

**McLaughlin v Royek**

2007 NY Slip Op 31281(U)

May 14, 2007

Supreme Court, Suffolk County

Docket Number: 0005233/2003

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 3-14-07  
Mot. Seq. # 001 - MG

-----X		SANDERS, SANDERS, BLOCK, et al.
KYLE McLAUGHLIN, an infant by his mother	:	Attorneys for Plaintiffs
and natural guardian LYDIA McLAUGHLIN,	:	100 Herricks Road
	:	Mineola, New York 11501
	:	
	:	ANDREW M. CUOMO, NYS Atty. Gen.
	:	By: Mary E. Oleske, Esq.
	:	Attys for Defts Hardart & Allen
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	:	New York, New York 10271
ANTHONY ROYEK, ANNE HARDART	:	
and TERRY ALLEN,	:	
	:	FUREY, FUREY, LEVERAGE, et al.
	:	Attys for Deft Royek
	:	600 Front Street
	:	Hempstead, New York 11550
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Upon the following papers numbered 1 to 17 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 17; Notice of Cross Motion and supporting papers \_\_\_\_\_; Answering Affidavits and supporting papers \_\_\_\_\_; Rep ying Affidavits and supporting papers \_\_\_\_\_; Other \_\_\_\_\_; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

**ORDERED** that this unopposed motion by defendants Anne Hardart, M.D. and Terry Allen, M.D. s/h/a Anne Hardart and Terry Allen for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the complaint as against them is granted.

This is a medical malpractice action brought by plaintiff mother on behalf of her infant plaintiff son to recover damages for injuries allegedly sustained by the infant plaintiff as a result of the negligent perinatal and neonatal care and treatment rendered by defendants from the time of plaintiff mother's admission on September 4, 1998 through the infant plaintiff's birth on September 5, 1998 until the infant plaintiff's discharge on September 10, 1998 from the University Medical Center at Stony Brook (Stony Brook Hospital), in Stony Brook, New York. On September 4, 1998, plaintiff mother was admitted to non-party St. Charles Hospital with complaints of severe headaches, fatigue, swelling of the legs and decreased fetal movement. St. Charles Hospital transferred plaintiff mother to Stony Brook Hospital in the early hours of September 5, 1998 to determine the source of her symptoms and to have

access to the Neonatal Intensive Care Unit (NICU) in the event of premature delivery. During her admission, plaintiff mother came under the care of the attending obstetrician/gynecologist, defendant Anthony Royek, M.D. s/h/a Anthony Royek (Dr. Royek), and third year resident defendant Anne Hardart, M.D. s/h/a Anne Hardart (Dr. Hardart). The infant plaintiff was delivered by cesarean section after 23 or 24 weeks of gestation weighing 505 grams (1 pound 1.1 ounce) and was transferred to the NICU. The cesarean section procedure was performed by Dr. Royek who was assisted by a first year resident, Terry Allen, M.D. s/h/a Terry Allen (Dr. Allen). The infant plaintiff remained in the NICU for the next three months in critical condition prior to being discharged to his home.

Specifically, by her bills of particulars with respect to defendant physicians Dr. Hardart and Dr. Allen, plaintiff mother alleges that defendants were negligent in, among other things, failing to take a thorough history; failing to perform an adequate examination; failing to adequately monitor the patient; failing to perform appropriate and timely diagnostic studies; failing to adequately treat pre-eclampsia; failing to heed the results of tests that were performed; failing to timely deliver; failing to perform a timely cesarean section; allowing the fetus to remain in an unwholesome environment; ignoring an alarming fetal heart tracing; failing to obtain timely and appropriate consultations; and causing and allowing fetal hypoxia. In addition, plaintiff mother alleges in her bill of particulars that as a result of defendants' negligence, the infant plaintiff sustained severe injuries including, brain damage, fetal hypoxia, cerebral palsy and mental retardation.

Defendants Drs. Hardart and Allen now move for summary judgment dismissing the complaint as against them on the grounds that as resident physicians they did not commit any independent acts of negligence, that at all times they were under the supervision of an attending physician, and that the attending physician did not deviate from the appropriate standard of care such that Drs. Hardart and Allen were obliged to intervene and override their attending/supervising physician. In addition, they assert that the medical care that they rendered to plaintiff mother and to the infant plaintiff did not deviate materially from the accepted standards of medical care and treatment and that they acted within their scope of duty. They point out that as resident physicians they collected data but that it was not the duty or responsibility of a resident physician to determine medications, therapies, or the mode or time of delivery. They emphasize that as resident physicians they could not order a cesarian section or decide on the time of delivery.

In support of their motion, defendants submit, among other things, the summons and complaint; the verified answer of Dr. Hardart; the answer of Dr. Allen; plaintiff's bills of particulars with respect to Drs. Hardart, Allen and Royek; the deposition transcripts of plaintiff mother, non-party witness infant plaintiff's father, Dr. Royek, Dr. Hardart, and Dr. Allen; plaintiff's Stony Brook Hospital records; plaintiff's Stony Brook Hospital progress notes; the operative report for September 5, 1998 dictated by Dr. Allen and signed by Dr. Royek; and the affirmed reports of Leonard Benedict, M.D., board certified in obstetrics and gynecology, and of Marjorie Schulman, M.D., board certified in pediatrics with a subspecialty in neonatal and perinatal medicine; and the affidavit of service of the subject motion upon the attorneys for the plaintiffs and Dr. Royek.

To make a prima facie showing of entitlement to summary judgment in an action to recover damages for medical malpractice, a defendant hospital or physician must establish through medical records and competent expert affidavits that the defendant did not deviate or depart from accepted

medical practice in defendant's treatment of the patient (*Mendez v City of New York*, 295 AD2d 487, 744 NYS2d 847 [2d Dept 2002]). A resident who assists a doctor during a medical procedure, and who does not exercise any independent medical judgment, cannot be held liable for malpractice so long as the doctor's directions did not so greatly deviate from normal practice that the resident should be held liable for failing to intervene (*Soto v Andaz*, 8 AD3d 470, 779 NYS2d 104 [2d Dept 2004]).

By his affirmation dated February 7, 2007, defendants' expert in obstetrics and gynecology, Dr. Benedict, reviewed the medical records and deposition transcripts and opined to a reasonable degree of medical certainty that resident physicians Drs. Hardart and Allen provided good and proper medical care to the plaintiff mother and the infant plaintiff and that no action or inaction on their part proximately caused the injuries claimed by the plaintiffs. Dr. Benedict pointed out that Dr. Hardart was a third year resident in a four year residency program who was working under the supervision of the attending obstetrician/gynecologist, Dr. Royek, when plaintiff mother arrived at Stony Brook Hospital. Dr. Benedict stated that Dr. Hardart was at all times under the direction and authority of her attending physician, Dr. Royek, and opined that Dr. Hardart's recommendation of a NICU consultation was appropriate and confirmed by the attending physician and that at no time did the care of the attending physician require the extreme reaction of a resident to override the attending physician's superior experience and professional discretion. In addition, Dr. Benedict opined to a reasonable degree of medical certainty that the decision by Dr. Royek to conduct the diagnostic test, a contraction stress test (CST), was well within the appropriate standard of medical care. Dr. Benedict also opined to a reasonable degree of medical certainty that there was no evidence that Dr. Hardart committed any independent acts of negligence at any time and that her conduct fully comported with accepted standards of medical care.

With respect to Dr. Allen, Dr. Benedict indicated that Dr. Allen was a first year resident on duty who assisted the attending physician Dr. Royek during the cesarean section procedure and whose duty was to follow the attending physician's instructions and to dictate the operative report. According to Dr. Benedict, the cesarean section fully comported with the appropriate standard of medical care and Dr. Royek's subsequent decision to give plaintiff mother magnesium sulfate to prevent convulsions and Heparin as a deep vein thrombosis prophylaxis after the operation conformed with the accepted standard of medical care. Dr. Benedict opined to a reasonable degree of medical certainty that there is no evidence that Dr. Allen committed any independent acts of negligence during the cesarean section or at any other time.

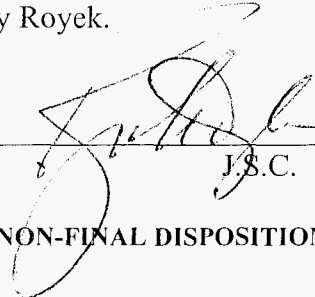
Dr. Benedict pointed out that the role of residents such as Drs. Hardart and Allen is to collect data concerning a patient and to present that data to the attending physician who then formulates a plan of treatment. According to Dr. Benedict, the treatment rendered, a cesarean section at 24 weeks gestation, was absolutely necessary to save the lives of the infant plaintiff and the plaintiff mother and that the complications that the infant plaintiff experienced are known and unavoidable complications of severe prematurity. He explained that as residents, Drs. Hardart and Allen could not order a cesarean section or decide when the delivery was to commence. Dr. Benedict further opined that based on the complete medical picture, there was no medical or surgical care rendered by Drs. Hardart and Allen that was a proximate cause of the alleged injuries and there was no proof demonstrating an independent act of negligence by either physician.

Defendants' expert in pediatrics and neonatal-perinatal medicine, Dr. Schulman, opined in her report dated February 5, 2007 to a reasonable degree of medical certainty that after reviewing the complaint, the bills of particulars, medical records and deposition transcripts, that no action or inaction by either Dr. Hardart or Dr. Allen proximately caused any of the infant plaintiffs alleged injuries. According to Dr. Schulman, the decision to obtain a NICU consult and to administer steroids to plaintiff mother comported with the appropriate standard of care and were timely performed. Dr. Schulman explained that steroids aid in the development of the infant's lungs and relieve or prevent respiratory distress syndrome. She provided further information that the normal gestation period ranges from 38 to 41 weeks and that in 1998, babies of the infant plaintiff's gestational age had a mortality rate of approximately 75 percent. Dr. Schulman noted that although the infant plaintiff remained in critical condition while at the Hospital, he did not suffer from seizures or organ failure which would have suggested extreme duress during the hours prior to birth. In addition, Dr. Schulman opined that patients in the infant plaintiff's position often suffer adverse consequences as a result of extremely premature birth but that the complications are known and recognized as occurring in the absence of negligence and unfortunately are not uncommon. Dr. Schulman also opined that all of the infant plaintiff's complications were due to extreme prematurity, which could not have been avoided under the circumstances. Dr. Schulman further opined that based on the complete medical picture, Drs. Hardart and Allen rendered good and proper treatment to the plaintiff mother and the infant plaintiff, that there was no departure from accepted medical practices at Stony Brook Hospital, and that there was no evidence of any independent acts of negligence by Drs. Hardart and Allen. Dr. Schulman added that the decision of how and when to deliver the infant plaintiff was clearly the attending physician's decision and that there were no unusual and extraordinary circumstances clear to the resident physicians warranting that they override the supervising attending physician.

Thus, upon review of the proffered proof, there is no evidence that Drs. Hardart and Allen exercised independent medical judgment in the treatment of plaintiff mother and the infant plaintiff at Stony Brook Hospital or that they should have prevented any alleged departures committed by their supervising attending physician Dr. Royek (*see, Velez v Goldenberg*, 29 AD3d 780, 815 NYS2d 205 [2d Dept 2006]). Plaintiff mother has submitted no opposition to the motion for summary judgment by Drs. Hardart and Allen. Therefore, the instant motion by Drs. Hardart and Allen for summary judgment dismissing the complaint as against them is granted.

Accordingly, the instant motion is granted and the action is severed and continued as against the remaining defendant Anthony Royek, M.D. s/h/a Anthony Royek.

Dated:           MAY 14 2007          

  
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 J.S.C.

FINAL DISPOSITION     NON-FINAL DISPOSITION