

Monsels v Sinclair

2007 NY Slip Op 30154(U)

March 5, 2007

Supreme Court, Suffolk County

Docket Number: 0029235

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 10/26/06 (#002)
12/15/06 (#003)
11/16/06 (#004,005)

ADJ. DATE 1/16/07

Mot. Seq. # 002 - MG
003 - MG
004 - MG
005 - MotD

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SEAN AKASH MONSELS, an infant under the age :
of 14 years, by his mother and natural guardian, :
KRISHNA K. MOHAN, :

Plaintiff, :

- against -

YVONNE J. SINCLAIR, M.D., KIRSTEN ELSA :
CAIN, J.D., RAJAA JABER, M.D., ANTHONY :
ROYEK, M.D., ANDREW PUTNAM, M.D., :
TERRY ANDREA ALLEN, M.D., ANNE :
HARDARDT, M.D., VITO ALAMIA, M.D., :
JAQUELINE AMMIRATA, M.D., STEVEN :
SALMIERI, M.D., MARIAN ZINNANTE, M.D., :
LYNN MACCO, M.D., ALLEN MONHEIT, M.D., :
LANCE PARTON, M.D., EDMUND LAGAMMA, :
M.D., JAMES PENNA, M.D., MUHAMMAD :
QURESHI, M.D., :

Defendants. :

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Upon the following papers numbered 1 to 89 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-15; 16-38; 39-51; 52-68; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 69 - 80; Replying Affidavits and supporting papers 81-82; 83; 84; 85-89; Other : (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion (#002) by defendant Lance Parton, M.D. for summary judgment dismissing the action as against him pursuant to CPLR 3212 is granted; and it is further

ORDERED that the motion (#003) by defendants Yvonne J. Sinclair, M.D.; Andrew Putnam, M.D.; Terry Andrea Allen, M.D.; Anne Hardardt, M.D.; Vito Alamia, M.D.; Jaqueline Ammirata, M.D.; Marian Zinnante, M.D.; Lynn Macco, M.D.; James Penna, M.D.; and Muhammad Qureshi, M.D. for summary judgment dismissing the action as against them pursuant to CPLR 3212 is granted; and it is further

ORDERED that the motion (#004) by defendant Kristen Elsa Cain, M.D. s/h/a Kirsten Elsa Cain, M.D. for summary judgment dismissing the action as against her pursuant to CPLR 3212 is granted; and it is further

ORDERED that the motion (#005) by defendants Anthony Royek, M.D.; Steven Salmieri, M.D.; Allen Monheit, M.D.; and Edmund Lagamma, M.D. for summary judgment dismissing the action as against them pursuant to CPLR 3212 is determined as follows.

In this medical malpractice action, plaintiff, Krishna K. Mohan, as the mother and natural guardian of the infant plaintiff, Sean Akash Monsels, alleges that defendants departed from accepted standards of medical care in the treatment of the infant plaintiff during the first three months of his life while a patient at non-party Stony Brook University Hospital (hereinafter referred to as "Stony Brook") from April 3, 1997 through June 20, 1997, the date of discharge. The gravamen of plaintiff's complaint is that defendants departed from accepted standards of medical care by their negligent acts and omissions which caused plaintiff to develop an intrauterine infection during her pregnancy with the infant plaintiff, which caused the infant to develop meningitis within days of delivery and to sustain permanent neurological injuries and developmental delays. Before the Court are motions for summary judgment by all the defendants. Procedurally, the plaintiff has discontinued the action as to Rajaa Jaber, M.D. pursuant to a stipulation dated November 14, 2005.

The record reveals that defendant Sinclair saw plaintiff for complaints of leaking amniotic fluid at Stony Brook on March 29, 1997, in her 27th week of pregnancy. The record reveals that a nitrazine test and a fern test were performed upon the vaginal fluid and were found to be negative. Defendant Cain, the attending physician, performed an ultrasound upon the plaintiff and noted that the amount of amniotic fluid, called the Amniotic Fluid Index ("AFI") was normal at 7.9 centimeters. Plaintiff was also placed on a fetal heart monitor which showed that the fetus was active and had a normal heart beat. Plaintiff's vital signs were normal. Plaintiff was discharged with instructions to begin bed rest and to see the doctor at the Riverhead Clinic where she was receiving prenatal care on March 31.

The Riverhead Clinic medical record reveals that plaintiff appeared on March 31 for an

evaluation which was essentially normal. The absence of leaking amniotic fluid was confirmed by laboratory tests and the fetal heart tones were normal. The plaintiff's vital signs were normal. The doctor at the clinic determined that plaintiff's membranes had not ruptured. He then instructed plaintiff was instructed to return to the clinic on April 2 for an ultrasound and to present her employer with a doctor's note for a leave of absence. Plaintiff received instruction regarding the signs and symptoms of pre-term labor and a follow-up visit was scheduled for April 7.

Plaintiff returned to Stony Brook instead on April 1 and was seen briefly by defendant Putnam and thereafter by defendant Allen who determined that the membranes had ruptured and the Amniotic Fluid Index was noted to be less than 1.0 as determined by an ultrasound. Later that day, plaintiff was evaluated by defendant Royek, the attending maternal fetal medicine physician, who admitted plaintiff to the hospital and ordered medications which would prolong the pregnancy and assist the baby's lungs to mature. The record reveals that plaintiff was afebrile throughout her stay at Stony Brook. Defendant Salmieri, an attending obstetrician, evaluated plaintiff on April 1 and 2, continuing the care begun by defendant Royek. The infant plaintiff was delivered on April 3, 1997. The pathology report of the placenta and fetal membranes revealed mild chorioamnionitis¹ and focal atrophy.

The infant plaintiff was evaluated by defendant Parton, an attending neonatologist, and transferred to the neonatal intensive care unit. The infant plaintiff required assisted ventilation and was placed on antibiotics for suspected sepsis. When no organisms were cultured after five days, the antibiotics were discontinued. The record reveals that high bilirubin levels were found which required that the infant undergo phototherapy for several days. The infant later developed a slow heart beat and interrupted breathing on or about April 10 and antibiotics were reinstated. On April 11, a spinal tap culture revealed the presence of bacteria and the infant was diagnosed with meningitis. The neonatal staff requested a consultation from non-party Dr. New, an attending physician in the field of pediatric infectious diseases, accompanied by defendant Qureshi, who wrote the consultation note for Dr. New. A surgical consultation was subsequently requested of non-party Dr. Priebe, accompanied by defendant Penna, who wrote the consult note in the infant's medical chart regarding an intestinal problem which required surgical intervention on or about May 28, 1997. Eventually, the infant was discharged from the hospital.

The discharge summary reveals that the infant continued to experience apnea and required an apnea monitor at home. In addition, the infant was found to be stable from a cardiovascular perspective. The treatment provided for patent ductus arteriosus resolved the problem. After surgery was performed to relieve an intestinal obstruction the infant had no further problems. In addition, the infant had no further problems hematologically after receiving phototherapy. As a result of the meningitis, plaintiff experienced seizures for approximately three months which have not recurred. However, screening for hearing and vision were noted to be abnormal and required outpatient follow up. The record reveals that plaintiff's post-partum course of treatment was uneventful and she was discharged from Stony Brook on April 4, 1997. Plaintiff alleges in the bill of particulars that the infant plaintiff sustained the following injuries: chorioamnionitis; meningitis; sepsis; brain damage; seizures; hearing loss; speech and motor

¹ Chorioamnionitis is an inflammation of the chorion and amnion, membranes which hold the amniotic fluid which surrounds the fetus.

developmental delays; and underwent multiple surgeries.

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, Derdarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166 [1980]; *Prete v Rafla-Demetrious*, 224 AD2d 674, 638 NYS2d 700 [1996]. The defendant's acts or omissions, however, need not be the only cause which produced the injury, and the plaintiff is not required to eliminate all possibility that the injury resulted from causes other than the defendant's negligence (*see, Scariati v St. John's Queens Hosp.*, 172 AD2d 817, 569 NYS2d 189 [1991]; *Koster v Greenberg*, 120 AD2d 644, 502 NYS2d 395 [1986]; *see also, Holton v Sprain Brook Manor Nursing Home*, 253 AD2d 852, 678 NYS2d 503 [1998], *lv denied* 92 NY2d 818 [1999]). And except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury (*see, Fiore v Galang*, 64 NY2d 999, 489 NYS2d 47 [1985]; *Lyons v McCauley, supra*).

