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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon Stanley J Sklar PART 29

Index Number : 108771/2004

GUTWILLIG, DANIEL

VS

PRESBYTERIAN HOSPITAL

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion to consolidated for disposition with motion 002 and as

~~MOTION~~ DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 6/6/07

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 29

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DANIEL GUTWILLIG, An infant by his Parents and Natural Guardians, MICHELE GREEN GUTWILLIG and STEVEN GUTWILLIG, and MICHELE GREEN GUTWILLIG and STEVEN GUTWILLIG, Individually,

Plaintiffs,

Index No.: 108771/04

-against-

THE NEW YORK PRESBYTERIAN HOSPITAL, ANNE T. CARLON, M.D., ANNE T. CARLON, M.D., P.C., RENEE L. DAVIS, M.D., ROBERT GREEN, M.D., NEAL KOTIN, M.D., STEPHEN E. DOLGIN, M.D., and THE MOUNT SINAI MEDICAL CENTER,

Defendants.

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SKLAR, J.:

Motions 001 and 002 are hereby consolidated for disposition. This is a medical malpractice action involving an infant, Daniel Gutwillig, who was born with respiratory problems (See 10:22 A.M. Sabagh Iqbal note; cross motion, exh J, p 7) and several months later was diagnosed with cerebral palsy. Defendant Anne T. Carlon, M.D., the attending obstetrician, and Anne Carlon, M.D., P.C. (collectively "Dr. Carlon"), now move (motion 001) for summary judgment or alternatively for a Frye hearing to establish that plaintiffs' theory of causation is insufficient to establish liability. Defendant New York Presbyterian Hospital, where the infant was born and where the mother was treated on February 24, 2003, 4 days before her delivery admission, cross moves for summary judgment on the ground that the treatment provided to the infant by its agents and employees during the admission when the infant was delivered was

appropriate and did not in any event cause injury to the infant. NYPH alternatively seeks a Frye hearing on plaintiffs' theory of causation.

Neal Kotin, M.D., Stephen E. Dolgin, M.D., Robert Green, M.D., Renee L. Davis, M.D., and the Mt. Sinai Hospital ("Mt. Sinai"), defendants claimed to have been involved in recommending, ordering and/or performing a CT scan and anesthetizing the infant for that CT scan, which was performed at Mt. Sinai when the infant was 27 days old, which CT scan allegedly resulted in further injury to the infant as a result of the anesthesia given, move (motion 002) for an order granting them summary judgment.

Th essence of plaintiffs' case against Dr. Carlon is that she failed to properly respond to the mother's alleged repeated complaints of severe pain and extensive vomiting 2 ½ - 3 weeks before the infant's birth, which complaints reflected undiagnosed cholecystitis (gallbladder inflammation) and cholelithiasis (gallstones), which were ultimately diagnosed shortly after the infant's birth and required removal of the mother's gallbladder. Plaintiffs maintain that the failure to recognize and appropriately respond to these complaints resulted in fetal distress as reflected by the presence of meconium at birth and that this distress was a cause of the infant's injuries.

Dr. Carlon seeks summary judgment claiming that the mother made no such complaints which would have warranted referrals or treatment other than that which was provided and that her pregnancy appeared to have been proceeding uneventfully. See Rochelson aff .¶¶ 9, 28, 31, 33, 39; Carlon EBT pp 23-25, 76, 136-139, 151 Dr. Carlon's expert, Dr. Burton Rochelson, maintains that there was no evidence that the mother "had acute cholecystitis up until the time of her delivery". Id 44 Dr. Carlon further maintains that meconium was not

