

**Ramsay v Good Samaritan Hospital**

2004 NY Slip Op 30113(U)

March 19, 2004

Supreme Court, Suffolk County

Docket Number: 1002370/1996

Judge: Peter Fox Cohalan

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 24 - SUFFOLK COUNTY

**PRESENT:**

Hon. PETER FOX COHALAN  
Justice of the Supreme Court

MOTION DATE 3/28/03 (#017)  
4/30/03 (#018, 019)  
6/13/03 (#020)

CAL. DATE 10/8/03

Mot. Seq. # 017 - XMD  
# 018 - MG  
# 019 - XMotD  
# 020 - MG

-----X  
SANDRA JO RAMSAY, as Administratrix of the :  
Estate of AURORA RAMSAY, deceased, :  
SANDRA JO RAMSAY, individually, and :  
WILLIAM RAMSAY, :

SHERMAN & BASICHAS, LLP  
Attorneys for Plaintiffs  
233 Broadway, Suite 770  
New York, New York 10279

Plaintiffs,

LEWIS, JOHS, AVALLONE, et al.  
Attorneys for Deft. Dekel  
425 Broad Hollow Road  
Melville, New York 11747

- against -

GOOD SAMARITAN HOSPITAL, CENTRAL :  
GENERAL HOSPITAL a/k/a NORTH SHORE :  
UNIVERSITY HOSPITAL, HOLLY JACOBSEN, :  
DR. MOSHE DEKEL, DR. LEONARD KAGAN :  
and DIX HILLS VOLUNTEER FIRE :  
DEPARTMENT, :

GEISLER & GABRIELE  
Attorneys for Deft. Kagan  
100 Quentin Roosevelt Blvd., PO Box 8022  
Garden City, New York 11530-9985

Defendants. :

FUMUSO, KELLY, DeVERNA, et al.  
Attorneys for Deft. Jacobsen  
2159 Joshua's Path  
Hauppauge, New York 11788-8828

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Upon the following papers numbered 1 to 15 read on these motions and cross-motions for summary judgment and to dismiss pursuant to CPLR 3216; Notice of Motion/ Order to Show Cause and supporting papers 1-3; 4-5; Notice of Cross-Motion and supporting papers 6-7; 8-9; Answering Affidavits and supporting papers 10-11; Replying Affidavits and supporting papers 12-13; 14-15; Other ~~→~~ (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that the cross- motion (017) by defendant Moshe Dekel, M.D. for dismissal of the complaint pursuant to CPLR 3216 on the ground that plaintiffs failed to file a timely note of issue is denied as moot; and it is further

**ORDERED** that the motion (018) by defendant Moshe Dekel, M.D. for *summary* judgment dismissing the complaint and any cross-claims as against him is granted; and it is further

**ORDERED** that the cross-motion (019) by defendant Holly Jacobsen for summary judgment dismissing the complaint and any cross-claims is granted to the extent that the seventh cause of action alleging lack of informed consent is dismissed; and it is further

**ORDERED** that the motion (020) by defendant Leonard Kagan, M.D. for summary judgment dismissing the complaint and all cross-claims as against him is granted.

This is a medical malpractice action arising out of the labor and delivery of plaintiff Sandra Jo Ramsay (hereafter referred to as Mrs. Ramsay), allegedly resulting in the death of plaintiffs decedent, the infant plaintiff Aurora Ramsay, on September 18, 1994. Defendant Holly Jacobsen, a midwife, was retained by Mrs. Ramsay to deliver her baby at home. Defendant Moshe Dekel, M.D., an obstetrician, was retained by Mrs. Ramsay and pursuant to an agreement became a backup physician to defendant Jacobsen. Defendant Leonard Kagan, M.D., also an obstetrician, allegedly was on call for defendant Dekel on the date of Mrs. Ramsay's delivery.

The Court construes the gravamen of the third cause of action by Mrs. Ramsay as against defendant Jacobsen to consist of allegations of medical malpractice and emotional distress for the loss of the infant decedent, Aurora'. The Court further construes the fourth cause of action as against defendant Dekel to consist of allegations that he departed from good and accepted standards of medical care by failing to abide by appropriate rules and regulations, failing to monitor Mrs. Ramsay's labor and delivery at home, failing to properly repair the episiotomy and failing to have a proper agreement with defendant Jacobsen. In the fifth cause of action as against defendant Kagan, the Court construes the allegations to mean that this defendant departed from good and accepted standards of care by breaching the practice agreement as he was allegedly not qualified to act as backup physician to a home birth. In the seventh cause of action, plaintiffs allege lack of informed consent as against all defendants.

The record reveals that Mrs. Ramsay first saw defendant Jacobsen in the office in June 1994 and thereafter retained defendant to deliver her baby at home. After subsequent prenatal visits with defendant Jacobsen, Mrs. Ramsay went into labor on September 17, 1994 and called defendant Jacobsen. Defendant Jacobsen's labor and delivery records reveal that defendant Jacobsen was called to Mrs. Ramsay's home on September 16, 1994 at approximately 12:40 p.m. The delivery record reveals that the first stage of labor<sup>2</sup> lasted sixty-three hours, the second stage<sup>3</sup> lasted two hours and thirty-eight minutes, and the third stage<sup>4</sup> lasted thirty-four minutes. The records further reveal that after an episiotomy was performed, the infant plaintiff, Aurora Ramsay, was born at 9:38 p.m. on September 18, 1994. Both mother and baby were transported to Good Samaritan Hospital after defendant Jacobsen noted meconium staining and that the baby was having difficulty breathing.

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<sup>1</sup> By order dated January 7, 1998 (Cohalan, J.), the Court noted that the specific requirements for pleading a cause of action for wrongful death pursuant to EPTL 55-4.1 were missing in both the original and amended complaint (see, footnote 2).

<sup>2</sup> The Court takes judicial notice (CPLR 4511) that the first stage of labor entails the onset of uterine contractions through the period of dilation of the os uteri (cervix) (Stedman's Medical Dictionary 957 [27<sup>th</sup> ed 2000]).

<sup>3</sup> The Court takes judicial notice (CPLR 4511) that the second stage of labor includes the period of expulsive effort, beginning with complete dilation of the cervix and ending with expulsion of the infant.

<sup>4</sup> The Court takes judicial notice (CPLR 4511) that the third stage of labor is the period beginning at the expulsion of the infant and ending with the completed expulsion of the placenta and membranes (Stedman's Medical Dictionary, *supra*).

The medical records of defendant Good Samaritan Hospital reveal that after transport by ambulance on September 18, 1994, defendant Dekel examined Mrs. Ramsay in the Labor and Delivery Department, and repaired a midline episiotomy with a right sulcus tear in the vagina. The discharge summary by defendant Dekel reveals that he was told by defendant Jacobsen that labor was essentially uneventful. The first stage of labor was slightly prolonged. The second stage lasted approximately two and one-half hours, (However, in the discharge *summary* by Dr. Dekel, he states the second stage was one and one-half hours.) and during that time doppler monitoring of the baby's heartbeat was excellent. At the last ten minutes of the second stage, an episiotomy was performed by defendant Jacobsen, and the head was delivered. A loose nuchal cord and thick meconium were noted. The baby was suctioned and delivered shortly thereafter with apgar scores of 0/0 and cord pulse of 40. Upon arrival to the emergency department, the baby was pronounced dead after one hour of cardiopulmonary resuscitation was performed unsuccessfully. The autopsy report revealed that the cause of death was neonatal pneumonia and meconium aspiration.

Plaintiffs allege in the bill of particulars that Mrs. Ramsay suffered complications from an improper midline episiotomy; a right sulcus tear; anal fissure; sexual dysfunction; inability to conceive naturally; inability to deliver a subsequent pregnancy vaginally; and pain, suffering and mental anguish. Plaintiff William Ramsay alleges a derivative cause of action. Plaintiffs further allege that defendant Dekel departed from acceptable standards of medical care by failing to be available for the backup medical care to which he agreed and improperly repaired the episiotomy, rendering plaintiff infertile because intercourse was too painful. Plaintiffs allege defendant Jacobsen was negligent in performing an episiotomy and caused extensive pain and suffering while Mrs. Ramsay's labor lasted sixty-three hours. Plaintiffs further allege that defendant Kagan departed from acceptable standards of medical care when either Mrs. Ramsay or her husband, plaintiff William Ramsay allegedly spoke to him on the telephone after Mrs. Ramsay's water broke during labor.

On a motion for summary judgment, the moving party must establish its entitlement to judgment as a matter of law (*GTF Marketing, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 498 NYS2d 786 [1985]; *Zuckerman v New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The elements of proof in an action to recover damages for medical malpractice are deviation or departure from accepted practice in the medical community and evidence that such departure was a proximate cause of injury or damage (*Lyons v McCauley*, 252 AD2d 516, 517, 675 NYS2d 375, *lv denied* 92 NY2d 814, 681 NYS2d 475 [1998]; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [1994]). To prove a prima facie case of medical malpractice, a plaintiff must establish that the defendant's negligence was a substantial factor in producing the alleged injury (*see, Derdarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166 [1980]; *Prete v Rafla-Demetrious*, 224 AD2d 674, 638 NYS2d 700 [1996]). It is settled law "that, absent an independent physical injury to the mother, she may not recover for emotional damages caused by the negligence of a physician resulting in the death or injury to her child either in utero or postpartum" (*Fahey v Canino*, 304 AD2d 1069, 758 NYS2d 708 [2003]; *Miller v Chalom*, 269 AD2d 37, 38, 710 NYS2d 154 [2000]; *see, Tebbutt v Virostek*, 102 AD2d 231, 477 NYS2d 776 [1984], *aff'd* 65 NY2d 931 [1985]). The mother also may not recover damages for the pains associated with prolonged labor (*Bubendey v Winthrop University Hospital*, 151 AD2d 713, 543 NYS2d 146 [1989]).

In support of his motion for summary judgment, defendant Kagan submits, *inter alia*, the pleadings, a call schedule for 1994 and a copy of his examination before trial testimony and that of Aaron David, M.D. At his examination before trial, defendant Kagan testified to the effect that he was not on call the weekend that Mrs. Ramsay was in labor at home. He stated that in 1994 there was an agreement among Dr. Dekel, Dr. Aaron David and him to cover one another's practices every third weekend. According to the submitted call schedule, Dr. Aaron David was on call for the weekend of September 16-18. At his examination before trial, Aaron David, M.D. testified to the effect that he was on call for Dr. Dekel during the weekend of September 16-18, 1994. He stated that he was contacted by his service late in the day on the weekend. He further testified that he called Dr. Dekel to tell him that there was a problem with a home birth and that Dr. Dekel took it from there. Based on the above submissions, defendant Kagan has made a prima facie showing sufficient to warrant judgment in his favor as a matter of law, shifting the burden to plaintiff to demonstrate the existence of a triable issue of fact (*Winegrad v New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1984]). However, plaintiff has not opposed the motion. Accordingly, defendant's motion for summary judgment to dismiss the complaint against him is granted.

Turning to defendant Dekel's motion for summary judgment, defendant submits, *inter alia*, copies of his office records and those of defendant Jacobsen; an affirmation by Joel L. Cooper, M.D., a physician who is board-certified in obstetrics and gynecology; and copies of the examination before trial transcripts of defendants Dekel and Jacobsen. Defendant Dekel's office records reveal that plaintiff began treating with him on February 25, 1994 after she learned that she was pregnant. On or about June 9<sup>th</sup>, plaintiff informed defendant Dekel that a midwife would manage her prenatal care. The record further reveals that after delivery plaintiff returned for follow-up examinations and offered no complaints of pain at the episiotomy site. Dr. Dekel noted that the episiotomy had healed well.

Defendant Jacobsen's office records reveal that plaintiff executed an agreement for midwifery services on July 8, 1994. The agreement provides that plaintiff agreed to see the consulting physician once during the pregnancy and upon any indication of abnormality as noted by the midwife. In addition, pursuant to the agreement, the risks and benefits of home birth were completely explained, with the plaintiff sharing the risk and responsibility of the endeavor.

Dr. Cooper opines in his affirmation that defendant Dekel conformed to good and accepted medical practice with respect to all care rendered to Mrs. Ramsay. During the two office visits, defendant performed complete physical examinations and told plaintiff to call the office immediately if any problems arose. Dr. Cooper states that defendant documented Mrs. Ramsay's wish to deliver at home with nurse midwife Jacobsen. Dr. Cooper further opines that the agreement between defendant Dekel and defendant Jacobsen was appropriate and was contingent upon notification, which never occurred according to the medical records and the examination before trial testimonies. Further, he states that the episiotomy repaired by defendant in the hospital, the only contact after labor and delivery, met all standards of gynecological care. In addition, any claims with regard to sexual dysfunction or inability to conceive naturally are unrelated to an episiotomy repair and were not documented in the medical records. Dr. Cooper concludes that defendant Dekel's care and treatment of Mrs. Ramsay at all times conformed to good and accepted medical practice and was not the proximate cause of any alleged injury to plaintiff.

During his examination before trial, defendant Dekel testified to the effect that he saw plaintiff twice during her prenatal course and noted no high risk factors. In addition, he testified that prior to Mrs. Ramsay's home birth he met with defendant Jacobsen, agreed to be the backup physician and discussed the midwifery protocol. It was understood that any deviation from normal would be immediately reported to him. It was further understood that Mrs. Ramsay's pregnancy and delivery would be managed by defendant Jacobsen, and if there was any problem during delivery, he would be called. He had no further communications with defendant Jacobsen until he learned that Mrs. Ramsay was transported to Good Samaritan Hospital on September 18, 1994 via a call from Dr. David. Upon his arrival to the hospital, defendant Dekel stated that he examined Mrs. Ramsay and repaired her episiotomy and a right sulcus tear. He testified to the effect that the sulcus tear is a function of delivery, not as a result of the episiotomy. As the baby passed through the vaginal canal during delivery, a wall of the vagina gave way because of extensive distention.

At her examination before trial, defendant Jacobsen testified to the effect that she would call the backup physician if concerns arose about the baby's heart rate, mother's vital signs, the length of labor, unusual labor result, bleeding, or prolonged rupture of membranes. Defendant Jacobsen further testified that she did not notify defendant Dekel during the labor and delivery. With these submissions, defendant Dekel has made a prima facie showing sufficient to warrant judgment in his favor as a matter of law, shifting the burden to plaintiff to demonstrate the existence of a triable issue of fact (see, *Baez v Lockridge*, 259 AD2d 573, 686 NYS2d 496 [1999]).

In opposition, plaintiff relies upon 8 NYCRR 79-5.7, which provides for the licensing and practice of midwifery. Plaintiff cites subsection (c) in particular, which pertains to the practice agreement between the midwife and the covering physician or **hospital**.<sup>5</sup> Plaintiff submits, *inter alia*, a redacted affirmation of her expert, who avers that he is a physician board-certified in the area of obstetrics and gynecology. Submission of an affirmation from an unidentified expert is permissible with the proviso that the court may require submission of an unredacted copy of the affirmation for an in camera inspection (*Marano v Mercy Hosp.*, 241 AD2d 48, 670 NYS2d 570 [1998]; *McCarty v Community Hosp.*, 203 AD2d 432, 610 NYS2d 588 [1994]).

The expert opines that defendant Dekel's role was that of supervising physician, and due to his failure to monitor the midwife in accordance with his agreement to do so, he essentially abandoned Mrs. Ramsay. The expert further states that defendant Jacobsen performed an episiotomy upon Mrs. Ramsay, which resulted in sulcus tearing and necessitated emergent surgical repair, causing complications from which Mrs. Ramsay suffered afterward.

However, the expert's opinion fails to raise an issue of fact regarding defendant Dekel's role in the home birth (8 NYCRR 79-5.7[c]). The Court finds that defendants complied with the statute by discussing and reviewing their practice agreement. Both defendant Dekel and defendant Jacobsen testified to the effect that they reviewed the protocols in the practice agreement and understood that defendant Jacobsen would manage the home birth and call defendant Dekel only if there was a problem.

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<sup>5</sup> 8 NYCRR 79-5.7(c) provides, in part, that the practice agreement shall provide for physician consultation, collaboration, referral and emergency medical obstetrical coverage and shall include written guidelines and protocols...

