



with respect to plaintiffs' claims of negligence against them. For the reasons set forth in this Decision, this Court grants judgment as a matter of law for plaintiffs on their claim of lack of informed consent in the nature of a battery against Dr. Barry Shah and, alternatively, a new trial as to that claim. This Court denies plaintiffs' new trial motions as to their claims of medical negligence against all defendants. As a result of its decisions on these motions, the Court need not reach defendants' motions for judgment as a matter of law.

## I

### FACTS AND TRAVEL

Plaintiff, Linda Spaight had been suffering from abdominal pain. Dr. Barry Shah initially suggested that she might be suffering from endometriosis and recommended a course of drug treatment to determine if that would relieve her symptoms. Endometriosis is a benign condition where the lining of the uterus escapes the uterus. It can involve the inner organs of the pelvis, including the ovaries, as well as the area behind the uterus. Endometriosis can cause severe pelvic pain. Ms. Spaight was reluctant to take medication for a condition that had not yet been diagnosed. At that point, Dr. Barry Shah recommended laparoscopic surgery, specifically an operative pelviscopy, to determine if she had endometriosis and to surgically remove any endometriosis that might be found.

Physician and patient discussed the contemplated procedure. Based on her testimony at trial, Ms. Spaight understood that the procedure would not involve any major surgery. She signed a consent form that authorized Dr. Barry Shah to perform an "operative pelviscopy and indicated surgery." She understood that phrase to mean a laparoscopic pelviscopy to determine if endometriosis was present and to remove any endometriosis found. Dr. Barry Shah viewed the consent more broadly, believing that it authorized him to determine through the laparoscopic

procedure whether any endometriosis was present and to conduct any further laparoscopic surgery that he deemed “reasonably necessary” to relieve Ms. Spaight of abdominal pain. Ms. Spaight raised a question at the time of signing the consent form as to its provisions regarding laboratory analysis of tissue samples. Dr. Barry Shah assured her that she need not worry about that provision because no such procedures were contemplated. The consent form described the risks associated with surgery as including “respiratory problems, blood clots, brain and nerve damage, heart attack, cardiac arrest, and/or death.”

During the course of the laparoscopic pelviscopy on March 23, 2004, Dr. Barry Shah found extensive endometriosis and undertook surgery to remove it. He further found that the endometriosis involved plaintiff’s left ovary and fallopian tube. According to his testimony, the ovary was completely diseased and had embedded within it a large endometrial cyst. Dr. Barry Shah was concerned that the ovary might be the source of plaintiff’s abdominal pain that the surgery was designed, if possible, to correct. He therefore proceeded to remove the ovary and tube, a procedure called a salpingo-oophorectomy. In the process of removing the diseased left ovary, he used a tripolar electrocautery device to grasp, cut and cauterize the plaintiff’s infundibular pelvic ligament which held the ovary in place. At the time he used the device, Dr. Barry Shah could not visualize the ureter nor did he know how close he was to it. Plaintiffs claim that the procedure to remove the ovary generated heat that caused a devascular injury to Ms. Spaight’s ureter and two perforations of it that, in turn, caused urine to drain into plaintiff’s abdominal cavity. These injuries did not appear until days after the surgery. Ms. Spaight was required to endure four subsequent surgeries and extensive hospitalization as a result of these injuries.

At trial, plaintiffs asserted two claims against Dr. Barry Shah for violation of the doctrine of informed consent. They first claimed a lack of informed consent in the nature of a battery, arguing that Ms. Spaight never consented to the removal of her left ovary and tube nor was ever apprised by Dr. Barry Shah of the possibility that those organs would be removed. Plaintiffs further asserted a violation of the more traditional negligence-based doctrine of informed consent, claiming that Dr. Barry Shah did not inform Ms. Spaight of the risk of injury to her ureter. Plaintiffs also asserted claims of negligence against all of the defendants. They contended that Dr. Barry Shah was negligent in removing Ms. Spaight's ovary because he never visualized the ureter—a requirement under the standard of care—before using the electrocautery device to cauterize her infundibular pelvic ligament. They also asserted a claim for medical negligence against Dr. Barry Shah's then-partner, defendant, Dr. Reza Shah-Hosseini, claiming that he either was in the operating room assisting in the surgery and failed to ensure the visualization of the ureter or that he should have been assisting in the surgery and failed to do so. Dr. Jennifer Botte, a resident, assisted Dr. Barry Shah with the surgery and in fact abandoned a direct role when the procedure became complicated. She, too, was sued for medical negligence for failing to ensure proper performance of the surgery. Women and Infants Hospital of Rhode Island was sued vicariously as Dr. Botte's employer.

At the close of the evidence, the defendant physicians moved for judgment as a matter of law as to the claims of negligence and lack of informed consent filed against them in plaintiffs' second amended complaint. Specifically, Dr. Barry Shah sought dismissal of the negligence and lack of informed consent claims asserted against him in Counts I and Count IV of that complaint, respectively, whereas Dr. Reza Shah-Hosseini and Dr. Botte sought dismissal of the negligence

counts asserted against them in Counts II and III of that complaint, respectively.<sup>1</sup> As to plaintiffs' negligence-based claim of lack of informed consent against Dr. Barry Shah, he argued that plaintiffs failed to establish that Ms. Spaight was unaware of the adverse consequences of the medical procedure. Dr. Barry Shah contended that Ms. Spaight signed a consent form that indicated the possibility of risk to "other organs" and that she testified inconsistently with respect to whether information regarding the specific risk to her ureter, if provided, would have altered her decision to proceed with the laparoscopic surgery. He further contended that Ms. Spaight failed to submit evidence of the likelihood of injury to her ureter and therefore failed to establish the materiality of the risk.

As to medical negligence, the defendant physicians contended that plaintiffs failed to establish causation, as they could not prove that an alternative surgical process would have eliminated the risk to Ms. Spaight's ureter. Defendants noted that Dr. Barbieri testified that had Dr. Barry Shah removed only the endometrial cysts and not the entire ovary, the risk of heat injury would have been reduced but not eliminated. Finally, Dr. Barry Shah argued that plaintiffs' expert relied on a pathology report that was not available to the physicians during the surgery.

In addition, defendant, Woman and Infants Hospital moved for partial judgment as a matter of law as to the claims asserted against it in plaintiffs' second amended complaint. Specifically, it filed this motion as to Count VI (Negligence -- Women and Infants Hospital), Count VII (Lack of Informed Consent -- Women and Infants Hospital), Count VIII (Corporate Liability -- Women and Infants Hospital), and Count X (Res Ipsa Loquitur -- Women and Infants Hospital). It also moved for judgment as a matter of law as to Count V, which alleged that the

---

<sup>1</sup> Plaintiffs and the defendant physicians also agreed to dismissal of Count IX of plaintiffs' second amended complaint which stated causes of action against the defendant physicians for res ipsa loquitur.

Hospital was vicariously liable for the negligence of Dr. Barry Shah, Dr. Reza Shah-Hosseini and Dr. Botte. In support of its motion as to the portion of Count V relating to Dr. Botte, it joined in her motion for judgment as a matter of law as to negligence.

This Court granted judgment as a matter of law in favor of Women and Infants Hospital as to Counts VI-X of plaintiffs' second amended complaint as well as the portions of Count V asserting claims for vicarious liability against the Hospital for the negligence of Dr. Barry Shah and Dr. Reza Shah-Hosseini. It reserved judgment on the balance of the defendants' motions.

The Court then submitted the case to the jury on the issues of lack of informed consent by Dr. Barry Shah (Count IV) and negligence of Dr. Barry Shah, Dr. Reza Shah-Hosseini and Dr. Botte (Counts I, II and III). It was agreed that judgment as to the portion of Count V for vicarious liability against Women and Infants Hospital for the negligence of Dr. Botte would enter consistent with the jury's verdict or any judgment as to the negligence claim against her in Count III.

In instructing the jury on the law of informed consent, the Court did not distinguish, nor did the parties ask it to distinguish, between plaintiffs' informed consent claim in the nature of a battery and their negligence-based claim of informed consent. It likewise did not instruct specifically on the differing law applicable to those claims. It instead included instructions relevant to both of plaintiffs' informed consent claims under a single broad informed consent instruction and submitted a single interrogatory to the jury on the verdict form which simply asked it to determine if Dr. Barry Shah failed to obtain Ms. Spaight's informed consent.

After the Court charged the jury, Dr. Barry Shah raised certain legal objections to the Court's instruction on informed consent which he inexplicably failed to raise earlier when he submitted his proposed jury instructions to the Court. He asked the Court to eliminate reference

to physicians having a duty to “obtain” informed consent—suggesting instead that the duty is to convey information. He also asked the Court to add an instruction that a physician has no obligation to disclose risks likely to be known by the average patient. He further asked that the Court instruct that plaintiff must prove that if she had been informed of the material risks and alternatives to treatment, she would not have consented to the procedure in question (even though those two latter proposed instructions are not the law as to plaintiffs’ claim of lack of informed consent in the nature of a battery).

At this juncture, the Court allowed the jury to commence its deliberations, in the afternoon, with no alterations in its instructions to the jury. After reflecting upon Dr. Barry Shah’s objections to the charge, however, it had a profound concern that none of the parties had properly distinguished the law of informed consent relative to claims in the nature of a battery from the law of negligence-based informed consent claims, even though they agreed that both claims were in the case. Near the end of the court day, the Court ordered the jury to suspend its deliberations and, with the consent of the parties, reinstructed the jury the following morning on the law of informed consent. It advised the jury that plaintiffs were asserting two separate informed consent claims and described the law as to each claim. It specifically indicated that in proving the battery-based claim, plaintiffs did not need to prove that had Ms. Spaight known that her ovary and tube were to be removed, she would not have consented to the surgery. The Court also re-crafted its instructions to address defendants’ other objections to the charge. It then recast the verdict form, in substitution for the first form that went to the jury, to ask the jury to determine if Dr. Barry Shah were liable under a theory of lack of informed consent and, if so, to indicate, in response to a second interrogatory, whether such liability was based on “lack of

consent to removal of ovary” and/or “failure to disclose risk of injury to ureter.” No party objected to the fact or content of this reinstruction or the revised verdict form.

The reinstruction prompted plaintiffs to file a motion for judgment as a matter of law on their battery-based informed consent claim before resubmission of the case to the jury. This Court reserved decision on that motion. After further deliberations, the jury rendered a verdict in favor of all of the defendants as to all claims. Following entry of judgment, plaintiffs and defendants timely renewed their motions for judgment as a matter of law on which this Court previously had reserved decision. In addition, and in part in the alternative, plaintiffs seek a new trial as to their battery-based informed consent claim.

## II

### PLAINTIFFS’ MOTION FOR JUDGMENT AS A MATTER OF LAW

#### A.

##### Standard of Review

Judgment as a matter of law is appropriate when “a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.” R.I. Super. Ct. R. Civ. P. 50. In reviewing a motion for judgment as a matter of law pursuant to Rule 50, the trial justice must consider the evidence “in the light most favorable to the adverse party and is obliged to give such party the benefit of all reasonable and legitimate inferences which may be properly drawn therefrom . . . .” Pimental v. D’Alliare, 114 R.I. 153, 156, 330 A.2d 62, 64 (1975); see also Malinowski v. UPS, Inc., 792 A.2d 50, 55 (R.I. 2002). After such review, if there are no remaining factual issues upon which reasonable persons might draw different conclusions, the motion should be granted. Skaling v. Aetna Ins. Co., 742 A.2d