present at birth as reflected by the hospital chart which indicates that the amniotic fluid was clear. Specifically Starr Dooley, the circulating nurse in the delivery room, testified that based on her observations at birth the amniotic fluid was clear, and she so indicated in her note. See Dooley EBT, pp 138-142; See also cross motion, exh I, p 46a This was reiterated by Dr. Carlon in a handwritten note in her otherwise typewritten operative report. Id p 74 Dr. Carlon notes that the only place in the chart which indicates that meconium was present was a concededly erroneous entry by an intern, Dr. Erin Thelander, who was not present in the delivery room and who attended to the infant in the NICU, that a cesarean section was performed because of the presence of meconium. Dr. Rochelson maintains that if meconium had been present at birth a pediatric resident would have been called to perform endotracheal or tracheal suctioning (See Thelander EBT, pp 237-238; See also Dooley EBT, p 103), which did not happen. Dr. Rochelson further indicates that the infant's venous cord gas suggests that the infant did not suffer from asphyxia at the time of birth. Id ¶ 19 Dr. Rochelson also points to the normal results of a February 13, 2003 non-stress test and of a February 24 biophysical profile as evidence that the infant was fine in utero. Dr. Rochelson also maintains that based on the infant's blood cultures there was no evidence of chorioamnionitis (an infection of the membranes around the fetus); so that no discernable infection was present at about the time of the infant's birth. Rochelson aff. ¶ 42 Dr. Rochelson states that in any event he is unaware of any medical study which links "cholecystitis and/or cholelithiasis to chorioamnionitis". Id ¶ 44 This assertion appears to be the basis for Dr. Carlon's request for a *Frye* hearing.

Plaintiffs oppose Dr. Carlon's motion relying, *inter alia*, on the parents' depositions, phone records which reflect numerous calls to Dr. Carlon's office during the last few

weeks of the pregnancy, and the affirmations of their expert obstetrician ("OB") and pediatrician/ neonatologist*. Plaintiffs assert that numerous calls were placed to Dr. Carlon's office in the last 2 ½ - 3 weeks of pregnancy. It is claimed that Dr. Carlon was informed of the fact that the mother, Michele Green Gutwillig ("Gutwillig"), a dermatologist, was in severe pain, suffered from projectile vomiting and could not hold down food (See M. Gutwillig EBT, pp 49-50, 56, 57, 252-253, 261; See also S. Gutwillig EBT, pp 61-62). Plaintiffs note that in the last few weeks of her pregnancy the mother failed to gain weight and instead lost weight. It is claimed that Dr. Carlon simply told Gutwillig that she was having problems because she was "a little girl [and] there [was] no room for the food to go down" (Id pp 251, 317). Plaintiffs claim that when the infant was born he was covered in brown, mud-like goo. See M. Gutwillig EBT pp 80, 81; S. Gutwillig EBT, pp 88, 93

Plaintiffs' OB expert opines that based on the complaints of persistent vomiting, an inability to hold down food, and abdominal pain Dr. Carlon was required to take steps to ascertain the cause of the mother's complaints, hospitalize Gutwillig, place her on I.V. fluids, antiemetics and pain killers and continuously monitor the fetus to ensure that it was not in distress. That expert maintains that persistent or excessive vomiting and pain can pose a risk to the mother and fetus and that Gutwillig's persistent vomiting and pain for a 2 ½ - 3 week period "would have had adverse impacts on the fetus as a result of severe stress and maternal dehydration". OB aff. p 18 The OB expert asserts that the parents' description of the infant being covered in brown, mud-like goo indicates that there was meconium present at birth which demonstrates that the fetus had experienced stress while in the womb in the days and weeks

* I have reviewed the unredacted versions of these affirmations in camera.

before delivery. Plaintiffs' pediatric expert maintains that there is no other medical explanation for a baby being covered in brown, mud-like goo other than "old, thick meconium". Ped. expert aff. ¶ 4 Plaintiffs' OB expert asserts that Dr. Carlon was negligent in failing to appropriately respond to and treat the mother's complaints of persistent pain, vomiting and an inability to keep food down. Plaintiffs' OB expert opines that the fetal distress could have been avoided had Dr. Carlon hospitalized the mother and had her properly hydrated and given her antiemetics and pain killers. That OB expert further opines that the fact that two non-stress tests failed to show lack of any acute distress is not determinative of whether the infant was in distress during that 2 ½ - 3 week period because such tests are "snapshots" which merely show how the fetus was doing at the time of the test. OB expert aff. ¶ 7 See also Carlon EBT, pp 184-185 Plaintiffs' OB expert further asserts that the normal cord blood gas recorded at birth is irrelevant because it merely indicates that at birth the baby was not hypoxic and does not address whether the fetus suffered an ischemic injury before birth. OB expert aff., ¶ 30

Plaintiffs' experts assert that based on the parents' description of when the baby first cried, the one minute Apgar score of 6 was erroneous and should have been a 4. Those experts also observe that a 10:22 note by Dr. Iqbal indicated that the infant required PPV (positive pressure ventilation) for multiple breaths, that he was pale with poor tone and "remained blush-pale with improving color by the 10 minute Apgar". OB expert aff 15 Based on this description it is further claimed that the five minute Apgar was inaccurate. See OB aff. ¶ 15 Plaintiffs' expert neonatologist opines that the infant aspirated meconium into his lungs after he was delivered and that his neonatal course, including respiratory distress, frequent episodes of oxygen desaturation and tachyphea, and chest x-rays taken at NYPH were consistent with

meconium aspiration syndrome. Plaintiffs' experts opine that Dr. Carlon's negligent treatment of the mother was a cause of the infant's lung damage and brain damage and that she is liable for that damage and any aggravation of those conditions caused by subsequent treating physicians. Plaintiffs' expert pediatrician (affirmation ¶¶ 38-39) asserts that the infant suffered brain damage in utero during the 2 ½ - 3 week period before his birth as a result of "significant fetal distress" caused by the mother's "persistent vomiting and pain".

Dr. Carlon's motion is denied. While nurse Dooley's testimony and her chart entry would tend to cast doubt on the parents' claim that the infant was covered in brown goo and a mud-like substance at the time of his birth leading plaintiffs' experts to conclude that meconium was present, the opposition papers sufficiently places whether meconium was present in issue. The plaintiffs' experts also raise issues as to whether there were numerous complaints to Dr. Carlon about excessive pain, vomiting and an inability to keep down food and whether Dr. Carlon departed from accepted standards of practice in failing to appropriately address those complaints thereby leading to injury to the fetus. Accordingly the application for an order granting summary judgment to Dr. Carlon and her professional corporation is denied. Their application for a *Frye* hearing is also denied since plaintiffs' counsel has represented that movants' basis for the Frye hearing is not plaintiffs' theory of the case against the movants. See Gaier aff. ¶ 155

NYPH cross moves for summary judgment or alternatively for a *Frye* hearing as to plaintiffs' theory of causation. The basis for the Frye hearing on the issue of causation is not stated in the moving papers in NYPH's memorandum of law other than to claim that causation is lacking. To the extent that NYPH's application for a Frye hearing is based on the ground

asserted by Dr. Carlon, the application is denied. Also that causation is lacking is not a basis for a *Frye* hearing; so that branch of the cross motion is denied. Regarding NYPH's summary judgment application, as the movant it in the first instance has the burden of prima facie eliminating all material issues raised by the pleadings. Since its expert, Dr. Lance Parton, did not in his initial cross moving affirmation address the claims alluded to in the bill and supplemental bill of particulars regarding treatment rendered on the evening February 24, 2003 when the mother was sent there by Dr. Carlon following a receipt of a phone call from the mother, but rather only addressed treatment rendered after the infant was delivered, the cross motion for summary judgment must be denied for that reason alone.

Regarding the post-delivery treatment, NYPH attempts to eliminate, *inter alia*, the issues raised in the bill of particulars that it failed to timely and properly resuscitate and suction the infant. Dr. Parton asserts that based on his review of the hospital chart and unspecified depositions the infant was appropriately treated by bulb suction, wall suction, bag and mask and oxygen whiffs. Dr. Parton claims that at birth there was no evidence of meconium present and that therefore the infant could not have suffered from meconium aspiration. Dr. Parton, who did not in his initial moving papers render any opinion on why the infant has cerebral palsy or respiratory difficulties, further opines that the infant at birth did not suffer from hypoxia or ischemia.

In response, as noted previously, plaintiffs assert that meconium was present at birth. In addition, plaintiffs point to the fact that the medical chart repeatedly listed the resuscitation measures employed by the NYPH staff in an order which, if in fact was the order in which the steps were taken, would have rendered the resuscitative measures harmful.

Specifically, according to plaintiffs' experts, the delivery record describes the resuscitative efforts as "Bulb Suction, Bag and Mask, 02 blowby, Laryngeal suction". Plaintiffs' experts state that if this were in fact the chronological order of the resuscitation the administration of PPV before laryngeal suctioning would have forced the meconium into the infant's lungs, thereby exacerbating his condition and causing further injury to his lungs and brain due to oxygen deprivation. Plaintiffs' experts further opine that in addition to the order of the steps being improper, the resuscitative efforts were inadequate because endotracheal suctioning, which goes deeper than the level of the vocal cords, should have been employed and that laryngeal suctioning, although a form of deep sectioning, was not a form which was adequately deep.

To the extent that NYPH is seeking to dismiss this case on the ground that the post-delivery treatment was proper, its application is denied. Plaintiffs have raised an issue of fact as to the presence of meconium. While Dr. Parton attempts to explain away the parents' assertions in their depositions that the infant was covered with brown goo or a mud-like substance, this was inappropriately raised for the first time in Dr. Parton's reply affirmation and could have been raised in his initial affirmation so as to give plaintiffs a chance to respond. Also, while at trial it is the plaintiffs who have the burden of establishing a prima facie case and will have to establish that the order of the resuscitative steps was incorrect, on summary judgment it is the movant which has the initial burden of eliminating all material issues raised by the pleadings, and NYPH has not prima facie established that the order of resuscitation was proper, here where there are no affidavits or EBT testimony presented from those with first-hand knowledge who actually did the resuscitation in the delivery room or saw it being done, so as to establish that the order was correct. The order in which the steps were written in the chart is not

necessarily determinative because there was a drop down menu on the computer screen and according to Nurse Dooley she simply checked the items which applied which were told to her by the pediatricians. Dooley EBT, pp 126-131 Nonetheless no evidence was prima facie offered by NYPH demonstrating that the resuscitation was properly done. Dr. Parton's assertion that the order of resuscitation is irrelevant (See Parton reply aff. ¶ 11) is unavailing because besides being raised for the first time in the reply papers, that assertion was disputed by plaintiffs' experts and even by Nurse Dooley (EBT, pp 130-131). In addition, plaintiffs have raised an issue as to whether NYPH was negligent in failing to use endotracheal suctioning. Thus NYPH's cross motion is denied.

This leaves the motion (002) of subsequent treaters Drs. Kotin, Dolgin, Green and Davis and the Mt. Sinai Hospital ("Mt. Sinai") which are all claimed to have been involved in a scan of the infant's lungs which was performed under a general anesthesia at Mt. Sinai. At the conclusion of the scan the infant began to experience what is described by plaintiffs as seizures, was then given more of the same anesthetic by Dr. Davis, the anesthesiologist, and then experienced more seizures, all of which seizures allegedly contributed to the infant's brain injury.

On March 24 Gutwillig brought the infant and some x-ray films to a pediatric pulmonologist, Dr. Kotin, because the infant was still experiencing breathing difficulties. She told Dr. Kotin that at NYPH they originally thought that her son had a tumor called a CCAM, then told her it was a pneumothorax and then told her the infant had "BPD maybe". Gutwillig EBT, pp 348-349 Dr. Kotin, who reviewed x-rays from NYPH, discussed having another x-ray taken as well as having a CT scan. According to him Gutwillig did not want another x-ray taken and wanted to go directly to a CT scan. Kotin EBT, pp 136-138 It is claimed by Gutwillig that

Dr. Kotin recommended a CT scan because of a concern that the infant had a rare lung tumor called a CCAM and advised that the infant needed to be brought to Mt. Sinai's emergency room ("ER") by next day to get that CT scan of his lungs. See Gutwillig EBT, pp 121-125 Dr. Kotin confirmed that he brought up the issue of a CT scan, and that he had called the radiologist to discuss how to get it done (Kotin EBT, pp 136, 155, 167) Dr. Kotin testified that while he was not aware that the infant would be unconscious during the procedure, he knew the infant would receive some medication to alter his level of consciousness. Kotin EBT, pp 160-164 Dr. Kotin denies that he sent the infant to Mt. Sinai's emergency room. Id 57, 171 Dr. Kotin also denies that he ever diagnosed the infant as having a CCAM, although he may have raised the possibility of the infant having a cyst. Id 219-222; See also Dolgin, EBT, p 83

Gutwillig claims that based on Dr. Kotin's telling her that the infant had a lung tumor she brought the infant the next morning to Dr. Dolgin, a pediatric surgeon she knew at Mt. Sinai, who reviewed some x-ray films brought by Gutwillig and allegedly told her that the infant definitely did not have a tumor and that he would speak to Dr. Kotin. Gutwillig EBT, p 126 Dr. Dolgin then had a discussion with Dr. Kotin and a Dr. Norton, the radiologist, and it was decided that a CT scan of the infant's lungs should be performed. See Dolgin EBT, pp 82-84, 111 Dr. Dolgin testified that he was aware that it was standard practice to perform a CT scan of an infant under a general anesthesia, often with a tube in the windpipe to manage the airway safely. Dolgin EBT, pp 29-31, 35 The reason for the anesthesia was to keep the infant still. Dr. Dolgin was unaware of an alternative of feeding an infant in an effort to make him/her fall asleep, stating in effect that that would not be practical because if the infant did not fall asleep, then you could not anesthetize the infant because you would then have an increased risk of aspiration. Id 35-36

Dr. Dolgin testified that the radiologist and the doctors making the referral for the CT scan would decide whether anesthesia was needed. Id 31

According to Dr. Dolgin when he saw Gutwillig she "had a great sense of urgency ... particularly to get a CAT scan done". Id 82, 139 It appears that the fastest way to have the CT scan performed was to have the infant brought to Mt. Sinai's ER and have him admitted. See Id p 90; Gutwillig EBT, 127 The infant was then brought to the ER. While in the ER the staff attempted to insert an I.V. and kept missing. Id 127 Gutwillig then called the office of the chairman of pediatrics insisting that someone come down to the ER to help. Id 127-128 According to Gutwillig the I.V. was to be inserted because the infant had not eaten. Id 356 According to the anesthesiologist, Dr. Davis, the I.V. was for the purpose of administering the anesthesia for the CT scan. See Davis EBT, 71 The chairman came down and sent the infant up to the NICU to have the I.V. inserted. Gutwillig EBT, 12 Defendant Dr. Green was then in charge of the NICU and was listed on the hospital records as the admitting and attending physician on admission to the NICU. By the time Gutwillig saw Dr. Green the CT scan had already been scheduled by others. Green EBT, 59 Under those circumstances Dr. Green believed it would have been presumptuous "to completely undo that plan". Id 68 Mt. Sinai's records (at p 29) indicate that the CT scan was prescribed to rule out a questionable cystic mass. Dr. Green before the CT scan was performed did not have any x-rays of the infant taken prior to his arrival at Mt. Sinai. Id 68

According to Gutwillig it was Dr. Green who informed her for the first time that the CT scan would be performed under anesthesia. Id 130 Weighing the risks and benefits of the CT scan Dr. Green thought it was reasonable to proceed with the CT scan and "probably said

lets go ahead with it". Green EBT, pp 59-60 Dr. Green encouraged the mother, who was vacillating, to go forward with the CT scan. Green EBT, pp 72-73, 76 Dr. Green testified that he was involved in making that decision. Id 76 Dr. Green believes that he spoke to Dr. Dolgin before the CT scan was performed and that Dr. Dolgin was concerned about the possible presence of a lesion in the right lower lobe. Id 61-63

Gutwillig asserts that she told Dr. Green that she did not want her son to have anesthesia under any circumstances and that he told her not to worry that she would see the anesthesiologist and have the opportunity to talk to her. Gutwillig EBT, p 360 Dr. Green spoke with someone to arrange for Gutwillig to speak to the anesthesiologist. Id 79 Dr. Green believed that even if the infant, who needed to remain still during the CT scan, could not be kept quiet by swaddling and feeding in an effort to make him fall asleep, the CT scan should proceed under general anesthesia. Id pp 74-78 Dr. Green testified that it was ultimately up to the anesthesiologist as to whether or not to use a general anesthesia. Id 81

While Gutwillig signed a consent form that authorized the use of any necessary anesthesia, she claims that she did not read it (EBT, p 133) and that she clearly informed Dr. Davis, the anesthesiologist that she did not want her infant son to receive anesthesia. Gutwillig EBT, p 364 Dr. Davis allegedly said "okay" and that she would try to have the infant fall asleep. Id 364-365 Gutwillig asserts that she told Dr. Davis that she did not want the infant anesthetized under any circumstances and that Dr. Davis agreed. Id 132

