At an IAS Term, Part 10 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 27th day of January, 2003

P R E S E N T :

HON. ARIEL E. BELEN,
Justice.

----------X

MIRIAM KOTLER and SAMUEL KOTLER,

Plaintiffs,

- against - Index No. 29175/99

STEVEN SWERSKY, MD., ROBERT J. KLINGLER, M.D., and BETH ISRAEL MEDICAL CENTER,

Defendants.

. . . . . -X

The following papers numbered 1 to 5 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1
Opposing Affidavits (Affirmations)	2
Reply Affidavits (Affirmations)	3
Further Opposition Affidavit (Affirmation)	4
Other Papers Sur-Reply	5

Upon the foregoing papers, defendant Steven Swersky, M.D., moves for an order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiffs' complaint as asserted against him.[1]

[1] Simultaneously therewith, defendants Robert J. Klinger and Beth Israel Medical Center also moved for summary judgment. Plaintiffs did not oppose said motion, which was granted by an order of this court dated May 1, 2002.

The instant action arises out of Dr. Swersky's treatment of plaintiff Miriam Kotler[2] during her fourth pregnancy in 1998. Dr. Swersky obtained his M.D. degree from New Jersey Medical College in 1977, completed his residency in obstetrics and gynecology in 1981, and did a fellowship in high risk obstetrics at Columbia Presbyterian from 1981 to 1983. Fotlowing the fellowship, Dr. Swersky worked as the physician in charge of high risk obstetrics at Beth Israel from 1983 to 1989 and also maintained his own private practice. In 1989, Dr. Swersky left the high risk obstetrics position at Beth Israel in order to open his own office and eventually became associated with Drs. Klinger and Dori, although he did maintain his privileges at Beth Israel. In 1997, Dr. Swersky's license to practice medicine was suspended for a two-year period, but the suspension was stayed, which allowed him to continue to practice as a physician. At this time, the state licensing authorities also placed Dr. Swersky on probation with conditions that required him to obtain approval from a designated person before he administered Petocin (a drug used to induce labor) or performed a caesarian section.

In October or November 1998, Dr. Swersky resigned his privileges at Beth Israel because he had violated the probation. Shortly after resigning his privileges at Beth Israel, he applied for privileges at New York University Hospital Downtown Beekman (NYU Beekman). Although he was initially told that he might have temporary privileges within four days, he eventually learned that his application was unlikely to be accepted and

[2] Plaintiff Samuel Kotler is Miriam Kotler's husband and all of Samuel Kotler's claims are derivative in nature. All singular references to plaintiff relate to Miriam Kotler.

withdrew his application. Dr. Swersky ultimately obtained privileges at Staten Island Hospital in March 1999.

Plaintiffs three previous pregnancies, prior to the 1998 pregnancy at issue here, had resulted in live children, although her third pregnancy had resulted in a premature birth by way of a caesarean section in December 1995. Dr. Swersky had served as plaintiff's obstetrician/gynecologist during the course of plaintiffs third pregnancy, but one of his partners had performed the caesarean section.

With respect to her fourth pregnancy, plaintiff first saw Dr. Swersky on July 6, 1998. As of thai date, the gestational age was estimated as 14.3 weeks. Dr. Swersky saw plaintiff at regular intervals from July 6, 1998 through October 22, 1998. On October 22, 1998, plaintiffs cervix was 2 centimeters dilated. In light of the degree of dilation, and because of her past history of premature birth, Dr. Swersky prescribed Indomethacin to relax plaintiffs uterus and to prevent premature labor and recommended bed rest for plaintiff.

At her deposition, plaintiff testified that she began to experience itching at approximately 30 to 31 weeks into her pregnancy. Plaintiff noted that she had experienced similar itching during the last trimester of her previous pregnancy and, although she stated that she had not discussed the itching during her 1995 pregnancy with Dr. Swersky at an office visit, she asserted that she had made at least three telephone calls to his office to complain about the itching she had been experiencing.[3] Plaintiff stated that she

---

[3] To the extent that Dr. Swersky submits that plaintiff, in her corrections to her deposition testimony, "recanted" her assertion that she told Dr. Swersky about the itching during her 1995 pregnancy he is incorrect, since plaintiff simply withdrew any assertion that she discussed the itching at an office visit, and did not withdraw her testimony that she told him about the itching over the telephone.

informed Dr. Swersky about the itching she was experiencing during the course of the 1998 pregnancy and the itching she had experienced during her previous pregnancy at the next scheduled visit on November 5, 1998. According to plaintiff, Dr. Swersky did not appear to remember that she had suffered similar itching in 1995 and informed her that there was no need for concern since itching is a normal discomfort associated with pregnancy. Plaintiff believed that Dr. Swersky prescribed some medication for her to alleviate the itching feeling at that visit.

Plaintiff asserted that this itching feeling increased in intensity over the next couple of weeks, that she developed scabs and sores because she was unable to stop scratching, and that the medication prescribed by Dr. Swersky, showers, and skin salves provided no relief. Plaintiff iestified that she again discussed her itching complaints with Dr. Swersky at the November 9 and November 16, 1998 office visits. She also testified that while Dr. Swersky observed the scratch marks and scabs on her body on those dates, he merely repeated his prior statement that the itching was normal and not anything to be concerned about.

In contrast, Dr. Swersky's office records contain no reference to a complaint of itching. Further, Dr. Swersky, at his deposition, testified that plaintiff did not complain of itching until she was in the hallway leaving Dr. Swersky's offices following the November 16, 1998 visit, when she mentioned that her arms were itching a little bit. Dr. Swersky examined plaintiffs arm, but did not see any signs of significant scratching. Dr. Swersky prescribed an antihistamine in order to help relieve the itching. Dr. Swersky

testified that his office records do not mention this complaint because it had been made in passing after the office visit was complete.

At one of these early or middle November 1998 office visits, Dr. Swersky told plaintiff that he had resigned his privileges at Beth Israel and that in light of his application at NYU Beekman he thought he might shortly have privileges there. In addition, he told plaintiff that if he did not have privileges when she went into labor, one of his partners would handle the delivery.

Dr. Swersky next saw plaintiff on the morning of November 19, 1998. At that time, the fetus was at 34 weeks, plaintiff was 3-4 centimeters dilated and plaintiff was having mild contractions. As Dr. Swersky did not have privileges at any hospital on that date, he sent plaintiff to one of his partners, Dr. Klinger, who upon examining plaintiff determined that she did not appear to be in labor. During his examination, Dr. Klinger noted that the fetal movement was good. Dr. Klinger prescribed a medication to relax the uterus and prevent contractions from developing in order to delay delivery.

However, plaintiff's contractions increased in intensity during the nipht of November 19 and into the morning of November 20. Plaintiff went to Beth Israel, where first a nurse, and then Dr. Dori, another of Dr. Swersky's partners, were unable to obtain a fetal heartbeat. Plaintiff thereafter gave birth to a stillborn child.

Plaintiffs commenced the instant action in September 1999. In the amended complaint, plaintiffs pleaded six causes of action. In the first cause of action, premised on

medical malpractice, plaintiffs alleged that Dr. Swersky negligently failed to diagnose and treat plaintiff for obstetric cholestasis[4] and that this failure led to damage to plaintiffs liver and caused the stillbirth. The second cause of action is premised on lack of informed consent. The third cause of action is for loss of services. The fourth cause of action is premised on fraud based upon Dr. Swersky's alleged representations that he was a specialist in high-risk pregnancies and that he would deliver her baby at Beth Israel. The fifth cause of action is premised on false advertising under General Business Law §§ 349 (a) and 350 based upon Dr. Swersky's alleged representations that he was a specialist in high-risk pregnancies and a sign in his office to the same effect. The sixth cause of action is for attorneys' fees pursuant to General Business Law § 350-e (3).

Medical Malpractice

The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted medical practice and evidence that such departure was a proximate cause of injury or damage ***(see Holbrook v United Hosp. Med. Ctr.,*** 248 AD2d 358, 358-359; *Bloom v City of New York*, 202 AD2d **465).** As in any other action, the proponent of a summary judgment motion in a medical malpractice case must make a prima facie showing of entitlement to judgment as a matter of law through the submission of admissible evidence sufficient to show the absence of any material issue of fact on any relevant issue

---

[4] Obstetric cholestasis is a condition that occurs during pregnancy, the main symptom of which is severe pruritus or itching. The condition causes the bile flow to slow and can result in changes in the mother's liver cells, which then release enzymes into the blood. Obstetric cholestasis can cause fetal death.

raised by the pleadings *(seeAlvarez v Prospect Hosp.*, 68 NY2d 320,324; *Zuckerman v City of New York*, 49 NY2d 557, 562; *Stone v Continental Ins.* Co., 234 AD2d 282,284). Once a doctor or hospital has shown, prima facie, that there was no negligence in the treatment of the plaintiff, a plaintiff must submit evidentiary facts in order to demonstrate the existence of a triable issue of fact sufficient to rebut the prima facie showing *(seeAlvarez*, 68 NY2d at 320; *Fileccia v Massapequa Gen. Hosp.*, 63 NY2d 639, *affg* 99 AD2d 796; *Toledo v Ordway*, 208 AD2d 518, 518-519).

In support of his motion for summary judgment, Dr. Swersky submits an affirmation from Charles H. Debrovner, M.D., a physician board certified in obstetrics and gynecology, in which he relied upon Dr. Swersky's testimony that plaintiff had not advised him of the itching, the primary symptom of obstetric cholestasis, until the November 16, 1998 visit. In any event, Dr. Debrovner asserts that Dr. Swersky correctly responded to plaintiffs complaints and that plaintiff did not suffer any permanent injuries because obstetric cholestasis is a condition which terminates at the end of the pregnancy. Dr. Debrovner states that the lack of permanent injury is supported by a bile acid test, conducted at Beth Israel two weeks after the stillbirth, which showed that plaintiffs bile acid levels had returned to normal.

Dr. Swersky also submits his own deposition testimony in which he stated that the treatment for obstetric cholestasis is to relieve the itching (also referred to as pruritus) through antihistamines and to wait to fetal maturity to deliver the infant. Dr. Swersky stated

that the condition is transitory and that no damage is done to the mother's liver, which is normal after delivery. Although Dr. Swersky was aware that some doctors had treated obstetric cholestasis with Cholestyramine to reduce the liver enzyme levels, he noted that there were some questions about the drug's safety.[5]

Even if plaintiffs deposition testimony is accepted, and Dr. Swersky should have been aware of plaintiffs itching at an earlier point and should have considered a diagnosis of obstetric cholestasis, Dr. Swersky's testimony shows that there is no evidence he could have managed her care any differently. Further, in evaluating the evidence submitted by Dr. Swersky, the court notes that New York does not allow for a wrongful death action for the death of an unborn child *(see Endresz* v *Friedberg,* 24 NY2d 478,482). In addition, "[i]t is well settled that absent independent physical injuries, a mother may not recover for emotional and psychic harm as the result of a still birth" *(Prado* v *Catholic Med. Ctr.*, 145 AD2d 614, 615; *see also Tebbutt v Virostek,* 65 NY2d 931, 932-933). Here, Dr. Swersky's evidence shows that plaintiff suffered from a transitory condition related solely to her pregnancy. This condition, which disappeared following the stillbirth, may not be deemed a distinct or independent physical injury to plaintiff *(see Scott* v *Capital Area Community Health Plan, Inc.,* 191 AD2d 772, 773-774; *Guialdo* v *Allen,* 171 AD2d 535,

---

[5] At his deposition, Dr. Swersky testified that he could not testify as to whether or not plaintiff had obstetric cholestasis without the results of a bile acid test. No such test results were available at the time of his deposition. In a further affirmation in opposition, plaintiffs have submitted a **copy** of test results showing that on the date of the stillbirth, Ms. Kotler underwent a bile acid test showing that she had **an** elevated bile acid level. Counsel for plaintiffs asserts that he only received a copy of there test results after filing their initial opposition papers.

536; *see also Parsons v Chenango Mem. Hosp.*, 210 AD2d 847, 848; *Kakoullis v Jansen*, 188 AD2d 769, 770).

In opposition, plaintiff submits an expert affirmation from an obstetrician and gynecologist licensed in New Jersey[6] who asserts that Dr. Swersky departed from accepted practice in failing to recognize that the pruritus was a symptom of obstetric cholestasis, in failing to offer treatment, in failing to monitor plaintiffs liver enzyme blood levels, and in failing to offer a coherent managment plan. Plaintiffs expert asserts that proper monitoring of plaintiffs liver enzyme levels could have prevented the stillbirth.

Plaintiffs' expert has failed to elaborate on what form the treatment should have taken and failed to address Dr. Swersky's assertions that proper treatment involved attempting to relieve the pruritus with antihistamines and delaying delivery. Moreover, plaintiffs' expert has failed to identify any independent physical injury suffered by plaintiff which would support a cause of action for emotional injuries resulting from the stillbirth. The conclusory affirmation of plaintiffs expert thus fails to supply an evidentiary basis warranting a conclusion that plaintiff suffered independent physical injuries, that Dr. Swersky departed from accepted medical practice or that any such departure made any difference in the proper

---

[6] In his reply papers, Dr. Swersky asserts that this purported affirmation was without probative force because only doctors licensed in New York may submit unsworn affirmations. Plaintiffs thereafter submitted further opposition papers with a sworn affirmation by plaintiffs' expert attached as an exhibit. This sworn affirmation is otherwise the same as the expert affirmation submitted in plaintiffs' initial opposition papers. In his sur-reply papers, Dr. Swersky states that it would be improper for the court to consider the sworn affirmation submitted in further opposition. Given the resolution of this motion, the court has not addressed Dr. Swersky's objections to the expert affirmations submitted by plaintiff.

care of plaintiff *(see Zawadzki v Knight,* 76 NY2d 898,899-900; *Fhima* v *Maimonides Med. Ctr.,* 269 AD2d 559, 560; *Kaplan v Hamilton Med. Assocs.,* 262 AD2d 609, 610; *Yasin v Manhattan Eye, Ear & Throat Hosp.,* 254 AD2d 281,283).

Plaintiff's expert also asserts that Dr. Swersky departed from accepted medical practice in failing to inform Mrs. Kotler that he did not have privileges at Beth Israel. Assuming. that this was a departure, it was a departure that is irrelevant in the absence of evidence that the course of treatment followed by Dr. Swersky was improper.

Informed Consent

As the alleged failure in Dr. Swersky's treatment involved a failure to diagnose and treat plaintiff and did not involve an invasion of plaintiff's physical integrity, plaintiff has not stated a cause of action based upon a lack of informed consent *(see Schel* v *Roth,* 242 AD2d 697,698; *Etkin v Marcus,* 74 AD2d 633).

Fraud

Defendant is also entitled to summary judgment dismissing the fraud cause of action. Even if dismissal were not rcquircd by the fact that plaintiff has failed to allege injuries separate or distinct from those alleged in the medical malpractice claim *(see Luciano v Levine,* 232 AD2d 378, 379), plaintiff has failed to show the fraud elements of misrepresentation, scienter and injury or damages *(see Matter of Garvin,* 210 AD2d 333,333 [elements of fraud are (1) misrepresentation of a material fact, (2) scienter, (3) justifiable reliance, and (4) injury or damages]). Namely, there is no evidence that Dr. Swersky made

any assertion that he had privileges at Beth Israel at a time when he did not have such privileges. Further, Dr. Swersky's deposition testimony shows that he had training and experience with respect to high risk pregnancies. Finally, even assuming the other elements of fraud were satisfied, plaintiffs have failed to show any injury or damage, since they have failed to show that the course of treatment followed by Dr. Swersky was improper *(see Polovy v Duncan,* 269 AD2d 111, 112).

False Advertising, Attorney's Fees and Loss of Services

Given Dr. Swersky's training and experience with respect to high risk pregnancies, plaintiffs have failed to show that his sign stating that he specialized in high risk pregnancies constituted a deceptive act under General Business Law § 349 or false advertising under General Business Law § 350 *(see Stutman v Chemical Bank,* 95 NY2d 24, 31-32). Even if there was a factual issue with regard to deceptiveness, plaintiffs have failed to show damage or injury as a result thereof *(see Small v Lorillard Tobacco Co.,* 94 NY2d 43, 55-57; General Business Law § 350-e [3]). In the absence of a violation of General Business Law §§ 349

or 350, plaintiffs are not entitled to attorney's fees under General Business Law §§ 349 (h) or 350-e (3).

Finally, since plaintiff Miriam Kotler has no viable claim against Dr. Swersky, plaintiff Samuel Kotler's cause of action for loss of services must likewise be dismissed.

Accordingly, Dr. Swersky's motion for summary judgment is granted and the complaint is dismissed.

This constitutes the decision, order and judgment of the court.

E N T E R ,

Arnd E. Bolen

J. S. C.