodiagnostic testing of plaintiff's spinal nerves during surgery. His role as a neurophysiologist involved monitoring plaintiff's spinal cord and related nerve roots through different monitoring techniques, reporting any changes to the attending surgeon, defendant Schwartz, and following Schwartz' orders. He had no other authority in the operating room. Prior to surgery, Lodato interviewed plaintiff and explained his role in the operating room. He placed the electrodes on plaintiff's legs, arms, and scalp. He also obtained baseline readings. During the surgery, Lodato stimulated the nerves, recorded the results, and informed Schwartz of the readings. During the lumbar decompression stage, Lodato identified a change in the morphology of the wave form of the lower extremity evoked potentials and advised Schwartz. Lodato stated that the change in the readings was attributed to plaintiff's low blood pressure. After the anesthesiologist provided intravenous fluids to plaintiff, Lodato noted some improvement in the neurological readings and advised Schwartz, who acknowledged the report. During the repair of the two holes in the dura, Lodato noted a 50% reduction from baseline in the amplitude with morphology changes in the wave forms of the left lower extremity readings. The readings were consistent with plaintiff's low blood pressure and lack of perfusion. At one point, Lodato noted a complete loss of the left lower extremity wave form and informed Schwartz. Schwartz ordered a wake up test, during which time, plaintiff was unable to move her left foot. Shortly thereafter, Schwartz decided to abort the procedure.

In his deposition, Schwartz testified that Lodato adequately informed him of all the changes in the wave forms of the intra-operative monitoring during the surgery. Schwartz also stated that Lodato continuously engaged in trouble shooting to identify whether there was a technical cause for the changes in the wave forms. After Lodato confirmed patient positioning and electrode positioning were appropriate and that the technical equipment was functioning, a technical problem was ruled out. Schwartz stated that Lodato had no authority to alter the surgical course, order a wake up test, or abort the surgical procedure.

In his personal affidavit, Lodato avers that he is a chiropractor who is certified as a neurophysiologist. He completed formal training in electrodiagnostic testing, and states that there is no licensing requirement in the State of New York. He states that he acted in accordance with the standard of care in performing Intra Operative Neurophysiological Monitoring during plaintiff's surgical procedure, and that the plaintiff's alleged injuries did not occur as a proximate result of any care or neglect of care on his part. It is his opinion, within a reasonable degree of professional certainty, that he properly set up the equipment on the plaintiff for monitoring, adequately stimulated and recorded the nerve potentials at appropriate intervals, promptly and accurately interpreted the nerve potentials, and promptly reported the changes to the attending surgeon. As a result, the plaintiff did not suffer any injuries as a result of any failure on his part.

Huntington Hospital and Lodato established their entitlement to judgment as a matter of law (*see, Starr v Rogers*, 44 AD3d 646, 843 NYS2d 371 [2d Dept 2007]; *Whalen v Victory Memorial Hosp.*, 187

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AD2d 503, 589 NYS2d 590 [2d Dept 1992]). Thus, the burden shifted to plaintiff to respond with rebutting medical evidence demonstrating a departure from accepted medical procedures (*see, Baez v Lockridge*, 259 AD2d 573, 686 NYS2d 496 [2d Dept 1999]). Plaintiff did not oppose the motions and, therefore, has failed to raise triable issues of fact.

Accordingly, the motions for summary judgment are granted. Plaintiff's claims against Huntington Hospital and Lodato, dismissed herein, are severed and the plaintiff's remaining claims shall continue.

Dated: 8/23/11


PETER H. MAYER, J.S.C.