Gutwillig's husband testified that his wife told him that Dr. Davis told her that they would try to do the CT scan without anesthesia but that if the infant did not remain still they would inform the parents of that and "they may have to give him some anesthetic". S. Gutwillig

EBT, p 149 Gutwillig then went to the ladies room. Allegedly while she was there Dr. Davis came out of the procedure room and advised Mr. Gutwillig that the infant would not remain still and that anesthesia was needed. Mr. Gutwillig allegedly asked Dr. Davis to wait until his wife returned, but Dr. Davis is claimed to have said that it had to be done then. Id 150-151

According to Dr. Davis in order for her to administer anesthesia to a patient that patient's physician would have to request it. Davis EBT, p 74-80 Then Dr. Davis after seeing the patient could decide what to do regarding anesthesia. Id 77-78 Dr. Davis testified that Gutwillig pushed to have the CT performed. Davis EBT, pp 62, 152 While normally a child of the infant plaintiff's age could have a CT scan under conscious sedation, rather than under a general anesthesia, both Dr. Davis and Gutwillig were concerned that because the infant already had respiratory problems conscious sedation would be inappropriate and potentially dangerous for the infant. Davis EBT, pp 156-157 Dr. Davis determined that it would be safer to perform the CT under a general anesthetic with controlled management of the infant's airway. Davis EBT, pp 153-157, 161, 163-164

Dr. Davis asserts that she informed the parents that she would try to do the CT scan without any anesthesia but that if the infant did not remain still she would use a general anesthesia with a breathing tube, and that this was explained to the mother, including which specific agent, Propofol, would be used. Ibid. A "pre-op" note by Dr. Davis indicates that there was no "FH" [family history] "anesthetic complications" and that the risks, including post-operative ventilation, and the benefits were discussed with the parents who agreed to proceed. See Mt. Sinai chart, p 24 There is no indication that the risk of seizures was explained to the infant's parents. Dr. Davis maintains that the mother never told her not to use anesthesia. Id p

170 The infant had to remain still with his arms fully extended over his head during the procedure. Id 174 Although the technician attempted to swaddle the infant, he was crying and would not remain still. Id 175 Dr. Davis claims that she then came out of the procedure room and explained this to Gutwillig and that she would have to proceed with anesthesia. Id 178-179 Dr. Davis had no recollection of Mr. Gutwillig asking her not to proceed. Id 178

While coming out of anesthesia the infant began to have seizures. Dr. Davis then administered more Propofol. The infant then experienced additional seizures in the NICU. The infant was then given Phenobarbital to stop the seizures. According to Dr. Davis, Phenobarbital was not available in the procedure room to stop the seizures because it was not a drug "we have in our anesthesia supply" because it lasted too long. Davis EBT, 336-337 Although Dr. Davis did not believe the seizures to have been a complication of the anesthesia, notes by others in the chart indicated that the seizures were "due to" and/or "secondary to" the anesthesia. Dr. Green thought it was due to the Propofol. The CT scan found no lesion. The CT scan report (last page of exh "G" of motion 002) gives an impression of "diffuse bilateral interstitial lung disease", possibly BPD, and indicates that the ordering physician was an Ulka Sachdev. According to Gutwillig the infant's condition was worse after the CT scan. Gutwillig EBT, pp 383-384 However, a note in Dr. Kotin's chart of a follow-up phone call from Mr. Gutwillig to Dr. Kotin indicated that the father informed him that the infant was back to himself. See Kotin EBT, pp 267-305

Drs. Kotin, Dolgin, Green and Davis as well as Mt. Sinai seek summary judgment. Their motion is supported, inter alia, by the affirmation of an expert in pediatric pulmonology, Dr. Michael Bye, who opines that the infant's presentation was atypical for BPD, a

condition suggested by the x-rays, so that a CT scan was needed to assess the infant's lungs because the chest x-rays also contained findings which could be consistent with a lung lesion, including a CCAM, which could be serious and require surgery. Dr. Bye asserts that the risks of a CT scan were outweighed by the potential benefits and that there was no contraindication to the use of Propofol. Dr. Bye notes that Dr. Davis documented that she explained the risks and benefits of the procedure and that the parents agreed to it. Dr. Bye observes that a hypoxic incident may be a cause of cerebral palsy in a full-term infant, such as Daniel, and that frequently the cause of cerebral palsy in such an infant is unknown. Dr. Bye maintains that no significant hypoxic event occurred at Mt. Sinai because the infant's saturation rate, according to the anesthesia record, never fell below 99% while he was under Dr. Davis' care and was adequate in the NICU. Dr. Bye concludes that the alleged damages are unrelated to the care rendered at Mt. Sinai and that these movants did not depart from accepted standards of medical practice. Dr. Bye did not address the claims raised in the pleadings regarding the care rendered to the infant once he began to exhibit seizures (e.g. Dr. Davis' alleged failures to timely and properly institute anti-seizure medication and reintubate the infant). See Bills and Supplemental Bills of Particulars as to Dr. Davis and Mt. Sinai

Plaintiffs' opposition papers, including the affirmation of their expert neonatologist and Gutwillig's deposition testimony, raise issues of fact warranting the denial of these movants' application. In particular the neonatologist opines that the testimony shows that Dr. Dolgin and Kotin were jointly responsible for the decision to have the CT scan performed and that both indicated that they were aware that some type of anesthesia would be involved. The expert asserts that there was no reason to order a CT scan because the x-rays from NYPH

indicated that any cystic lesion was resolving, and since it was resolving the risk of anesthesia to a child with breathing problems outweighed any potential benefit from the CT scan. The expert asserts that Dr. Green, who was aware that anesthesia might be used on the infant who had breathing problems, was required to look at the films and records from NYPH before urging the mother to go forward with the CT scan. It is claimed that had he done so he would have realized that it was not worth the risk to have the child undergo a CT scan. It is therefore claimed that Dr. Green was negligent in urging the mother to go ahead with the CT scan.

Plaintiffs' expert, relying on Dr. Davis' testimony that the doctors who sent the infant for the CT scan would have decided whether the child needed anesthesia and that she could then exercise her own judgment in that regard, also raises an issue as to whether Drs. Dolgin, Kotin and Davis were negligent in ordering a CT scan with anesthesia, or in performing a CT scan with anesthesia. Plaintiffs' expert opines that there was no justification for putting an already impaired child such as the infant plaintiff through the increased risks of anesthesia and that steps should have been taken to try to get the infant to sleep. If such attempt was unsuccessful it is claimed that the CT scan should have been delayed. The expert also notes that Dr. Davis was allegedly instructed by Gutwillig not to administer anesthesia to the infant, that such directive overrode any prior written consent and that Dr. Davis' failure to follow that directive constituted malpractice.

The neonatology expert also raises issues as to whether Propofol , which was allegedly known to cause seizures, was an appropriate anesthetic agent based on the child's history, which according to the expert posed a significant risk that the infant suffered brain damage and thus could be prone to seizures. Also the neonatologist opined that Propofol is

specifically not recommended for infants such as plaintiff who were under one month of age. Thus the expert asserts that Propofol should not have been given.

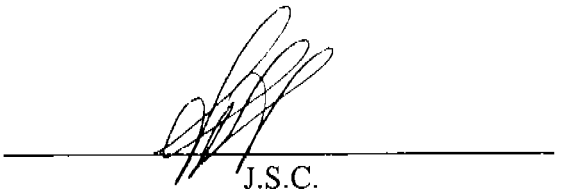
The expert further opines that Dr. Davis was negligent is using Propofol to stop the initial seizures which it allegedly caused. It is further claimed that Phenobarbital should have been used after the initial seizures and that it would have prevented the later seizures in the NICU. The expert opines that Mt. Sinai was negligent in failing to have Phenobarbital available for use in the procedure room.

Plaintiffs' neonatology expert further raises issues of fact as to whether these departures resulted in the infant experiencing seizures and whether the seizures exacerbated the infant's brain damage allegedly extant when the infant presented to these movants. The expert's bases for this latter conclusion is the Mt. Sinai chart which indicates that the day after the CT scan the infant continued to be lethargic, the parents' testimony about how the infant appeared limp and gray in the NICU and the mother's testimony that the infant's condition was worse after the CT scan and that he was lethargic, sleeping a lot and staring off after he left Mt. Sinai.

In light of the foregoing motion 002 is denied as are motion 001 and the cross motion.

Settle order.

Dated: June 6, 2007
60 Centre Street
New York, NY



J.S.C.