

**Doherty v McBride**

2016 NY Slip Op 31919(U)

August 17, 2016

Supreme Court, Suffolk County

Docket Number: 12-3496

Judge: Arthur G. Pitts

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INDEX No. 12-3496

CAL. No. 15-01684MM

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 43 - SUFFOLK COUNTY

**PRESENT:**

Hon. ARTHUR G. PITTS  
Justice of the Supreme Court

MOTION DATE 11/7/14 (#006)

MOTION DATE 1/22/15 (#007)

MOTION DATE 5/21/15 (#008)

ADJ. DATE 3/10/16

Mot. Seq. #006 - MG

Mot. Seq. #007 - MG

Mot. Seq. #008 - WDN

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JAMIE DOHERTY as mother and natural guardian of JORDAN DOHERTY, an infant, JAMIE DOHERTY, individually, and RICHARD DOHERTY, individually,

Plaintiffs,

- against -

GOLDIE McBRIDE, J. GERARD QUIRK, MARIE FREY, MARCELLA WEISS, as executrix of the estate of MARIE FREY, STONY BROOK MIDWIFERY PRACTICE, STONY BROOK PRIMARY CARE, UNIVERSITY ASSOCIATES IN OBSTETRICS & GYNECOLOGY, P.C., CAROLINE M. HOCK, and KELLY McGUIRE,

Defendants.  
-----X

SILBERSTEIN, AWAD & MIKLOS, P.C.  
Attorney for Plaintiffs  
600 Old Country Road, Suite 412  
Garden City, New York 11530

BROWN, GRUTTADARO, GAUJEAN & PRATO, LLC  
Attorney for Defendants Goldie McBride, J. Gerard Quirk, Marcella Weiss, and University Assoc. in Obstetrics & Gynecology  
1 North Broadway, Suite 1010  
White Plains, New York 10601

ERIC T. SCHNEIDERMAN, ESQ.  
Attorney General of the State of New York  
By: Marcie K. Glasser, Esq.  
Attorney for Defendants Caroline M. Hock and Kelly McGuire  
120 Broadway  
New York, New York 10271

Upon the following papers numbered 1 to 78 read on these motions for summary judgment and motion to quash subpoena; Notice of Motion/ Order to Show Cause and supporting papers 1-37; 38-71; 72-78; Notice of Cross Motion and supporting papers \_\_\_\_; Answering Affidavits and supporting papers \_\_\_\_; Replying Affidavits and supporting papers \_\_\_\_; Other \_\_\_\_; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

**ORDERED** that these motions are hereby consolidated for the purposes of this determination; and it is further

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**ORDERED** that the motion by defendants Caroline M. Hock and Kelly McGuire for summary judgment dismissing the complaint against them is granted; and it is further

**ORDERED** that the motion by defendants Goldie McBride, J. Gerard Quirk, Marcella Weiss, as executrix of the estate of Marie Frey, and University Associates in Obstetrics & Gynecology, P.C. for summary judgment dismissing the complaint against them is granted; and it is further

**ORDERED** that the motion by nonparty witness Joseph Decristofaro for an order (i) pursuant to CPLR 2304, quashing the subpoena commanding his presence for a second deposition, (ii) pursuant to CPLR 3103, granting a protective order, and (iii) granting an award of costs and sanctions, having been withdrawn as confirmed by letter to the court dated August 9, 2016, shall be marked "withdrawn."

Plaintiff Jamie Doherty, individually and on behalf of her son, Jordan Doherty, commenced this action to recover damages for injuries allegedly sustained by them during his birth. Plaintiff's husband, Richard Doherty, brought a derivative claim for loss of services and companionship. Plaintiffs assert causes of action against defendants for medical malpractice and lack of informed consent. The bill of particulars alleges, among other things, that defendants failed to properly manage plaintiff's labor and delivery and failed to perform a timely cesarean section, causing brain damage to plaintiff's infant son.

Defendants Caroline M. Hock and Kelly McGuire now move for summary judgment in their favor on the ground that their conduct did not depart from accepted medical practice, and that their actions were not a proximate cause of plaintiffs' injuries. Specifically, defendants allege that they were not present at the time plaintiff delivered her son and, in any event, did not have the authority to order a cesarean section. In support of the motion, defendants submit copies of the pleadings, the bill of particulars, an expert affidavit, the transcripts of the parties' deposition testimony, and plaintiffs' hospital records. The motion is unopposed.

