Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE THOMAS V. POLIZZI IA Part 14
Justice

JUSTIN WILLIAM PARKER, an infant by his Mother and Natural Guardian, KELLY LESTER, and KELLY LESTER, Individually,

Plaintiff,

-against-

LONG ISLAND JEWISH MEDICAL CENTER,

Defendant.

Index Number 8136 2003

Motion Date April 19, 2005

Motion Cal. Number 27

The following papers numbered 1 to 10 read on this motion by defendant for summary judgment or, alternatively, to dismiss the claim for punitive damages.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1-4
Answering Affidavits - Exhibits	5-7
Reply Affidavits	8-10

Upon the foregoing papers it is ordered that the motion is determined as follows:

This is an action to recover damages for the emotional distress allegedly sustained by plaintiff Kelly Lester as the result of the autopsy performed on her son without her consent. At the outset, the complaint as asserted on behalf of Justin William Parker is dismissed. The deceased infant is not a proper party to this action. Even if the deceased infant's purported claim were brought by the personal representative of his estate as required (EPTL 11-3.2), the cause of action alleged herein accrues to the next-of-kin. (See, Bambrick v Booth Mem. Med. Ctr., 190 AD2d 646 [1993]; Trammell v City of New York, 193 Misc 356 [1948], affd 276 App Div 781 [1949].)

Contrary to plaintiff's assertion, Public Health Law §§ 4210-c and 4214 are not applicable here. There is no allegation that plaintiff's opposition to an autopsy was based upon religious belief. (Public Health Law § 4210-c.) Furthermore, since the autopsy was performed by the Office of the Chief Medical Examiner of the City of New York, not by defendant Long Island Jewish Medical Center, the requirement imposed on a hospital to seek written consent before performing an autopsy was not triggered. (Public Health Law § 4214; see, Juseinoski v New York Hosp. Med. Ctr. of Queens, 18 AD3d 713 [2005]; see also, Harris-Cunningham v Medical Examiner of New York County, 261 AD2d 285 [1999].)

However, on the record before the court, issues of fact exist as to whether defendant's medical personnel were negligent in concluding that the deceased infant died under circumstances requiring that the death be reported to the office of the Medical Examiner and/or with regard to the information concerning the circumstances of the death provided to the Medical Examiner. (Cf., Banks v United Hosp., 275 AD2d 623 [2000]; see generally, Juseinoski v New York Hosp. Med. Ctr. of Queens, supra.) Summary relief on the issue of defendant's liability to plaintiff Kelly Lester is, thus, precluded. (CPLR 3212[b].)

The demand in the complaint for punitive damages is dismissed. Plaintiff has not alleged the type of reckless or wanton conduct evidencing a high degree of moral culpability which is necessary to sustain a demand for punitive damages in a negligence action. (See, Arnold v Siegel, 296 AD2d 363 [2002]; Lee v Health Force, Inc., 268 AD2d 564 [2000].)

Accordingly, the motion is granted only to the extent that the claim asserted on behalf of Justin William Parker and the demand for punitive damages are dismissed. In all other respects, the motion is denied.

Dated: July 7, 2005

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J.S.C.