SHORT FORM ORDER

INDEX No. 03-5233
CAL. No. 06-02682-MM

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

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 4/4/07
ADJ. DATE 5/18/07
Mot. Seq. # 002 - MD

KYLE McLAUGHLIN, an infant by his mother and natural guardian, LYDIA McLAUGHLIN, Plaintiff, - against - ANTHONY ROYEK, ANNE HARDART and TERRY ALLEN, Defendants.	WALDINGER ASSOCIATES, P.C. Attorneys for Plaintiffs 990 Stewart Avenue, Suite 120 Garden City, New York 11530 ANDREW M. CUOMO, NYS Atty. Gen. By: Mary E. Oleske, Esq. Attys for Defts Hardart & Allen 120 Broadway, 23rd Floor New York, New York 10271 FUREY, FUREY, LEVERAGE, et al. Attys for Deft Royek 600 Front Street Hempstead, New York 11550

Upon the following papers numbered 1 to 27 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 18 - 23; Replying Affidavits and supporting papers 24 - 27; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant Anthony Royek, M.D. s/h/a Anthony Royek for an order pursuant to CPLR 3212 granting summary judgment in his favor dismissing the complaint as against him is denied.

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 at 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 late at night on September 4, 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 1.1ounce) 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.

Plaintiff mother alleges one cause of action in her complaint, seeking to recover damages for the alleged medical malpractice of the defendants. With respect to defendant Dr. Royek, plaintiff mother by her bill of particulars alleges that he was negligent in, among other things, failing to adequately treat preeclampsia; failing to timely perform a Cesarean section; ignoring an alarming fetal heart tracing; causing and allowing fetal hypoxia; and failing to obtain timely and appropriate consultations. Plaintiff mother alleges that as a result of the aforementioned negligence, the infant plaintiff sustained injuries including brain damage; fetal hypoxia; exacerbation of injuries related to prematurity; cerebral palsy; developmental delays; status encephalopathy; cognitive and speech deficits; and the need for braces on his extremities. The Court's computer records indicate that the note of issue in this action was filed on November 16, 2006.

Defendant Dr. Royek now moves for summary judgment in his favor dismissing the complaint as against him on the grounds that his care and treatment of the plaintiff mother, who presented with a complex medical history, and the infant plaintiff, who was born extremely prematurely and at a dangerously low birth weight, in no way departed from good and accepted medical standards of care. Dr. Royek emphasizes that he was not involved in the plaintiff mother's prenatal care, that the infant plaintiff showed no neurological sequelae or clinical evidence of hypoxic insult when he entered the NICU, and that the infant plaintiff has developed remarkably well to the extent that he is no longer wearing braces, is only receiving speech therapy and is in a regular classroom setting. In support of his motion, defendant Dr. Royek submits, among other things, the summons and complaint; the answer of Dr. Royek; the bill of particulars dated June 6, 2003 with respect to Dr. Royek; the deposition transcripts of plaintiff mother, non-party witness infant plaintiff's father, Dr. Royek; plaintiff's Stony Brook Hospital records; the affidavit of Adiel Fleischer, M.D. (Dr. Fleischer), who is Board Certified in Obstetrics and Gynecology with a sub-specialty in Maternal-Fetal Medicine; and the affidavit of service of the subject motion upon the attorneys for the plaintiffs and the attorneys for Drs. Hardart and Allen[1].

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 the defendant's treatment of the patient (***Mendez v City of New York***, 295 AD2d 487,744 NYS2d 847 [2d Dept 2002]). To rebut a prima facie showing by the defendant hospital or

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[1]The prior motion (#001) by defendants Hardart and Allen for summary judgment dismissing the complaint as against them was granted by order of this Court (Doyle, J.) dated May 14, 2007.

physician, a plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice and containing an opinion that the defendant's acts or omissions were a competent-producing cause of the injuries of the patient (*see*. ***Lifshitz v Beth Israel Med. Ctr.-Kings Highway Div.***, 7 AD3d 759, 776 NYS2d 907 [2d Dept 2004]; ***Domaradzki v Glen Cove OB/GYN Assocs.***, 242 AD2d 282, 660 NYS2d 739 [2d Dept 1997]).

Defendant Dr. Royek's expert, Dr. Fleischer, opines by affidavit within a reasonable degree of medical certainty that the care and treatment rendered by Dr. Royek was at all times well within the standards of good and accepted medical practice in September 1998 and that said care and treatment in no way caused, contributed to or exacerbated the infant plaintiff's alleged injuries. Dr. Fleischer relates that plaintiff mother's prenatal care was rendered by a group of private non-party obstetrician/ gynecologists and that her significant medical history included lupus and preeclampsia during a prior pregnancy. In addition, Dr. Fleischer notes that plaintiff mother was admitted to Stony Brook Hospital shortly before midnight with a differential diagnosis of lupus cerebritis/nephritis versus preeclampsia at approximately 24 weeks gestation. Dr. Fleischer also relates that when plaintiff mother arrived, fetal monitoring was commenced and a steroid, Betamethasone, 12 mg IM, was administered at 2 a.m. in order to promote fetal lung maturity in the extremely premature infant plaintiff, who was on the borderline of viability. Dr. Fleischer continues that an NICU consult was ordered and that the plaintiff mother was administered Hydralazine to control hypertension. Dr. Fleischer notes that at this point Dr. Royek's findings included poor fetal heart variability with probable placental insufficiency and that a contraction stress test (CST) was planned to determine the fetal response to contractions to assess the degree of uteroplacental insufficiency. The CST was begun at 3 a.m. with the administration of Pitocin and discontinued at 5:30 a.m. when contractions were not induced. Dr. Fleischer opines within a reasonable degree of medical certainty that Dr. Royek's initial plan to administer Betamethasone, monitor the fetus, control maternal hypertension and attempt a CST were well within the appropriate standards of medical care. Dr. Fleischer indicates that at 5:30 a.m. Dr. Royek again noted the fetal heart monitor poor variability and intermittent decelerations in the absence of maternal contractions but opted to delay delivery of the very premature infant plaintiff for a "finite period of time" mainly to maximize the potential benefit to the fetus of the Betamethasone administration. Dr. Fleischer opines that given the clinical presentation, the decision to delay delivery to allow the very premature fetus the maximum benefit of steroid administration was reasonable and well within the accepted standards of medical care.

Dr. Fleischer next indicates that at 9:30 a.m. Dr. Royek discussed with plaintiff mother and the infant plaintiff's father the risks of delivery, which included cerebral palsy, failure to thrive, respiratory distress syndrome, chronic complications and death, and that despite said risks Dr. Royek recommended delivery by Cesarian section. Dr. Fleischer opines within a reasonable degree of medical certainty that the recommendation to proceed with a Cesarian section delivery and the timing of the delivery based on the entire clinical picture was appropriate and constituted good medical practice. He points out that the infant plaintiff was delivered at 10:46 a.m. weighing 505 grams or 1.1 pounds with Apgar scores of 4 at one minute and 7 at five minutes and that there were no neurological sequelae noted in the nursery or any sign of hypoxic insult. According to Dr. Fleischer, the infant plaintiff's alleged injuries were known and unavoidable complications of severe prematurity and were in no way related to any of the care and treatment rendered to plaintiff mother or the infant plaintiff by Dr. Royek or by any of the physicians at Stony Brook Hospital. Dr. Fleischer concludes that in his opinion within a reasonable degree of medical certainty that Dr. Royek exercised appropriate medical judgment in his treatment of the plaintiff mother

and the infant plaintiff and rendered medical care and treatment well within the accepted standards of obstetrical practice in 1998 and that Dr. Royek's treatment was in no way causally related to the injuries alleged by the infant plaintiff. Here, through his submissions, defendant Dr. Royek established his prima facie entitlement to summary judgment dismissing the cause of action sounding in medical malpractice (*see*, ***Bengston v Wang***, ___ NYS2d ___, 2007 WL 1776083, 2007 NY Slip Op 05447 [NYAD 2 Dept Jun 19, 2007]).

In opposition to the motion, plaintiff mother contends that defendant Dr. Royek departed from accepted practice by unjustifiably delaying the inevitable Cesarian section delivery for several hours in order to perform the CST after the arrival of the infant plaintiff's father, despite the evidence of fetal distress, and to wait for the benefits of the steroid to take effect and for an attending neonatologist to arrive, all of which substantially contributed to injury to the infant plaintiff. In support of her opposition, plaintiff mother submits, among other things, the affirmation of Karen Weiss, M.D. (Dr. Weiss), Board Certified in Obstetrics and Gynecology and the affidavit of Leon Charash, M.D. (Dr. Charash), Board Certified in Pediatrics together with his report.