Lance Parton, M.D. moves for summary judgment. In support of the motion, defendant submits, among other things, the pleadings; and the affirmation of his expert, Dennis Davidson, M.D. In his affirmation, Dr. Davidson avers that he is licensed to practice medicine in the State of New York and is Board Certified in pediatrics as well as in the subspecialty of neonatal-perinatal medicine. After reviewing the records, documents and transcripts he concludes that defendant provided appropriate medical, pediatric, neonatal care to the infant plaintiff between April 4 and 18, 1997. He opines that defendant treated the infant plaintiff within acceptable standards of neonatal care for 1997 which did not cause or contribute to the claimed injuries. Instead, Dr. Davidson avers, the claimed injuries are the result of the child's prematurity and/or from the meningitis which was timely recognized and appropriately treated. The Court finds that defendant has demonstrated his entitlement, prima facie, to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320; *Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Plaintiff submits no opposition to the motion. Accordingly, the motion is granted.

Defendants Sinclair, Putnam, Allen, Hardardt, Alamia, Ammirata, Zinnante, Macco, Penna and Qureshi move for summary judgment dismissing the complaint on the grounds that they were interns, residents and fellows studying at Stony Brook and each saw either the plaintiff or the infant with an attending physician whose responsibility it was to manage the medical care of the patient. The record reveals that plaintiff waived the examinations before trial of defendants, Putnam, Allen, Zinnante and Macco, who submit personal affidavits attesting to the above facts.

In support, defendants submit, among other things, the affirmation of Victor R. Klein, a physician licensed to practice medicine in the field of obstetrics and gynecology in the State of New York. Dr. Klein opines, upon reviewing the record, the examination before trial testimonies and affidavits of defendants, that the above defendants' acts were within the bounds of good and standard practice and finds that each of their acts was endorsed by their attending physicians. The court finds

that defendants have met their prima facie entitlement to judgment as a matter of law (*Alvarez v Prospect Hosp.*, *supra*). Plaintiff's counsel affirms that there will be no opposition to the requests for summary judgment by Putnam, Hardardt, Alamia, Zinnante, Macco, Penna and Qureshi. Accordingly, inasmuch as plaintiff failed to raise an issue of fact which would preclude summary judgment as against these defendants, their requests for summary judgment are granted dismissing the action as against them.

Defendants Sinclair and Cain move for summary judgment dismissing the action. In support, they submit, among other things, the medical record from Stony Brook and Riverhead Clinic; the examination before trial testimonies of Cain and defendant Sinclair; the affirmation of Frank A. Manning, M.D.; and the above-stated affirmation of Dr. Klein. The medical record reveals that defendants saw plaintiff on March 29, 1997 in the Urgent Care area of the Labor & Delivery ward. As an on-call obstetrician, Cain testified to the effect that she was the supervising attending physician who was responsible for the care of patients on the labor and delivery floor and the supervision of defendant Sinclair, an intern.

The record reveals that a series of tests were performed to determine whether the vaginal discharge was amniotic fluid. In addition, Cain performed a vaginal examination and noted no fluid, blood or uterine tenderness. The lab tests were negative, as was a sonogram, which revealed that the fetus was not in distress. The plaintiff's vital signs were normal and the fetal heart sounds were also normal. Based upon these findings, Cain determined that plaintiff was not leaking amniotic fluid and that there was no reason to admit her to the hospital.

Cain testified that she observed plaintiff for a lengthy period of time, performed several tests and monitored her for over an hour. Cain stated that she concluded that plaintiff was not showing any signs of being in labor or any signs of ruptured membranes or infection. Cain provided to plaintiff specific and detailed instructions for discharge, including bed rest, hydration and to call if plaintiff noticed leaking, contractions, or fever. Cain also instructed plaintiff to return to the Riverhead clinic in two days for follow-up.

In her examination before trial, plaintiff testified to the effect that she did not follow Cain's instructions to initiate complete bed rest, but, instead, drove to BJ's store to buy groceries which she loaded into her vehicle and also unloaded at her home after her visit to Stony Brook.

In her examination before trial, defendant Sinclair testified to the effect that at the time she saw plaintiff, she was an intern at Stony Brook. She further stated that she had no recollection of having seen plaintiff and had difficulty recalling what her duties were as an intern. She stated that her role during a sonogram/ultrasound would have been to observe the attending doctor. She also stated that as an intern, she could not make independent decisions without consulting the attending. Dr. Klein affirms that Sinclair did not depart from accepted standards of care when observing plaintiff. Dr. Klein also avers that Sinclair correctly discussed her observations with Cain.

