SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. KENNETH A. DAVIS,

Justice

TRIAL/IAS, PART 5
NASSAU COUNTY

MUHAMMED ALI-ARSALAN SHEIKH, an Infant under the age of 14 years, by his natural guardian and father JIMIL MUHAMMED SHEIKH,

Plaintiffs,

- against-

FRANKLIN HOSPITAL, NORTH SHORE - LONG ISLAND JEWISH HEALTH SYSTEM, INC., KAREEM E. TANNOUS, MARC J. BERGER, MARIA E. LEVADA, KMLT GYNECOLOGICAL ASSOC., P.C., and WESTERN NASSAU OB/GYN GROUP,

Defendants.

Submission Date: 11/19/07

INDEX No.: 1064/06

MOTION SEQ. # 8,9,10

The following papers read on this motion:

Notice of Motion/Notice of Cross Motion.....	XXX
Answering Papers.....	X
Reply.....	XXX
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	

Upon the foregoing papers, Motion by defendant Maria E. Levada, M.D., for summary judgment pursuant to CPLR 3212 dismissing the complaint as to said defendant is denied. Motion by defendants Franklin Hospital, North Shore-Long Island Jewish Health Care, Inc., s/h/a North Shore Long Island Jewish Health System, Inc., and by Marc J. Berger, M.D., s/h/a Marc J. Berger for summary judgment dismissing the complaint pursuant to CPLR 3212 is granted solely as to defendant North Shore-Long Island Jewish Health Care, Inc., s/h/a North Shore Long Island Jewish Health System, Inc. Motion by defendant KMLT Gynecological Assoc., P.C. for summary judgment dismissing the complaint as to said defendant is denied.

The infant plaintiff in this medical malpractice action was

born on February 26, 1996 at defendant Franklin Hospital following a placental abruption, a condition in which the placenta prematurely separates from the uterine wall. An emergency cesarean section was performed by Dr. Tannous at approximately 11:53 a.m. after the placental abruption was confirmed by sonogram. The infant was born at 27.7 weeks of gestation, in a depressed state, weighing approximately 1054 grams (2 lbs. 5 oz.). Despite efforts to resuscitate him, the infant was still not breathing after five minutes and needed to be intubated. He was transferred to the neonatal intensive care unit at Schneider's Children's Hospital for continued care. The day after his transfer, the infant plaintiff was diagnosed as suffering from necrotizing enterocolitis and surgery was performed. The second day after his transfer, a cranial ultrasound revealed that the baby had suffered extensive grade IV intracranial hemorrhage.

Huma Mughal, the infant's mother, had presented to the emergency room of Franklin Hospital on February 26, 1996 at approximately 3:30 a.m. complaining of a gush of blood from the vagina, abdominal pain and a reduced fetal movement. After an assessment/evaluation of her condition by Dr. Berger, a "house officer" employed by defendant Hospital in its labor and delivery unit during the overnight hours, Ms. Mughal was admitted to the hospital sometime between 4:00 and 4:30 a.m.

At the time in question, Dr. Berger was an employee of defendant Franklin Hospital as was Dr. Tannous who was also a principle with his wife, Dr. Levada, in KMLT Gynecological Assoc., P.C., an alleged partner in Western Nassau OB/GYN Group. It appears Western Nassau OB/GYN was hired by Franklin Hospital sometime after February, 1996 to staff its Women's Health Center where Huma Mughal was a patient and received prenatal care. It is undisputed that she was a patient of the hospital, and not a private patient of any of the defendant physicians. The hospital chart lists the assigned attendings as "Leva/Tanno/Robe/Rizz." These four doctors were employed by KMLT Gynecological Assoc., P.C.

There are presently three motions for summary judgment before the Court.

> Dr. Levada's motion is predicated on the lack of a physician-patient relationship between her and Huma Mughal. Dr. Levada asserts that she neither delivered nor treated the infant plaintiff nor provided prenatal care to her mother;
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> The motion by Franklin Hospital and Dr. Berger is predicated on the grounds that plaintiff's claimed injuries are complications of his

> prematurity and are the result of any action or inaction on the part of said defendants; and
>
> KMLT Gynecological Assoc.'s motion is predicated on the grounds that Huma Mughal was not a patient of KMLT and it may not be held vicariously liable for the injuries which allegedly resulted from the acts and/or omissions of Dr. Tannous, an employee of Franklin Hospital, in the care and treatment of the infant plaintiff and his mother..

Inasmuch as plaintiff has conceded that defendant North Shore-Long Island Jewish Health Care, Inc., s/h/a North Shore-Long Island Jewish Health System, Inc. is entitled to summary dismissal as to said defendant, the complaint is dismissed as to said defendant.

To establish a *prima facie* case of liability in a medical malpractice action, a plaintiff must prove 1) the standard of care in the locality where the treatment occurred, 2) that the defendant breached that standard of care and 3) that the breach of the standard was the proximate cause of the injury. *Texter v Middletown Dialysis Center, Inc.*, 22 AD3d 831 [2nd Dept. 2005]; *DiMitri v Monsouri*, 302 AD2d 420, 421 [2nd Dept. 2003]. In a medical malpractice action, the party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by showing the absence of a triable issue of fact as to whether the defendant was negligent. *Taylor v Nyack Hospital*, 18 AD3d 537 [2nd Dept. 2005]. Thus the moving defendant has the burden of establishing the absence of any departure from good and accepted medical practice or that plaintiff was injured thereby. *Williams v Sahay*, 12 AD3d 366, 368 [2nd Dept. 2004]. If the moving party makes its *prima facie* showing, then the burden shifts to plaintiff to demonstrate the existence of a triable issue of fact by submitting an expert's affidavit attesting to a departure from accepted practice and demonstrating the requisite nexus between the malpractice allegedly committed and the harm suffered. *Dallas-Stephenson v Waisman*, 39 AD3d 303, 307 [1st Dept. 2007]; *Savage v Franco*, 35 AD3d 581, 582 [2nd Dept. 2006].

The threshold issue in deciding a motion for summary judgment in a medical malpractice action is whether or not the defendant has made a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. *Ritt by Ritt v Lenox Hill Hospital*, 182 AD2d 560, 561 [1st Dept. 1992]. Defendants have failed to meet this burden.

In support of their motion, Franklin Hospital and Dr. Berger

have submitted the affirmation of a physician board certified in neurology, with special qualifications in child neurology, who opines that the infant plaintiff's respiratory distress syndrome, intraventricular hemorrhage, gastrointestinal injuries and diminished visual acuity in the right eye were a function of his prematurity and low birth weight as opposed to any actions or inactions on the part of defendant Hospital or its employee, Dr. Berger. The neurologist opines that the defendants timely and appropriately diagnosed respiratory distress syndrome within the first few hours of the baby's life whereupon he was intubated, given respiratory support, etc. The expert, however, does not address the standard of care rendered by Drs. Berger and/or Dr. Tannous *vis a vis* the clinical presentation of Huma Mughal and the alleged delay in performing a cesarean section.

In opposition, plaintiff has submitted the affirmations of two physicians: one board certified in pediatric neurology who, in addition to reviewing relevant medical records and affirmations of the defendants' respective medical experts, also conducted a physical and neurological examination of the infant plaintiff; and the other board certified in obstetrics and gynecology and maternal fetal medicine. The pediatric neurologist opines that the competent producing cause of infant plaintiff's neurological, gastrointestinal injuries, deficits and conditions was his exposure to prolonged intrauterine hypoxia, after placental abruption occurred, due to defendants' delay in delivering him by cesarean section. In short, he states that the child's deficits and disabilities are not the product of his prematurity but rather to exposure to prolonged intrauterine hypoxia after placental abruption which led to necrotizing enterocolitis and a brain hemorrhage.

Plaintiff's expert, board certified in obstetrical/maternal-fetal medicine, identifies a series of departures from accepted standards of medical and hospital care including:

> the failure on the part of Drs. Levada and Tannous to immediately proceed to the hospital and to immediately determine and follow the condition of the fetus in light of the high risk status of the patient and lack of suitably qualified and credentialed personnel at the hospital in the overnight hours; and
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> the failure to order a cesarean section by 5:05 a.m. given the non-reassuring fetal heart monitoring strips which revealed persistent decelerations and beat to beat variability indicating that the fetus was exposed to prolonged intrauterine hypoxia.

The Court finds that plaintiff's submission is sufficient to raise a triable issue of fact as to the departures from accepted standards of care by Franklin Hospital and Dr. Berger in treating Huma Mughal when she presented at the hospital emergency room. This court does not agree with defendants' contention that plaintiff's obstetrical/maternal-fetal care expert attributed the infant plaintiff's injuries to the fact of his premature birth. Rather, he delineated the specific vulnerabilities and susceptibilities of pre-term infants and specifically states that the prolonged intrauterine hypoxia, resulting from the unacceptable delay in delivering the baby, caused or exacerbated the infant's respiratory distress syndrome and necrotizing enterocolitis and also caused him to sustain and/or worsened the intraparenchymal hemorrhage that was diagnosed in the days following his birth. Vicarious liability applies to hospitals and its physician employees. *Kavanaugh by Gonzales v Nussbaum*, 75 NY2d 535, 546 [1988].

With respect to Dr. Levada's motion, it is generally recognized that liability for medical malpractice may not be imposed in the absence of a physician-patient relationship. *Glasheen v Long Island Diagnostic Imaging*, 303 AD2d 365, 366 [2nd Dept. 2003], *lv to appeal den.* 100 NY2d 517 [2003] and *lv to appeal den.* 100 NY2d 517 [2003]. Such a relationship is created when the professional services of a physician are rendered to and accepted by another for the purposes of medical or surgical treatment. *Lee v City of New York*, 162 AD2d 34, 36 [2nd Dept. 1990], *appeal den.* 78 NY2d 863 [1991]. Dr. Levada contends that she is entitled to summary judgment because of the absence of a physician patient relationship between her and Huma Mughal.

Dr. Levada correctly argues that there is no basis for liability for medical malpractice unless the injured party can establish that he or she had a physician-patient relationship with a physician, as there is no legal duty in the absence of such a relationship. *Garofalo v State of New York*, 17 AD3d 1109, 1110 [4th Dept. 2005], *lv to appeal den.* 5 NY3d 707 [2005]. Such a relationship is, however, created when the professional services of a physician are rendered to, and accepted by, another person for the purposes of medical or surgical treatment. Although defendant Levada testified at her deposition that she had no recollection of receiving a specific phone call from Dr. Berger at approximately 4:30 in the morning on February 26, 1996, Dr. Berger testified, and the Franklin Hospital record reflects, that such a phone call did occur. Moreover, Dr. Berger testified that he had a conversation with Dr. Levada with respect to his examination/workup of Huma Mughal and was advised by Dr. Levada to admit the patient to the hospital, hydrate her and have a sonogram performed in the a.m. which Dr. Berger interpreted to mean at approximately 8:00 a.m.

Notwithstanding Dr. Levada's contrary position, the record

establishes the existence of a factual issue as to whether Dr. Levada commenced a physician-patient relationship with Huma Mughal when she became involved in making decisions regarding the management of her care and put in place a non-urgent "wait and see" management plan that contemplated a sonogram hours later to reach a diagnosis with respect to the bleed, completely ignoring the ongoing status of the fetus which, according to plaintiff's expert constituted a departure from the accepted standard of obstetric care of a patient with Huma Mughal's history and presentation. Lacking assurance that the fetal monitoring strips were reassuring, neither Dr. Levada nor Dr. Tannous was in a position to determine whether or not immediate intervention was or would be required.

Under the doctrine of *respondeat superior*, a corporation, including a professional corporation, is liable for a tort committed by its employees acting within the scope of their employment. *Yaniv v Taub*, 256 AD2d 273 [1st Dept. 1998]. Inasmuch as the action has not been dismissed as to Dr. Levada, the issue of KMLT's vicarious liability remains for resolution by the trier of fact.

This decision constitutes the Order of the Court.

Dated: DEC 14 2007

Kenneth A. Davis, J.S.C.