Plaintiff testified that she presented to Stony Brook University Hospital on July 31, 2009 for the purpose of having her labor induced. She testified that she had a normal, full-term pregnancy with no complications, and that her cousin, defendant Goldie McBride, was her midwife. Plaintiff testified that after she arrived at the hospital, Goldie performed an examination and inserted an intravenous line to administer a painkiller. She testified that either Goldie or Marie, another midwife, "broke her water," and that Goldie administered Pitocin. Plaintiff testified that she delivered Jordan vaginally and that he weighed 8.6 pounds and had a big head. She testified that Jordan was taken to the nursery and brought to her for feeding. Plaintiff testified that on the day she and Jordan were scheduled to go home, he was brought to the Neonatal Intensive Care Unit (NICU) because he had suffered a seizure. Plaintiff testified that she spoke to two doctors in the NICU, Dr. Schuman, a neurologist, and another doctor whose name she does not know, and that they told her that Jordan's head was very large and could not fit through her pelvis, causing his head to crush and squish the ventricles around the brain, and resulting in a clot which caused the seizures. Plaintiff testified that Jordan remained in NICU for 12 days where he underwent several tests and was treated with medications.

Caroline M. Hock, a nurse, testified that she works in the labor and delivery department at Stony

Brook University Hospital and works between 7:00 p.m. and 7:00 a.m. She testified that she does not recall meeting plaintiff and referred to plaintiff's medical chart for her testimony. Hock testified that she assumed plaintiff's care at 3:47 a.m. on July 31, 2009, and that she initially reviewed the consent forms to assure that they were signed. She testified that she did not perform any type of examination on plaintiff or her son, that she only put the fetal monitor on her and reviewed the fetal monitoring strips. Hock testified that if she observed signs of distress on the monitoring strips, she would have contacted plaintiff's midwife, Goldie McBride, but plaintiff's chart does not indicate that she did. She testified her shift was over at 7:00 a.m. and her treatment of plaintiff ended.

Kelly McGuire, a nurse, testified that she works in the labor and delivery department at Stony Brook University Hospital and that she was working on July 31, 2009. She testified using plaintiff's medical chart and testified that plaintiff was admitted to the hospital on July 31, 2009 when she was over 41 weeks pregnant. She testified that her shift began at 7:00 a.m., and that she spoke with Hock, the outgoing nurse, to obtain information about plaintiff. McGuire testified that she reviewed plaintiff's lab work and consent forms and the fetal monitoring strips acquired after 7:00 a.m. She testified that Marie Frey, a midwife, was also monitoring the fetal monitoring strips. McGuire testified that she documented the fetal heart rate, the variability, and plaintiff's contractions every 15 minutes, and that she continuously watched the monitoring strips. She testified that if she had observed signs of fetal distress, she would have notified a midwife or physician to evaluate the patient, as she has no authority to make such an evaluation. McGuire testified that Frey ruptured plaintiff's membrane at 8:56 a.m.

Goldie McBride testified that she is a certified nurse/midwife and a faculty member in the department of obstetrics and gynecology at the State University of New York at Stony Brook. She testified that she is an independent practitioner and is not under anyone's supervision. McBride testified that plaintiff is her cousin, and that she admitted her at Stony Brook University Hospital on July 31, 2009. McBride testified that she did not provide prenatal care to plaintiff while she was pregnant but frequently saw her at family gatherings. She testified that plaintiff obtained prenatal care from her practice but at a different location. McBride testified that while plaintiff was at her house on a personal visit on July 29, 2009, plaintiff complained that the baby was big, and that she wanted to be induced. She testified that she admitted plaintiff to Stony Brook University Hospital on the evening of July 31, 2009, and that she ordered Pitocin, which was administered by one of the nurses at the hospital. McBride testified that the fetal heart monitor indicated that the fetus had a normal heart rate and everything was normal. She testified that when her shift ended at 7:00 a.m. on the following morning, her colleague, Marie Frey, cared for plaintiff.

McBride testified that after Jordan was born, she brought her own children to the hospital to visit, and that both plaintiff and her son appeared to be doing well.

J. Gerard Quirk testified that he is a physician and faculty member of the State University of New York at Stony Brook and was the president of University Associates in Obstetrics & Gynecology, P.C. (UAOG) in 2009. He testified that Goldie McBride and Marie Frey are midwives and employees of UAOG. Quirk testified that UAOG provides Stony Brook University Hospital with a physician on its premises at all times to supervise and assist the residents and to care for its private patients, and also provides an on-call physician if needed. Quirk testified that he did not treat plaintiff at any time but that he reviewed the results of a sonogram taken on July 27, 2009.

It is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067, 416 NYS2d 790 [1979]). The failure of the moving party to make a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion, who must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

A professional health care provider may be liable for medical malpractice if he or she departed from accepted community standards of practice, and such departure was a proximate cause of a plaintiff's injuries (*Abakpa v Martin*, 132 AD3d 924, 19 NYS3d 303 [2d Dept 2015]; *Schmitt v Medford Kidney Ctr.*, 121 AD3d 1088, 996 NYS2d 75 [2d Dept 2014]). A professional health care provider who moves for summary judgment dismissing a complaint asserting a cause of action in medical malpractice must establish, prima facie, that he or she did not depart from the applicable standard of care or that such departure was not a proximate cause of plaintiff's injuries. To establish a prima facie showing of entitlement to summary judgment, a defendant must establish through medical records and competent expert affidavits that he or she did not deviate or depart from accepted medical practice in his or her treatment of the patient or that any departure was not a proximate cause of a plaintiff's injuries (*Lau v Wan*, 93 AD3d 763, 940 NYS2d 662 [2d Dept 2012]; *Castro v New York City Health & Hosps. Corp.*, 74 AD3d 1005, 903 NYS2d 152 [2d Dept 2002]). Furthermore, to satisfy his or her burden on a motion for summary judgment, defendant must address and rebut specific allegations of malpractice set forth in plaintiff's bill of particulars (*Wall v Flushing Hosp. Med. Ctr.*, 78 AD3d 1043, 912 NYS2d 77 [2d Dept 2010]; *Grant v Hudson Val. Hosp. Ctr.*, 55 AD3d 874, 866 NYS2d 726 [2d Dept 2008]; *Terranova v Finklea*, 45 AD3d 572, 845 NYS2d 389 [2d Dept 2007]).

The affirmation of Marc Engelbert, board certified in obstetrics and gynecology, has been submitted. In his affirmation, Engelbert states that he is an attending physician at Mount Sinai Medical Center and provides obstetrical care to patients, including prenatal care, labor, and delivery. He states that he has reviewed the hospital records relating to plaintiffs and the transcripts of deposition testimony by Jamie and Richard Doherty, Goldie McBride, J. Gerard Quirk, Caroline M. Hock, and Kelly McGuire. Engelbert states that he has reviewed the fetal monitoring tracings and opines, with a reasonable degree of medical certainty, that the results of the fetal monitor did not provide a basis to order a cesarean section, and, more importantly, that neither Hock nor McGuire has the authority or discretion to order a cesarean section. He states that the applicable standard of care is for a nurse to inform a midwife or a physician of any abnormalities found in the fetal monitoring strips, and that nurses do not have the discretion to make such a judgment call. Engelbert states that plaintiff was under the care of the midwives, and that if the midwives believed a cesarean section was indicated, they would contact the obstetrician. Engelbert reviewed the medical records and found ongoing communications among the nurses and the midwives throughout plaintiff's labor and delivery. He further states that the hospital records indicate proper obstetrical management and patient oversight by the midwives.

Engelbert states that the nurses followed the orders of the midwives at all times, and opines, with a reasonable degree of medical certainty, that Hock and McGuire acted in accordance with accepted

obstetrical practice in allowing the labor to continue and a vaginal delivery to occur. He opines, with a reasonable degree of medical certainty, that Jordan's developmental problems cannot be ascribed to the labor and delivery process, and, thus, that the nurses' treatment of plaintiff was not a proximate cause of plaintiffs' injuries.

Defendants' submissions establish, prima facie, their entitlement to judgment as a matter of law on the medical malpractice cause of action. Their testimony and the affirmation of Marc Engelbert demonstrate that their treatment and care of plaintiffs conformed to good and accepted medical and nursing practice, and that any departure from the standard of care was not the proximate cause of plaintiffs' injuries. The burden, therefore, shifts to plaintiffs to raise a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Stukas v Streiter*, 83 AD3d 18, 918 NYS2d 176). As there is no opposition to the motion, defendants Caroline M. Hock and Kelly McGuire are granted summary judgment dismissing that cause of action against them.

Defendants Goldie McBride, J. Gerard Quirk, Marcella Weiss, as executrix of the estate of Marie Frey, and University Associates in Obstetrics & Gynecology, P.C. also move for summary judgment dismissing the complaint against them. In support of the motion, they submit copies of the pleadings, the bill of particulars, the transcripts of the parties' deposition testimony, plaintiffs' hospital records, and the affirmation of James Howard.

James Howard states in his affirmation that he is a physician who is board certified in obstetrics and gynecology, and that he has maintained a private practice "for decades." He states that he reviewed plaintiffs' hospital records from Stony Brook University Hospital and University Associates in Obstetrics & Gynecology, P.C., the bill of particulars and the deposition testimony by Goldie McBride and J. Gerard Quirk. Howard states that Quirk's only involvement with plaintiff was to interpret a post-date sonogram taken on July 27, 2009, which was taken to evaluate the fetus's biophysical condition and determine the volume of amniotic fluid. He states that no abnormalities were detected on the ultrasound and that the amniotic fluid was within the normal range. He states that the fetal weight was estimated at 4610 grams and the relation of the head circumference to the abdominal circumference was 1.0, which is in the normal range. He states that McBride's notes taken at 5:30 a.m. indicated a fetal heart rate in the 130s with moderate variability and no decelerations. He states that plaintiff's membrane was artificially ruptured at 8:55 a.m. and active labor was noted with reassuring fetal heart rate pattern. Howard states that plaintiff was fully dilated at 10:37 a.m. and after 18 minutes of pushing, infant plaintiff was delivered at 10:55 a.m. Dr. Howard states that infant plaintiff weighed 8.6 pounds, and that he was not macrosomic. He states that Jordan's Apgar scores were eight and nine and that he was treated in the well nursery until his second day when he was transferred to the NICU for seizure activity.

Howard opines, with a reasonable degree of medical certainty, that the treatment and care rendered by defendants was in accord with accepted medical practice, and that their treatment was not a proximate cause of plaintiffs' injuries. He states that the American College of Obstetricians and Gynecologists recommends that a non-diabetic pregnant woman should be offered a cesarean section if the estimated fetal weight is 5000 grams or more and that the sonogram results from July 27, 2009 did not indicate plaintiff should have a cesarean section on that date or be induced on July 27, 2009. He opines that the fetal head circumference was not an indication for any intervention, including a cesarean section, as the head circumference to the abdominal circumference was within the normal range. Howard further opines that,

nevertheless, the head molds to accommodate itself to the available space in the pelvis, as it did in the instant case, and that if it could not “the baby would not come out.” Here, he opines, the delivery was easy and labor only lasted 18 minutes. Further, he states that no instruments were needed to assist with delivery and the actual birth weight was only 3810 grams. Howard opines that Jordan was well at birth as confirmed by “his excellent Apgar scores” and by the fact that he cried spontaneously.

Howard opines that there was no departure from the standard of care in allowing the labor to continue based on the fetal monitor tracings, as the tracings were reassuring signs of fetal well-being. He explains the tracings in detail and demonstrates that defendants acted within accepted obstetric practice. He opines with a reasonable degree of medical certainty that nothing defendants did or did not do in managing plaintiff’s prenatal care and labor and delivery was the cause of the hemorrhage, and there is no record of any evidence that the Jordan suffered any trauma during the “uncomplicated delivery.”

Defendants Goldie McBride, J. Gerard Quirk, Marcella Weiss, as executrix of the estate of Marie Frey, and University Associates in Obstetrics & Gynecology, P.C. have established their prima facie entitlement to judgment as a matter of law on the medical malpractice cause of action, and are also granted summary judgment dismissing that cause of action against them, as there is no opposition to the motion.

The second cause of action contained in the complaint, alleging lack of informed consent, is dismissed against all moving defendants. The elements of a cause of action for lack of informed consent are “(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” (*Spano v Bertocci*, 299 AD2d 335, 337-338, 749 NYS2d 275 [2d Dept 2002]). For the claim to be actionable, a defendant must have engaged in a “non-emergency treatment, procedure or surgery” or “a diagnostic procedure which involved invasion or disruption of the integrity of the body” (Public Health Law § 2805-d [2]). Furthermore, an essential element of a cause of action for lack of informed consent is that there be an affirmative violation of a plaintiff’s physical integrity (*Ellis v Eng*, 70 AD3d 887, 895 NYS2d 462 [2d Dept 2010]). Lack of informed consent does not apply to injuries that allegedly result from a failure to undertake a procedure (*id.*). As the alleged injuries are alleged to have occurred from the failure to perform a cesarean section, lack of informed consent is inapplicable and the second cause of action is, therefore, dismissed.

**Dated: Riverhead, New York  
August 17, 2016**

  
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**ARTHUR G. PITTS, J.S.C.**

\_\_\_\_\_ FINAL DISPOSITION      X   NON-FINAL DISPOSITION