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SHORT FORM ORDER

INDEX No. 00-19008

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 3/10/05 (#006)
4/4/05 (#007)
3/10/05 (#008)
ADJ. DATE 5/25/05
Mot. Seq. # 006 - MG
007 - MG
008 - MG

PATRICK RUDDY, as Administrator of the Estate of GINA MARIE RUDDY, deceased, Plaintiff, - against - PATRICIA NOLAN, M.D., IAN WINKLER, M.D., QUEENS LONG ISLAND MEDICAL GROUP, P.C., VISHNU SEODAT, M.D., EAST END FAMILY PRACTICE ASSOCS., P.C., TATIANA S. ERDELY, M.D., PAULINO S. CRUZ, M.D. and SUFFOLK FAMILY MEDICINE ASSOCIATES, P.C., Defendants.	DUFFY, DUFFY & BURDO Attorneys for Plaintiff EAB Plaza Uniondale, New York 11556-1370 LEWIS JOHS AVALLONE AVILES, et al. Attys. for Defts Seodat & East End Fam. Prac. 425 Broad Hollow Road, Suite 325 Melville, New York 11747-4712 IVONE, DEVINE & JENSEN, LLP Attorneys for Deft. Erdely 2001 Marcus Avenue Lake Success, New York 11042 BARTLETT McDONOUGH BASTONE, et al. Attys. for Defts. Cruz & Suffolk Fam. Med. 300 Old Country Road Mineola, New York 11501 VARDARO & HELWIG Attorneys for Defts. Queens LI Med Group, Nolan and Winkler 732 Smithtown Bypass, Suite 203 Smithtown, New York 11787

Upon the following papers numbered 1 to 16 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-3; 4-6; 7-8; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 9 - 12; Replying Affidavits and supporting papers 13 - 16; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#006) by defendant Tatiana S. Erdely, M.D. for summary judgment dismissing the complaint as against her pursuant to CPLR 3212 is granted; and it is further

ORDERED that the motion (#007) by defendants Vishnudat Seodat, M.D. and East End Family Practice Associates, P.C. for summary judgment dismissing the complaint as against them pursuant to CPLR 3212 is granted; and it is further

ORDERED that the motion (#008) by defendants Paulino S. Cruz, M.D. and Suffolk Family Medicine Associates, P.C. for summary judgment dismissing the complaint as against them pursuant to CPLR 3212 is granted.

In this medical malpractice action, plaintiff, Patrick Ruddy, as Administrator of the Estate of Gina Marie Ruddy, an infant decedent, alleges that defendants departed from accepted standards of medical care by their failure to prescribe an Epipen, a premixed injection of epinephrine, which is used to treat anaphylactic reactions.

The record reveals that plaintiff was diagnosed with an allergy to milk at birth and that, despite plaintiff's mother's attempts to avoid milk or mild products in her diet, on October 28, 1999 the six-year-old infant plaintiff ingested a portion of her father's biscuit, which contained a milk product. The infant immediately complained of difficulty breathing, was brought to an emergency room and died a short time later. The coroner's report reveals the cause of death to be an anaphylactic reaction. Plaintiff alleges that defendants, who are the pediatricians and allergists who treated the infant plaintiff over time until her death, departed from accepted standards of medical care by their failure to prescribe an Epipen, thereby proximately causing plaintiff's death.

The record reveals that plaintiff was tested for allergies by non-party Daniel Mayer, M.D., an allergist, who diagnosed an allergy to milk and other foods on or about June 7, 1995. The record also reveals that, of the three moving defendants, the infant plaintiff first visited Dr. Seodat at defendant East End Family Practice Associates, P.C. located in Aquebogue on September 9, 1995 and continued as his patient until February 18, 1997. The infant plaintiff was also seen by a team of allergists at Stony Brook University Hospital during this time frame. The infant's mother testified to the effect that she was advised to try giving small amounts of the offending foods to the infant to desensitize her. The infant plaintiff then began seeing Dr. Erdely at her offices located in Mastic on February 28, 1997 as a patient until her last visit on May 1, 1998. The infant plaintiff began seeing Dr. Cruz at Suffolk Family Medicine Associates, P.C. located in Nesconset on September 9, 1998 until her last visit on February 17, 1999. The infant plaintiff was a patient of the Queens Long Island Medical Group located in Ronkonkoma beginning on March 17, 1999 until her death. She saw defendants Ian Winkler, M.D., a pediatrician, and Patricia Nolan, M.D., a pediatric allergist.

Defendants Tatiana S. Erdely, M.D.; Vishnudat Seodat, M.D. and East End Family Practice Associates, P.C.; and Paulino Cruz, M.D. and Suffolk Family Medicine Associates, P.C. move separately for summary judgment dismissing the complaint and contend that they did not depart from accepted standards of medical care while she was a patient in their care and did not proximately cause

her injuries or her death.

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 [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*, ***Derdiarian v Felix Contracting Corp.***, 51 NY2d 308, 434 NYS2d 166 [1980]; ***Prete v Rafla-Demetrious***, 224 AD2d 674, 638 NYS2d 700 [1996]).

In support of her motion, Dr. Erdely contends that she did not depart from accepted standards of medical care and her care did not proximately cause the injuries suffered by the infant plaintiff. She submits, *inter alia*, the pleadings, bill of particulars, a copy of her office records and her personal affidavit. Dr. Erdely avers that she personally saw the infant plaintiff on the following dates: February 28, 1997, September 19, 1997, December 8, 1997 and January 13, 1998. During the course of her treatment, the child exhibited symptoms of asthma and asthmatic bronchitis with wheezing on frequent occasions.

Dr. Erdely also states that she learned from the infant plaintiff's mother about the allergy to milk and that the child was being treated by an allergist. She states that to her knowledge the child was not given milk and had no symptoms related to milk at any time during the period of time that the child was a patient. She states that at no time did the child suffer an anaphylactic reaction while under her care. The circumstances at the time did not require prescribing an Epipen. "The affidavit of a defendant physician may be sufficient to establish a prima facie entitlement to summary judgment where the affidavit is detailed, specific and factual in nature and does not assert in simple conclusory form that the physician acted within the accepted standards of medical care" (***Toomey v Adirondack Surgical Assocs. P.C.***, 280 AD2d 754, 755, 720 NYS2d 229 [2001]; *see*, ***Winegrad v N.Y. Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). Here, the court finds that defendant Erdely has provided sufficient detail in her affirmation and office records to meet her burden of demonstrating, *prima facie*, her entitlement to judgment as a matter of law.

In opposition, plaintiff submits, *inter alia*, the redacted affirmation of a physician whose name has been redacted[1] in accordance with ***Carrasquillo v Rosencrans*** (208 AD2d 488, 617 NYS2d 51 [1994]). The expert states that he is board-certified in pediatrics and states that defendant Erdely should have prescribed an Epipen, since the child exhibited signs and symptoms consistent with anaphylactic reaction and should have kept in mind the very real possibility that the child may experience an anaphylactic reaction in the future. Although conflicting opinions may raise a question of fact, neither the affirmation of plaintiff's expert nor any other evidence in the record before this court supplies the requisite nexus between the malpractice allegedly committed by defendant Erdely and the demise of

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[1] The court has conducted an in-camera inspection of the original unredacted affirmation and finds it to be identical in every way to the redacted affirmation in plaintiff's opposition papers with the exception of the redacted expert's name. In addition, the court has returned the unredacted affirmation to the plaintiff's attorney.

plaintiff's decedent (***Ferrara v South Shore Orthopedic Assoc., P.C.***, 178 AD2d 364, 577 NYS2d 813 [1991]). Accordingly, defendant Erdely's motion for summary judgment is granted.

In their motion for summary judgment, defendants Seodat and East End Family Practice Associates, P.C. contend that they did not proximately cause the infant plaintiff's injuries, since the infant plaintiff was not in their care at the time of her death and they did not depart from accepted medical practice in their care of the infant plaintiff. Defendants submit, *inter alia*, a copy of their office records, a copy of defendant Seodat's examination before trial transcript and an affidavit by Paris Phillips, M.D., who is board-certified in the field of family practice. Dr. Seodat testified to the effect that at the first appointment he was made aware of the infant plaintiff's allergies to milk and other foods by her mother and that she was being followed by an allergist. He also stated that there was no type of medication that could be administered in 1995 to 1996 to a child to prevent a food allergy from occurring. He testified that he and Mrs. Ruddy spoke frequently about the infant's health and allergies and that Mrs. Ruddy should avoid giving the infant the offending foods. In addition, he stated that while she was under his care, she was not considered a risk for an anaphylactic reaction. In each of the two cases where the infant plaintiff had an allergic reaction, she had an immediate response to a nebulizer treatment when it was instituted.

Dr. Phillips avers that the symptoms exhibited by the infant plaintiff were not consistent with anaphylaxis but instead were more consistent with severe environmental and food allergies. He also stated that it was within acceptable standards of medical care for Dr. Seodat and the East End Family Practice Associates, P.C. to assume the infant was continuing to treat with allergists and other specialists. In addition, Dr. Phillips states that the child's symptoms of asthmatic bronchitis, eczema and allergies were appropriately managed by Dr. Seodat and the symptoms improved with his recommended treatment. The child left Dr. Seodat's care in December of 1996 and was never again seen by him. At her examination before trial, Mrs. Ruddy testified to the effect that she never discussed the possibility of prescribing an Epipen with Dr. Seodat. In addition, she stated that she stopped bringing her daughter to Dr. Seodat's office because they moved out of the area. The above submissions demonstrate that defendants have satisfied their *prima facie* burden for judgment as a matter of law (***Winegrad v N.Y. Univ. Med. Ctr.***, *supra*).

In opposition, plaintiff submits, *inter alia*, the redacted affirmation of a physician whose name has been redacted[2] in accordance with ***Carrasquillo v Rosencrans***, *supra*. The original unredacted affidavit has been submitted to the court for inspection under separate cover. The expert opines that Dr. Seodat departed from accepted standards of medical care by not prescribing the Epipen for the infant plaintiff. He bases his conclusion on two episodes of difficulty breathing as reported by her mother, which were allegedly associated with milk. However, the expert fails to note that the infant plaintiff sustained difficulty breathing in any event without such exposures. Thus, the court finds that plaintiff has failed to raise an issue of fact, since the expert's opinions are not supported by the evidence in the record (*see*, ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324-5, 508 NYS2d 923 [1986]). Accordingly, the

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[2] The court has conducted an in-camera inspection of the original unredacted affirmation and finds it to be identical in every way to the redacted affirmation in plaintiff's opposition papers with the exception of the redacted expert's name. In addition, the court has returned the unredacted affirmation to the plaintiff's attorney.

motion by Dr. Seodat and East End Family Practice, P.C. is granted.

In support of their motion for summary judgment, Dr. Cruz and Suffolk Family Medicine Associates, P.C. submit, *inter alia*, the office records and the affirmation of Steven M. Fried, M.D., who is board-certified in the fields of internal medicine and pediatrics. Dr. Fried affirms that defendants Cruz and Suffolk Family Medicine Associates, P.C. did not deviate from accepted standards of medical practice on any of the care and treatment provided to the infant plaintiff, nor was the care and treatment provided the proximate cause of her death or of any of her alleged injuries. During the period from September 5, 1998 through February 17, 1999, care and treatment was provided for a variety of upper respiratory infections and asthmatic complaints. However, at no time was the infant plaintiff seen for anaphylactic reactions that require the provision of an Epipen. Nor was it reasonably foreseeable that the patient would require such a device in the future, based upon her history or her presenting signs and symptoms. The court finds that defendants have demonstrated, prima facie, their entitlement to judgment as a matter of law (***Winegrad v N.Y. Univ. Med. Ctr.***, *supra*).

In opposition, plaintiff submits, *inter alia*, the redacted affirmation of the above-stated expert[3]. The expert opines that the infant plaintiff's asthma was a risk factor associated with possible anaphylactic reactions. Inasmuch as there is no dispute that the infant plaintiff never suffered an anaphylactic reaction while under the care of defendant Cruz, such speculation cannot substitute for a causal link between defendants' care and plaintiff's injuries. In the absence of a causal nexus, plaintiff failed to create an issue of fact precluding summary judgment (*see*, ***Wahila v Kerr***, 204 AD2d 935, 611 NYS2d 966 [1994]). Accordingly, the motion for summary judgment by defendants Cruz and Suffolk Family Medicine Associates, P.C. is granted.

Accordingly, the motions by all defendants are granted. The action is severed as against the moving defendants. The matter is continued as against the remaining defendants and the caption shall be deemed amended accordingly.

Dated: 8 August 05

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**

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[3] The court has conducted an in-camera inspection of the original unredacted affirmation and finds it to be identical in every way to the redacted affirmation in plaintiff's opposition papers with the exception of the redacted expert's name. In addition, the court has returned the unredacted affirmation to the plaintiff's attorney.