Dr. Manning affirms that he is a physician duly licensed to practice medicine in the State of New York and is board certified in obstetrics and gynecology with a sub-certification in maternal-fetal medicine. He is an attending physician at NYU Downtown Hospital, New York, NY, where he serves

as Chairmar of the Department of Obstetrics and Gynecology. He opines that all of the treatment rendered by defendant Cain was done in accordance with good and accepted medical practice. He opines that Cain performed the four necessary tests which would determine whether plaintiff was experiencing a rupture of membranes. The ultrasound confirmed a normal AFI. He states that in 1997 and today, an AFI greater than 5cm is considered normal. He further states that plaintiff was not leaking amniotic fluid nor was she in pre-term labor nor was there fetal distress when she presented to Stony Brook on March 29, 1997 and the tests and methods used by Cain to rule out those possibilities conformed to accepted standards of medical care. Thus there is no basis for plaintiff's claim that Cain failed to warn her about "improper discharge" from the hospital. Further, plaintiff's allegations that she was not provided with informed consent regarding alternate forms of treatment are meritless inasmuch as plaintiff did not present with symptoms which would require such treatment. In addition, Dr. Manning opines that Cain's treatment on March 29 did not proximately cause the rupture of plaintiff's membranes that was discovered on April 1, three days later. The Court finds that defendant Cain has demonstrated her prima facie entitlement to judgment as a matter of law (*Alvarez v Prospect Hosp., supra*).

Defendants Royek, Salmieri, Monheit and La Gamma move for summary judgment dismissing the action. In support of the motion, defendants submit, among other things, the affidavits by Denise A. Guidetti, M.D. and Marjorie Schulman, M.D. Defendants' counsel affirms that depositions of Monheit and LaGamma were waived by plaintiff.

Dr. Guidetti states that she is board certified in obstetrics and gynecology with a subspecialty in maternal fetal medicine. She avers that defendants Royek, Salmieri and Monheit acted in accordance with good and accepted medical practice in the management of the ante-partum course and labor of plaintiff and delivery of the infant plaintiff and that the care and treatment rendered in no way caused, created or exacerbated any injuries claimed to the infant plaintiff. Dr. Guidetti states that defendant Royek's plan upon admission to the hospital on April 1 properly included monitoring the plaintiff for any signs and symptoms of chorioamnionitis, administration of medications to arrest labor and to promote fetal lung maturity. In addition, Dr. Guidetti opines that defendant Salmieri appropriately managed plaintiff's care from April 1 through April 2. On April 3, defendant Monheit's sole contact with plaintiff occurred approximately five hours prior to the time of delivery and rendered appropriate care. During the time that defendants attended to plaintiff, there were no clinical signs and symptoms of chorioamnionitis or any indication of fever. In addition, there was no indication for an expeditious delivery of the infant plaintiff or of any infection at birth.

Dr. Schulman avers that she is a physician duly licensed to practice medicine in the State of New York and is board certified in pediatrics as well as in the subspecialty of neonatal perinatal medicine. Dr. Schulman opines that defendant Lagamma acted in accordance with good and accepted medical practice in his involvement with the care of the infant plaintiff and that his involvement in no way caused, contributed or exacerbated the infant's medical condition. Lagamma commenced his on-service duties for the neonatal intensive care unit on April 18, 1997, approximately two weeks after the infant's birth. Defendant's role involved supervising an already established and proper course of therapy. The Court finds that defendants have demonstrated their prima facie entitlement to judgment as a matter of law (*Alvarez v Prospect Hosp., supra*). Plaintiff's counsel affirms that there will be no opposition to the request by defendants Lagamma and Monheit for summary judgment. Accordingly, the motion by

Lagamma and Monheit for summary judgment dismissing the complaint is granted.

Turning to the opposition by plaintiff to the motions for summary judgment by defendants, Sinclair, Allen, Ammirata, Cain, Royek and Salmieri, plaintiff submits three affirmations of her medical experts², whose names have been redacted in accordance with *Carrasquillo v Rosencrans*, 208 AD2d 488, 617 NYS2d 51 (1994). The original unredacted affidavits have been submitted to the court for inspection under separate cover. The first expert states that he is a doctor duly licensed to practice medicine in the State of New York and is Board Certified in obstetrics and gynecology and his affirmation is submitted in opposition to the motions by defendants Sinclair and Cain. Although the normal AFI was between 5 and 25 centimeters, he opines that plaintiff's AFI was too low at 7.9 when measured on March 29. He avers that such a low AFI was an indication for admission. The expert gives no opinion regarding plaintiff's allegation that defendant Cain failed to obtain informed consent.