Dr. Weiss opines in her affirmation that uteroplacental insufficiency was causing the fetal distress, which was not noted in the fetal monitoring strips while plaintiff mother was at St. Charles Hospital but did appear at 2 a.m. at Stony Brook Hospital. According to Dr. Weiss, given said fetal distress, there was no valid medical justification for delaying the commencement of the CST for one hour to await the arrival of the infant plaintiff's father and opines that said delay constituted a departure from accepted obstetrical practice. Dr. Weiss adds that Dr. Royek abandoned the CST test at 5:30 a.m. and decided to delay delivery for a "finite period of time for fully staffed NICU and for some steroid benefit and opines that it was a departure from accepted practice for Dr. Royek to delay for said reasons, thereby leaving the fetus in the unwholesome uterine environment associated with placental insufficiency. With respect to the administration of Betamethasone, Dr. Weiss states that in 1998 it was good and accepted practice to give it to mothers of prospective premature neonates so as to accelerate lung maturity and to reduce the risk of respiratory distress syndrome and indicates that the standard practice was to give two doses of 12 mg of the drug twelve hours apart and to subsequently deliver the neonate some twelve hours after the second dose. According to Dr. Weiss, there is no evidence that steroids can have any beneficial effect on fetal lung maturity within nine hours of administration any more than after four hours such that the delay in a futile attempt to allow the lungs of the fetus to mature constituted a departure from accepted practice.

Dr. Charash states in his affidavit dated March 27, 2007 that he has extensive experience with victims of neonatal trauma and that his opinions are based on a review of the infant plaintiff's delivery and nursery records as well as his personal examination of the infant plaintiff on August 20, 2002. Dr. Charash notes that the infant plaintiff's milestones were delayed as evidenced by his failure to walk until two years of age, when he began walking on his toes, and that at the time of his examination when the infant plaintiff was almost four years old, the infant plaintiff was not yet toilet trained and was dependent on his mother's assistance for being dressed, groomed and bathed. According to Dr. Charash, the infant plaintiff was cognitively delayed with maturation closer to a two and a half year old child rather than a four year old and that the infant plaintiff showed "signs of residuae of a static encephalopathy" that originated at birth with a very mild diplegia and a secondary microcephaly. Dr. Charash acknowledges that underlying the infant plaintiff's deficits was vulnerability as a preterm

neonate but opines that added to said vulnerability was a hypoxic episode that the infant plaintiff experienced during the perinatal period. Dr. Charash notes that Dr. Royek observed at about 2 a.m. evidence of fetal distress as disclosed by fetal monitoring and that Dr. Royek ultimately delivered the infant plaintiff by Cesarean section at 10:46 a.m. He opines with reasonable medical certainty that the unwholesome uterine environment that the infant plaintiff was left in for nearly nine hours after Dr. Royek first evaluated the condition of the plaintiff mother and infant significantly contributed to the infant plaintiff's encephalopathy and that a timelier delivery by as little as four hours earlier would have reduced or obviated the severity of the infant plaintiff's injury.

In reply, defendant Dr. Royek contends that plaintiff mother failed to raise an issue of fact due to deficiencies in her experts' submissions. Dr. Royek notes that Dr. Weiss failed to offer an opinion that the alleged departures that she listed actually caused injury to the infant plaintiff and questions where Dr. Charash found support in the records to conclude that the infant plaintiff suffered a hypoxic episode during the perinatal period, in contrast to Dr. Royek's expert's determination that such an episode was absent from the record.

Although Dr. Weiss did not expressly render an opinion concerning whether the listed departures proximately caused the infant plaintiff's injuries, Dr. Charash remedied said defect by opining within reasonable medical certainty in his affidavit that the unwholesome uterine environment in which the fetus was left for nearly nine hours after Dr. Royek's first evaluation significantly contributed to the infant plaintiff's encephalopathy and that an earlier delivery, by as little as four hours, would have decreased or rendered non-existent the severity of his injury. Contrary to defendant Dr. Royek's contention, Dr. Charash's affidavit cannot be deemed conclusory or speculative inasmuch as he established the elements of a medical malpractice claim by specific factual references to the time that Dr. Royek observed the infant plaintiff in fetal distress based on fetal monitoring and the time that Dr. Royek subsequently delivered the infant plaintiff (*see*, ***Wiands v Albany Med. Ctr.***, 29 AD3d 982, 816 NYS2d 162 [2d Dept 2006]; ***Feinberg v Feit***, 23 AD3d 517, 806 NYS2d 661 [2d Dept 2005]). Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions (*see*, ***Shields v Baktidy***, 11 AD3d 671, 783 NYS2d 652 [2d Dept 2004]; ***Barbuto v Winthrop Univ. Hosp.***, 305 AD2d 623, 760 NYS2d 199 [2d Dept 2003]). Such credibility issues can only be resolved by a jury (*see*, ***Feinberg v Feit***, *supra*). Here, plaintiff mother raised triable issues of fact by submitting the affirmation and affidavit of her expert physicians which contradict defendant's expert by opining that departures by Dr. Royek in significantly delaying delivery of the infant plaintiff while in fetal distress proximately caused his injuries, which were not necessarily unavoidable (*see*, ***Bengston v Wang***, *supra*).

Accordingly, the instant motion is denied.

Dated: JUL 17 2007

J.S.C.

_____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION