[* 1]

At an IAS Term, Part MMTRP 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 30th day of June, 2005.

P R E S E N T:

HON. GERARD H. ROSENBERG,
Justice.

----------X

Alice Greene, as Mother and Natural Guardian of Thomas Mungioli and Alice Greene, Individually,

Plaintiff(s),

DECISION & ORDER

-against-

Index No. 43279/01

Yvette Martas, M.D., Michael Silverstein, M.D., Gwyneth Levy, M.D., David Horowitz, M.D., New York University Ob/Gyn Associates, Pediatric Associates of NYC and New York University Medical Center,

Calendar No. 2004-007989T

Motion Seq. Nos. 007, 008, 009

Defendant(s).

----------X

The following papers numbered 1 to 23 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/Petition/ Cross Motion and Affidavits (Affirmations) Annexed	1-23 24-37 38-41
Opposing Affidavits (Affirmations)	42-55 56
Reply Affidavits (Affirmations)	57 58
Other Papers	

Upon the foregoing papers, Defendants Gwyneth Levy, M.D., David Horwitz, M.D.,

s/h/a David Horowitz, M.D., and Pediatric Associates of NYC ("the Pediatric defendants") move pursuant to CPLR 3112 for an order granting summary judgment and dismissing plaintiffs' complaint on the basis that no triable issues of fact exist. By separate motion, defendants Yvette Martas, M.D., Michael Silverstein, M.D., New York University Ob/Gyn Associates, and NYU Hospitals Center, s/h/a "New York University Medical Center" ("the NYU defendants") move for the same relief. Plaintiffs cross-move for an order providing that if any defendant obtains summary judgment and dismissal of plaintiffs' claims against it, (1) then any remaining defendant should be precluded from obtaining, or should be deemed to have waived or forfeited, the limited liability benefits of CPLR Article 16 in relation to the acts or omissions of said defendant who is granted summary judgment and dismissal of plaintiffs' claims against it; and (2) then such should become the "law of the case" as to any remaining defendant so as to preclude the application of CPLR Article 16 concerning the acts or omissions of said defendant who is granted summary judgment and dismissal of plaintiffs' claims against it.

This is a medical malpractice action, in which plaintiffs seek damages for injuries allegedly sustained by the infant plaintiff at his birth on September 11, 1999 due to the alleged malpractice of the defendants. Plaintiffs assert, inter alia, that defendants failed to properly examine, diagnose and medicate plaintiffs; failed to treat the infant in utero and his mother prenatally; failed to properly evaluate the plaintiff-mother's pelvic anatomy; failed to properly diagnose and treat the plaintiff-mother's herpes and herpatic condition; failed to treat the

pregnancy as high risk; failed to perform and interpret sonograms; improperly recognized the presence of and improperly treated the complications of delivery; negligently and improperly attempted a vacuum extraction delivery; failed to timely and properly perform a vacuum extraction; failed to perform a cesarean section once the vacuum extraction failed; improperly performed a forceps delivery, and failed to use the forceps in a proper manner, negligently cutting the infant with the forceps; and created a portal of entry of herpes to the infant by the improper use of forceps during delivery, thereby resulting in the infant-plaintiff contracting herpes simplex virus, Type II ("HSV-2").

Background

The infant plaintiff's mother, Alice Green, is a physician Board Certified in Internal Medicine. On March 8, 1999 Dr. Greene presented to New York University Village Women's Health ("Women's Health") for prenatal care, and was examined by Dr. Martas. According to her deposition, Dr. Greene was unaware that she had ever been exposed to herpes, and reported to her obstetricians that she did not have herpes or diabetes. In fact, the NYU defendants claim that Dr. Greene still denied that she had herpes to Dr. Martas on April 27, 2000, some seven months after the delivery. The NYU defendants claim that the prenatal care records and labor and delivery records reveal that herpetic vesicles or lesions were never observed during any of Dr. Greene's vaginal examinations throughout the pregnancy.

Dr. Greene remained under the care of Dr. Martas during the prenatal period. In response to a blood sample report on March 8, 1999 which revealed raised red blood cell

antibodies which had the potential to destroy the fetus or newborn's red blood cells, Dr. Martas referred Dr. Green to non-party Dr. Men-Jean Lee, a specialist in maternal-fetal medicine, for evaluation and monitoring. Dr. Lee monitored Dr. Greene's blood antibodies through the pregnancy.

On September 8, 1999 Dr. Greene was examined by Dr. Martas at Women's Health. She was 50% effaced, her cervix was closed, and the gestational age was more than thirty-seven weeks. Dr. Greene consented to vaginal delivery by induction. She presented to New York University Medical Center ("NYUMC") on September 9, 1999 at 5:08 p.m. for delivery with the assistance of Pitocin. A fetal heart rate monitor was placed and Dr. Martas ordered Pitocin to be infused at 7:25 p.m. After some 25 hours Dr. Greene's membranes were artificially ruptured at 9:00 p.m. on September 10, 1999. Dr. Martas examined the patient for the last time at approximately 5:56 p.m. on September 11, 1999, some 48 hours after Dr. Greene presented to NYUMC.

From this point on, Dr. Silverstein - who was covering Dr. Martas' patients - took over the care of Dr. Greene. Approximately 12 hours later, at 5:30 a.m. on September 11, 1999 the infant-plaintiff was delivered by Dr. Silverstein. A vacuum extraction was performed, and forceps were applied to complete the delivery. A pediatrician was present at the time of delivery and noted Apgar scores of eight at one minute and eight at five minutes. The infant was transferred to the well-baby nursery, where he was noted to have two "skin tears"; one on the left side of the face and one on the right neck. The infant-plaintiff was discharged home

on September 13, 1999, and skin lesions appeared intermittently in September of 1999.

Dr. Levy and Dr. Horwitz are pediatricians associated with Pediatric Associates of NYC ("Pediatric Associates"). The infant first was seen at the Manhattan office of Pediatric Associates on September 19, 1999 by Dr. Horwitz. This is the only time Dr. Horwitz saw the infant, who was brought in before his first scheduled appointment, on a Saturday, due to a skin condition. Dr. Horwitz testified that the lesion looked like a bacterial pustulosis or impetigo lesion, which is also bacterial. He prescribed Keflex and Bactroban, and took a culture.[1] Dr. Horwitz claims that since Keflex and Bactroban are highly effective against a staph infection, which it turned out is what the infant had, then his care and treatment were appropriate. He also testified that he could not perform a culture for herpes in his office as that requires special training which he did not have. Since the infant was to be a patient of the Brooklyn office of Pediatric Associates, Dr. Horwitz never saw the infant again.

On September 22, 1999 Dr. Levy first saw the infant at the Brooklyn office of Pediatric Associates. She noted that the infant had developed 3 pustules with straw colored fluid 3-4 days before this visit, which Dr. Horwitz had treated with Keflex and Bactroban. She further noted that the infant's mother had no history of oral herpes infections or sexually transmitted diseases. The infant presented with two new pinpoint lesions on his neck, and at that time there was no growth of the cultures up to that date and the cultures were being held for fungus.

---

[1] This culture later came back positive for staph aureus, and will be discussed, infra.

Dr. Levy consulted by telephone with Dr. Phil Orbuch, a pediatric dermatologist, describing what she observed on the infant. According to Dr. Levy, Dr. Orbuch did not seem concerned and told her to continue the Keflex and Bactroban and to add Nizoral cream. Dr. Orbuch stated that it appeared to be a fungul skin infection, and thought that the lesions could have been caused by the forceps used during delivery. Dr. Levy's impression was that the pustules could be staph aureus, candida, staph epidermidis or epidermolysis bullosa. She continued the Keflex (this was day 4 of the 10 day course of Keflex prescribed by Dr. Horwitz), and prescribed Nizoral cream and Bactroban 3 times per day. If the lesions progressed, the mother was to return to the office and Dr. Levy noted that she would send the baby to a pediatric dermatologist.

Dr. Levy next saw the infant on September 23, 1999. She observed no new lesions, and noted three honey crusted lesions on the right neck and three on the chest. Dr. Levy's impression was questionable impetigo. She instructed the mother to continue the Keflex, Bactroban and Nizoral and to call if there were any new lesions.

In the interim, the results of the culture taken by Dr. Horwitz were stated in a report dated September 30, 1999, and revealed staphylococcus aureus.

Dr. Levy next saw the infant on October 7, 1999 - he was fussy on that date and was seen due to colic. On October 14, 1999 the baby was seen again by Dr. Levy. Dr. Greene, the infant's mother, had observed intermittent anisocoria (unequal pupil size) that morning. Dr. Levy referred the infant to a pediatric ophthalmologist, Dr. Steele, to be seen that same day,

and Dr. Levy spoke with Dr. Steele about the infant that day (i.e., on October 14, 1999). A referral was also made to the pediatric dermatologist, Dr. Orbuch, who was to see the infant the next day due to questionable impetigo. Dr. Levy noted the mother reported that the skin lesion recurred three days ago and she had been using Nizoral and Bactoban with results. On exam, there was intermittent anisocoria of the right eye and the right pupil was equal and reactive to light. There was a honey crusted lesion on the right neck and a dry lesion on the right chest.

Dr. Orbuch's records indicate that the infant's mother did not bring the infant in until October 18, 1999. He cultured the lesions and they were negative. Dr. Orbuch did not think they were herpes. Blood tests (TORCH panels) which had been performed on the mother and infant revealed that the infant-plaintiff and his mother were positive for the antibody for HSV-2, in reports dated October 19 for the mother and October 22 for the infant.

Dr. Levy testified that she consulted with Dr. Orbuch after he saw the infant and mother on October 18, 1999. Dr. Levy indicated that she had wanted them to see Dr. Orbuch on October 15. Dr. Levy also testified that she received a report from a Dr. Nathan Litman indicating that he saw the infant on November 4, 1999 for congenital/perinatal herpes infection.

Contentions

The NYU defendants argue that they committed no departures in the care and treatment of the infant-plaintiff and plaintiff-mother. In support they offer the affirmation of Dr. Daniel

Skupski, who is Board Certified in obstetrics and gynecology, and also Board Certified in the subspeciality on maternal-fetal medicine. He has reviewed the pertinent medical records of Alice Greene, the infant mother plaintiff, and Thomas Mungioli, the infant, the pleadings, the deposition testimony, the Verified Bill of Particulars and Supplemental Bill of Particulars. Dr. Skupski explains that herpes simplex virus type 2 (HSV-2) is a sexually transmitted disease. The virus establishes latency in the sacral ganglion at the base of the spine, and thereafter recurs in the genital area. He opines that induction of labor was not contraindicated, that consent for induction was properly obtained, that defendants performed the appropriate examinations and tests leading up to the delivery of the infant-plaintiff, that the appropriate specialty consults were obtained, and that forceps were properly obtained. He further states that since there was no reason to believe that Dr. Green had HSV-2, a vaginal delivery was indicated.

With respect to the issue of proximate cause, the NYU defendants argue that contracting herpes is not a foreseeable risk to the infant plaintiff even if one assumes that the NYU defendants committed the alleged departures. Dr. Greene was unaware that she had herpes at the time of her delivery, and no outward signs had ever been manifested. Indeed, Dr. Greene, who is Board Certified in Internal Medicine and trained to diagnose herpatic lesions, never observed any lesions at any time prior to the infant's birth. Dr. Skupski states that a Cesarean section is indicated to prevent herpes from spreading to the infant when "the would-be mother has active genital lesions or has early symptoms associated with the onset of an

attack of herpes at or near the time of delivery." In this case, since there was no reason to suspect that Dr. Greene had HSV-2, as none of the records document signs of lesions or vesicles at any time, a vaginal delivery was indicated. It is not the standard of care to test an obstetrical patient for HSV-2 unless they are a known carrier of the virus or they have a known history of the virus, which was not the case here. Plaintiff's allegations that a Cesarean section was indicated because of fetal distress and because of the mother's pelvic anatomy do not encompass a risk to the fetus of contracting herpes, since the defendants could not have possibly foreseen that a vaginal delivery would expose the fetus to the herpes virus.

With respect to plaintiffs' claim that NYUMC failed to properly evaluate and assess medical personnel applying for employment or privileges, the NYU defendants offer the affidavit of Dorothy Zelnick, who is the Manager of Medical Staff Services at NYUMC. She asserts that NYUMC had cohesive and comprehensive procedures in place for reviewing physician's qualifications and that these procedures were adhered to with respect to Dr. Martas and Dr. Silverstein. Defendants claim that there is no evidence to the contrary and this claim must therefore be dismissed.

The Pediatric defendants contend that the treatment rendered by Drs. Levy and Horwitz and Pediatric Associates was appropriate and within the standards of acceptable medical practice. In support they offer the affirmation of Dr. Roy Horowitz, who is a Board Certified pediatrician. He has reviewed the pertinent medical records of the infant plaintiff, as well as the Verified Bill of Particulars and the deposition testimony of Drs. Levy and Horwitz.

Dr. Horowitz states that when Dr. Horwitz saw the infant on September 19, 1999 he suspected staph aureus as the first thing one would expect with an open lesion. The culture which he took came back positive for staph aureus and therefore the antibiotic treatment he had prescribed (of Keflex and Bactroban) was appropriate. Thus, Dr. Horwitz's actions on September 19, 1999 conformed to accepted medical practice.

With respect to Dr. Levy, Dr. Horowitz states that Dr. Levy's actions on September 22, 1999 were appropriate. She noted the appearance of the lesions and noted that the infant's mother did not have a history of herpes or sexually transmitted diseases. She also telephoned a pediatric dermatologist to discuss the patient and describe the appearance of the lesions. Dr. Horowitz states that a herpes lesion looks like a dewdrop on a rose petal, which is not described anywhere in the pediatric records.

The expert notes that when the infant was seen on October 14, 1999 due to intermittent anisocoria, the infant's mother reported that the skin lesions recurred three days ago. Upon learning this Dr. Levy appropriately referred the patient to a pediatric dermatologist and requested that the infant be seen by the pediatric dermatologist the next day. The infant's records regarding subsequent treatment by Dr. Litman dated November 16, 1999 indicate that the minor haziness in the infant's eye was thought to be secondary to perinatal trauma. The infant was hospitalized at Montefiore on November 8, 1999 and treated with intravenous Acyclovir.

Dr. Horowitz concludes that the care rendered by Dr. Levy was within accepted

standards of medical practice. Dr. Levy consulted a pediatric dermatologist on September 22, 1999 and subsequently referred the patient to the pediatric dermatologist for a consult. A pediatrician is not expected to perform a herpes culture. The appropriate action is to refer a child to a specialist when there is a recurring problem outside general pediatric care.

Dr. Horowitz states in conclusion that the care rendered by Drs. Horwitz and Levy and Pediatric Associates was in all respects appropriate and within the standard of care.

In opposing the motions by the defendants, plaintiffs submit the affidavits of a physician Board Certified in Obstetrics and Gynecology, and a physician Board Certified in Pediatrics and Pediatric Emergency Medicine.

Plaintiff's Ob/Gyn expert states that he/she reviewed the deposition transcripts of Ms. Greene and Joseph Mungioli, the infant's parents, Dr. Martas, Dr. Silverstein, Dr. Levy, Dr. Horwitz and Nurse Maureen Bourne, the pertinent medical records, the Bills of Particulars and Supplemental Bill of Particulars, the Complaint, and the affirmation of Dr. Skupski, the NYU defendants' expert. This expert states that the NYU defendants departed in failing to give Dr. Greene the option of having a cesarean section because she had been exposed to Human Papilloma Virus in 1985 and had "cryosurgery" for genital warts at that time. The expert also states that events occurred during her admission to NYUMC on September 9-10, 1999 (including numerous instances of fetal decelerations, uterine hyperstimulation, and instances of minimal variability of the fetal heart rate) which warranted the ordering of a cesarean section by 5:05 p.m. on September 10, 1999. The expert also states that arterial

blood gas and cord venous blood gas collected perinatally showed certain abnormal readings and evidenced a certain degree of fetal hypoxia. In addition, the use of the forceps during the vaginal delivery caused trauma to the infant's neck and chest which created a portal by which the infant acquired herpes simplex infection from his mother at the time of delivery. Plaintiff's expert concludes that had a cesarean section been timely ordered and performed, there is a substantial chance the infant would not have been exposed to the herpes simplex infection at the time of delivery nor acquired the infection via the forceps trauma.

Plaintiff's pediatric expert states that he/she reviewed the deposition transcripts of Ms. Greene, Joseph Mungioli, Dr. Martas, Dr. Silverstein, Dr. Levy, Dr. Horwitz and Nurse Maureen Bourne, the pertinent medical records, the Bills of Particulars and Supplemental Bill of Particulars, the Complaint, and the affirmation of Dr. Roy Horowitz, the Pediatric defendants' expert. With respect to the Pediatric defendants, this expert states that the lesions which were observed as of the September 19, 1999 visit were consistent with the appearance of herpes simplex virus lesions. While the lesions could also be caused by other agents, herpes simplex virus should have been key among the differential diagnosis until ruled out. Further, the infant should have been treated for herpes infection pending diagnostic evaluation of the lesions. This expert states that HSV infection should be considered, and treated, when an unexplained vesicle appears on a neonate. The expert also states that the lesions appeared approximately one week after birth, which is consistent with the incubation period of 5-21 days. Dr. Horwitz should have recognized that this constellation of findings is consistent with

HSV until proven otherwise, and if unable to provide the care himself, he should have referred the infant and mother to a specialist for appropriate action.

With respect to Dr. Levy, plaintiff's expert points out that Dr. Levy has testified that she had never seen herpes lesions in neonates and was not familiar with what they were supposed to look like. Dr. Levy should either have performed the appropriate diagnostic tests herself or referred the infant to a specialist who could take appropriate action. Plaintiff's expert states that this departure resulted in the long term sequelae which the infant is suffering from today.

Plaintiff's expert states that while Dr. Horwitz performed a culture of the lesion on September 19, 1999, it was not a culture which would have revealed the presence of HSV or any other virus. Moreover, the results of that culture were not known until September 30, 1999, so the HSV was given time to progress. Dr. Levy, in response to the episode of asymmetry in the infant's eyes, ordered "TORCH" panel blood work in October which ultimately revealed results that were elevated for HSV for the mother and infant. This diagnosis and subsequent treatment occurred approximately one month after birth. In addition, the referral to Dr. Orbuch resulted in his conducting a culture specimen which came back negative for HSV, but the delay caused by Dr. Horwitz in not making an earlier referral resulted in a delay in Dr. Orbuch's specimen, thereby reducing the chance of an accurate result in the culture. This is so because a culture specimen be taken on active lesions during viral shedding is more accurate.

The delay is additionally significant since early institution of antiviral therapy is critical to the outcome of HSV infection acquired at the time of delivery. Also, by October 14, 1999, when Dr. Levy referred the patient to a specialist, recurrences of the infection had occurred and symptomatology involving the left eye had been observed by Ms. Greene. Had antiviral therapy been instituted earlier there was a substantial chance that the infant would have avoided the left eye injuries and the spread of the infection, and their sequelae.

Analysis

Summary judgment may be granted only when it is clear that no triable issues of fact exist (*Alvarez v Prospect Hosp.*, 68 NY2d 320). "The province of a court on a motion for summary judgment is issue finding rather than issue determination" *(Litwak v Crown Beverages Corp.*, 133 AD2d 742, 742). The party moving for summary judgment "bears the initial burden of making a prima facie showing of its entitlement to judgment as a matter of law" (*Holtz v Niagra Mohawk Power Corp.*, 147 AD2d 857, 858). Once such a showing has been established, the "burden is shifted to the opposing party to come forward with proof in evidentiary form to show the existence of genuine triable issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, supra; *Zuckerman v City of New York*, 49 NY2d 557). General conclusory statements and expressions of hope are insufficient to defeat the motion (*Zuckerman v City of New York*, id.). On such a motion, the court is not to determine credibility, but whether a factual issue exists (*Capelin Assoc. v Globe Mfg.*, 34 NY2d 338).

It is well established that:

> for a plaintiff to establish a cause of action sounding in negligence, he must meet the initial burden of showing (1) the existence of a duty flowing from defendant to plaintiff; (2) a breach of this duty; (3) a reasonably close causal connection between the contact and the resulting injury; and (4) actual loss, harm or damage.

(*Febesh v Elcejay Inn Corp.* , 157 AD2d 102, 104, appeal denied 77 NY2d 801, citing Prosser & Keeton, Torts § 30, at 164-165 [5th ed]; accord, *Murray v New York City Hous. Auth.*, 269 AD2d 288; *Solomon v City of New York*, 66 NY2d 1026). It is equally well established that in determining whether a breach of duty has occurred, it is necessary to consider whether the resulting injury was a reasonably foreseeable consequence of the defendant's conduct (see, *Cygan v City of New York*, 165 AD2d 58, appeal denied 78 NY2d 855, citing, *Gordon v City of New York*, 70 NY2d 839, 841; *Danielenko v Kinney Rent a Car*, 57 NY2d 198, 204). "When faced with a motion for summary judgment on proximate cause grounds, a plaintiff need not prove proximate cause by a preponderance of the evidence, which is plaintiff's burden at trial. Instead, in order to withstand summary judgment, a plaintiff need only raise a triable issue of fact regarding whether defendant's conduct proximately caused plaintiff's injuries" (*Burgos v Aqueduct Rlty.*, 92 NY2d 544, 550).

The NYU Defendants

The court finds that plaintiff's experts statements as to departures as to the NYU defendants amount to nothing more than speculation. For example, the expert states that a cesarean should have been performed because the mother had HPV and genital warts in 1985.

The expert states that these are sexually transmitted, so Dr. Martas knew that Ms. Greene had been exposed to a sexually transmitted disease. The expert continues that HPV can cause pharyngeal condylomata in the baby and thereby possibly obstruct the pharynx, which is life threatening. Dr. Martas should have notified Ms. Greene of this risk to the baby, and of the fact that this risk would be substantially decreased if a cesarean section was performed. The expert also states that as of 5:05 p.m. on September 10, 1999 a cesarean should have been performed, since continued labor exposed the mother and fetus to danger from maternal exhaustion, uterine abruption due to scar separation, fetal distress, fetal hypoxia, and uterine abruption due to scar separation.

In effect, plaintiff's expert is claiming the single departure of failure to perform a cesarean section as to the NYU defendants. While plaintiffs claim that the infant contracted HSV as a result of the vaginal delivery and the trauma sustained by the use of forceps, plaintiffs fail to address the issue of proximate cause, and more specifically, foreseeability. The list of injuries in the preceding paragraph which the expert opines the infant could have suffered from a vaginal, rather than cesarean, delivery, were not in fact suffered by the infant. To the contrary, the injury which is at issue here - the contracting of HSV - is not listed as a foreseeable risk of vaginal delivery to a reasonable degree of medical certainty. The NYU defendants were presented with no basis to believe that there was this risk. No herpetic vesicles or lesions were ever observed in Dr. Greene during the prenatal period, and she affirmatively reported that she did not have herpes and was unaware that she had ever been

exposed to herpes, even to a point seven months after the birth of the infant plaintiff.

Because of this failure to establish that the risk of being infected with HSV was foreseeable as to the infant plaintiff, the motion by Dr. Martas, Dr. Silverstein and New York University Ob/Gyn Associates for summary judgment is granted. In addition, plaintiff has pointed to no departures by NYUMC staff. Plaintiffs' allegations are directed at Dr. Martas and Dr. Silverstein, who according to the evidence, were private attending physicians and not employees of NYUMC in 1999. Plaintiffs' expert in pediatrics addresses only those actions by the Pediatric defendants, who are not NYUMC staff, and whose course of treatment occurred after the infant plaintiff was discharged from NYUMC.

Finally, plaintiffs' claims of negligent credentialing which are contained in the Bill of Particulars were addressed by the NYU defendants in the affidavit of Dorothy Zelnik, and plaintiffs have not come forward with evidentiary proof of any kind to rebut Ms. Zelnik's statements that proper procedures were employed by NYUMC in the credentialing of physicians. This claim is therefore dismissed, and summary judgment is granted to NYUMC

The Pediatric Defendants

Here, upon the properly supported papers of both sides (*see Marano v Mercy Hospital,* 241 AD2d 48), the court finds that issues of fact exist as to whether defendants Dr. Horwitz, Dr. Levy and Pediatric Associates deviated from accepted standards of medical practice which preclude the granting of summary judgment. Unlike the situation presented with the NYU defendants, plaintiffs' pediatric expert clearly sets forth departures and deviations as to the

correctness of these defendants' treatment and diagnosis of the infant plaintiff, as well as the timeliness of their actions and referrals to appropriate specialists, which plaintiffs' expert opines permitted the HSV infection to remain undiagnosed for several weeks and to become less amenable to treatment. Accordingly, the court denies the motion.

Plaintiff's Cross-Motion

Plaintiff's cross-motion seeks an order providing that if any defendant(s) obtains summary judgment, then the remaining defendant(s) should be precluded from obtaining, or should be deemed as having waived or forfeited, the benefits of CPLR Article 16, and also that such should become the "law of the case" as to any remaining defendant so as to preclude the application of CPLR Article 16 concerning the acts or omissions of said defendant who is granted summary judgment and dismissal of plaintiffs' claims against it.

In support of the motion plaintiffs cite the case of *Drooker v South Nassau Community Hospital* (175 Misc 2d 181 [N.Y. Sup. Ct. Nassau Cty, 1998]) and the unreported case of *Taylor v Queens Long Island Medical Group, P.C.* (N.Y. Sup. Ct. Nassau Cty., Roy S. Mahon, J., Feb. 4, 2003).

By this decision and order, summary judgment has been granted to NYUMC and constitutes the law of the case. This principle, applying the reasoning in *Drooker v South Nassau Communities Hospital* (175 Misc 2d 181 [1998]), which the court finds highly persuasive,[2] precludes the remaining defendants from attempting to prove the negligence of

[2] At least five other Supreme Court decisions, all unreported, including two from this county, have followed the *Drooker* rationale: *Concolino v Romeo*, Sup Ct, Kings County,

the dismissed defendants to reduce their own Article 16 proportional liability.

Plaintiff and codefendants in *Drooker* failed to challenge the sufficiency of the movant's showing and "[i]nasmuch as a motion for summary judgment is the functional equivalent of a trial and the remaining defendants failed to satisfy the evidentiary burden that shifted upon the movant's prima facie showing, the opportunity to limit liability under Article 16 with respect to the movant's acts or omissions has been forfeited" (*id.* at 185-186). "The same applies, of course, where a defendant opposed the motion and lost." (Moore and Gaier, "Medical Malpractice: CPLR Article 16 and Dismissal of Claims Against Defendants," NYLJ, February 5, 2002, at 3, col 1 and at 4, col 6). The remaining defendants have had a full and fair opportunity to address each moving party's liability in this case, and the cross-motion is accordingly granted.

Conclusion

For the foregoing reasons, the motion by defendants Dr. Martas, Dr. Silverstein, New York University Ob/Gyn Associates and New York University Medical Center for summary judgment is granted and the plaintiffs' complaint is dismissed as to these defendants.

The motion for summary judgment by defendants Dr. Levy, Dr. Horwitz (s/h/a David Horowitz, M.D.) and Pediatric Associates is denied. The complaint is severed as to these

---

October 29, 2004, Belen, J., Index No. 18160; *Maniscalo v Fagen,* Sup Ct, Suffolk County, August 1, 2002, Kitson, J., Index No. 7933/00; *Sonnenshen v Fazio*, Sup Ct, Kings County, June 19, 2002, Goldberg, J., Index No. 42784/96; *Siegel v Subramanian*, Sup Ct, NY County, April 10, 2002, Sklar, J., Index No. 121497/97; *McMahon v Koval,* Sup Ct, NY County, February 27, 2001, Shafer, J., Index No. 102460/97.

defendants and shall continue.

The cross-motion by plaintiffs for "Article 16 relief" under the case of *Drooker v South Nassau Community Hospital* to preclude the remaining defendants - Dr. Levy, Dr. Horwitz (s/h/a David Horowitz, M.D.) and Pediatric Associates - herein from asserting CPLR Article 16 defenses is granted.

This constitutes the Decision and Order of the Court.

ENTER

HON. GERARD H. ROSENBERG

J. S. C.