Plaintiff's second expert avers that he is a physician duly licensed to practice medicine in the State of New York and is Board Certified in internal medicine and infectious diseases. This expert opines that since plaintiff developed an infection in the membranes, the drug therapy she received prior to the infant's delivery was inadequate and the failure of defendants Allen, Ammirata, Royek and Salmieri to give additional antibiotics raised the likelihood that the bacteria causing the meningitis would flourish. The expert opines that plaintiff should have been treated more aggressively, which constitutes a departure from the accepted standards of medical care for the treatment and prevention of chorioamnionitis at that time. In addition, such a diagnosis was a substantial factor in increasing the risk that the infant would develop meningitis and suffer developmental effects. Plaintiff's third expert avers that he is a physician duly licensed to practice medicine in the State of New York and is Board certified in pediatrics and neonatal-perinatal medicine. The expert concurs with the above opinions.

The court finds that plaintiff has failed to raise an issue of fact as to defendant Cain, since the experts' opinions are not supported by the evidence in the record (*see, Alvarez v Prospect Hosp.*, 68 NY2d 320, 324-5, 508 NYS2d 923 [1986]). Indeed, plaintiff's first expert failed to take into account the events following plaintiff's discharge from the urgent care unit at Stony Brook on March 29 when she conceded that she remained active after discharge. In addition, expert downplays plaintiff's visit to the Riverhead Clinic the next day, March 30, where no evidence of membrane rupture was found. The expert also failed to give an opinion regarding informed consent. Accordingly, Cain's motion for summary judgment is granted. In addition, since the evidence demonstrates that the hospital interns and residents had no contact with plaintiff except while they were under, and thus bound by, the direct supervision of their attending physicians, no rational trier of fact could find that the hospital residents' acts or failures to act were a proximate cause of the infant plaintiff's injuries and therefore, summary judgment is awarded to defendants Sinclair, Allen and Ammirata (*see, Smith v Vosburgh*, 176 AD2d 259, 574 NYS2d 73 [1991], *lv den* 79 NY2d 757 [1992]).

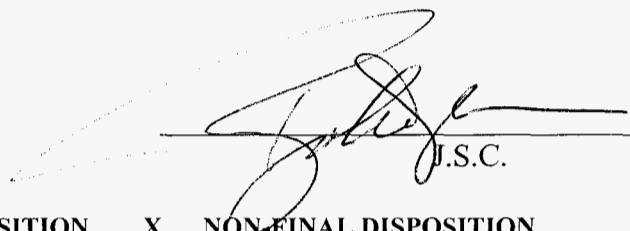
However, inasmuch as defendants Royek and Salmieri's medical experts' conclusions were

²The Court has conducted an in-camera inspection of each of the original unredacted affirmations and finds each to be identical in every way to the redacted affirmation in plaintiff's opposition papers with the exception of the redacted experts' names. In addition, the Court has returned the unredacted affirmations to the plaintiff's attorney.

completely contradicted by the plaintiff's medical experts, such a conflict of medical opinion should be resolved by a finder of fact (see, *Viti v Franklin Gen. Hosp.*, 190 AD2d 790, 593 NYS2d 840 [1993]; *Taype v New York*, 82 AD2d 648, 442 NYS2d 799 [1981]). There is an issue of fact regarding whether the alleged failures of Royek and Salmieri to treat plaintiff more aggressively with additional antibiotics from April 1 through the infant's delivery on April 3 proximately caused the infant's meningitis eleven days after his birth. Accordingly, the requests for summary judgment by defendants Royek and Salmieri are denied.

Accordingly, the motions for summary judgment by defendants, Parton, Sinclair, Putnam, Allen, Hardardt, Alamia, Ammirata, Zinnante, Macco, Penna, Qureshi, Cain, Monheit and Lagamma are granted. The action is severed as to these defendants. The action continues as to the remaining defendants, Royek and Salmieri.

Dated: MAR 05 2007



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION