At an IAS Term, Part 15 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 4th day of April, 2008.

P R E S E N T:

HON. MARSHA L. STEINHARDT,
Justice.

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ISIS LOWHAR, AN INFANT, BY HER MOTHER AND NATURAL GUARDIAN, ELAINE COLE,

Plaintiff,

- against -

Index No. 26320/05

EVA STERN 500 LLC, et al.,

Defendants.

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The following papers numbered 1 to 10 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1- 3
Opposing Affidavits (Affirmations)	4- 8
Reply Affidavits (Affirmations)	9
Affidavit (Affirmation)	
Other Papers Infant plaintiff's attorney's March 12, 2008 letter	10

Upon the foregoing papers in this action brought on behalf of the infant plaintiff Isis Lowhar (the infant plaintiff), by her mother and natural guardian, Elaine Cole, seeking to recover damages for personal injuries allegedly sustained by the infant plaintiff due to lead poisoning and alleging negligence and medical malpractice, defendants the New York Methodist Hospital s/h/a the New York Methodist Hospital and New York Hospital Family

Health Center (Methodist), and Park Slope Pediatric Medicine, P.C. (Park Slope) move for summary judgment dismissing the infant plaintiff's complaint as against them.

The infant plaintiff was born at Kings County Hospital on August 8, 1999. Following her birth, the infant plaintiff resided with her mother, Elaine Cole, and her father, Junior Lowhar, in apartment 3K, located at 500 St. John's Place in Brooklyn, New York (the St. John's Place apartment), where her parents had been living since on or about 1997. According to Elaine Cole, the apartment had a peeling paint condition at the time when she and Junior Lowhar had first moved there.

From January 14, 2000 to April 26, 2000, the infant plaintiff was seen at Methodist's emergency room on three occasions for asthma. On July 24, 2000, the infant plaintiff's blood was tested for lead poisoning by Methodist. The result of that test showed a blood lead level of 4 ug/dL, which was negative for lead poisoning.[1] Beginning in December 2000, the infant plaintiff sought pediatric care at Montefiore Medical Group. She underwent her second blood lead test on January 10, 2001. The result of that test showed a blood lead level of 7 ug/dL, which was also within the normal range.

After another emergency room visit at Methodist for asthma in April 2002, the infant plaintiff presented to Park Slope for her first visit on May 3, 2002. She was seen by Steven Gelman, M.D. (Dr. Gelman) for a complaint of wheezing and a rash on her scalp. Dr.

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[1]10 NYCRR 67-1.1(d) provides that an "[e]levated blood lead level means a blood lead concentration equal to or greater than ten micrograms per deciliter of whole blood" (*see also* Public Health Law § 1103 [which also both define lead poisoning as a blood lead level of 10 ug/dL or higher]).

Gelman wrote, in his note, that the plan was for the infant plaintiff to come in for follow-up for a well-child visit.

The infant plaintiff was next seen at Park Slope on September 19, 2002 for another visit concerning her skin problem, and a note indicates that Elaine Cole was directed to bring the infant plaintiff back to see Dr. Gelman for a well-child visit in one month. An appointment for a well-child visit was made at that time for October 17, 2002. On October 17, 2002, at which time the infant plaintiff was three years, two months, of age, she underwent a complete examination as well as a development assessment, which indicated that she had met her three-year-old milestones appropriately. The infant plaintiff's physical examination at that time was also essentially unremarkable. The medical record for that date reflects that under Health Education (x = explained), an "x" in the boxes for "Lead prevention" and "Child's development" is present. Under "Treatment/Plan," the record states "Anticipatory guidance and vaccine info. statements given or reviewed." Under Laboratory Assessment, the box for a "Lead test" is checked as "to be done today." The infant plaintiff's blood was drawn for lead testing at this visit, and the result showed a blood lead level of 4 ug /dL. The infant plaintiff was thereafter seen at Park Slope on December 13, 2002, for difficulty breathing and coughing; on February 4, 2003, for a skin rash and coughing; and on March 5, 2003, for a skin rash.

On May 12, 2003, when the infant plaintiff was about three years and nine months old and living with her aunt in Connecticut, she had a blood lead test performed at the Fair Haven Community Health Clinic in New Haven, Connecticut (the Connecticut clinic). The

result, which was reported on May 30, 2003, was a markedly elevated blood lead level of 31 ug/dL. On June 11, 2003, another blood lead test was performed at the Connecticut clinic, and the result was an elevated blood lead level of 24 ug/dL.

On July 21, 2003, the infant plaintiff returned to Park Slope with a presenting complaint of a rash on her abdomen and under her neck, consistent with her prior skin problems. There is no mention in the note in the infant plaintiff's medical record for that date that the parent made the physician at Park Slope aware of the elevated blood lead test result at the Connecticut clinic.

The infant plaintiff returned to Park Slope for her second well-child visit and complete examination on July 31, 2003. Under the developmental assessment portion of the medical record for that examination, the infant plaintiff was noted to have met all of her four-year-old milestones. According to Elaine Cole, at that time, she informed the physician at Park Slope about the infant plaintiff's elevated blood lead test result obtained at the Connecticut clinic. This was reflected as a notation in the infant plaintiff's record under the "Treatment /Plan section" as "Pb @ clinic -Ct (24)." Under "Health Education," the box indicating that "Lead Prevention" was explained, is checked. Under "Treatment/Plan," it states that "[a]nticipatory guidance and vaccine info statements [were] given or reviewed." The infant plaintiff's blood was drawn at Park Slope at this visit, and the blood lead test showed that the infant plaintiff's blood lead level was then 20 ug/dL. The record for this visit also states that the plan was to repeat lead testing in three months.

On September 27, 2003, the New York City Department of Health (the DOH) inspected the St. John's Place apartment and found lead paint hazards on five painted surfaces. On October 2, 2003, the DOH issued an Order to Abate Nuisance to the owner of the St. John's Place apartment. On October 22, 2003, workers were sent by the DOH to abate the lead paint condition due to the owner's noncompliance.

On November 11, 2003, the infant plaintiff underwent a repeat blood lead test at Park Slope. The result of this test showed a decline in the infant plaintiff's blood lead level to 14 ug /dL. On November 20, 2003, the DOH determined that all of the lead paint violations at the St. John's Place apartment had been fully abated. Another follow-up blood lead test was performed at Park Slope on February 11, 2004, and a blood lead level of 12 ug/dL was obtained. The note for this visit indicates that the infant plaintiff was asymptomatic developmentally with no changes in the central nervous system and no learning problems.

Three months later, on May 6, 2004, the infant plaintiff returned to Park Slope for a follow-up blood lead test. The blood lead test result at that time was a blood lead level of 9 ug/dL, which was within the normal range. On August 5, 2004, the infant plaintiff returned to Park Slope for another three-month blood lead test follow-up as well as for a complete examination. The blood lead test result on that date was, again, a blood lead level of 9 ug/dL. The record of the examination for this visit also indicated that the infant plaintiff had met all of her five-year-old milestones, and that the examination was otherwise unremarkable. The infant plaintiff and her family have moved out of the St. John's Place apartment, and now live in Connecticut.

On August 25, 2005, the infant plaintiff, by her mother and natural guardian, Elaine Cole, filed this action against Eva Stern 500 LLC, and Stern Realty and Property Management LLC (who own and manage the St. John's Place apartment building, which is a multiple dwelling), Methodist, and Park Slope. These defendants have interposed answers, all pre-trial discovery has been completed, and the infant plaintiff has filed a note of issue.[2]

In addressing Park Slope and Methodist's instant motion, it is noted that on a motion for summary judgment, the movants have the initial burden to set forth evidentiary proof, in admissible form, sufficient to entitle them to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once the movants have satisfied this burden, it is incumbent upon the party opposing the motion to assemble, lay bare, and reveal their evidentiary proof, in admissible form, to establish the existence of a genuine material triable issue of fact (*see Alvarez*, 68 NY2d at 324; *Zuckerman,* 49 NY2d at 562). Notably, a "'shadowy semblance of an issue or bald conclusory assertions . . . are not enough to defeat a motion for summary judgment,'" (*Orange County - Poughkeepsie Ltd. Partnership v Bonte*, 37 AD3d 684, 687 [2007], quoting *Spodek v Park Prop. Dev. Assoc.*, 263 AD2d 478, 478 [1999]; *see also S. J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 342 [1974]).

In order to establish a prima facie case in a medical malpractice action, the plaintiff is required to show that the defendant's conduct deviated or departed from good and accepted

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[2] The motion to strike the infant plaintiff's note of issue was withdrawn by a stipulation dated March 12, 2008.

standards of medical practice, and that such departure was the proximate cause of the plaintiff's injury (*see Lyons v McCauley,* 252 AD2d 516, 517 [1998]; *Prete v Rafla-Demetrious*, 224 AD2d 674, 675 [1996]; *Holbrook v United Hosp. Med. Ctr.*, 248 AD2d 358, 358-359 [1998]; *Bloom v City of New York*, 202 AD2d 465, 465 [1994]). Unless the plaintiff is able to establish, with competent evidence, a causal connection between the alleged acts of medical malpractice and the injuries claimed in the lawsuit, summary judgment is warranted (*see Lyons,* 252 AD2d at 517; *Fridovich v David*, 188 AD2d 984, 985-986 [1992]).

In support of their motion, Park Slope and Methodist have submitted the medical expert affirmation of Marvin Resmovits, M.D. (Dr. Resmovits), a physician, who is board-certified in the field of pediatrics. Dr. Resmovits opines, within a reasonable degree of medical certainty, that Dr. Gelman performed a proper, thorough, and complete examination and risk evaluation of the infant plaintiff at the time of the October 17, 2002 visit. He explains that based upon the blood lead test result of 4 ug/dL, no follow-up lead testing was indicated at that point in time, and that Dr. Gelman's plan to next screen the infant plaintiff by questioning for risk assessment purposes at the age of four was entirely appropriate and in accordance with the standards of good and accepted medical practice as well as the New York State Department of Health and CDC guidelines.

Dr. Resmovits also notes that Dr. Gelman had testified, at his deposition, that anticipatory guidance regarding lead was discussed at every well-child visit (*see* Dr. Gelman's Dep. Transcript at 28), and that the infant plaintiff's medical chart indicated that

this was discussed with Elaine Cole at the time of the October 17, 2002 visit. He opines, based upon this, that Dr. Gelman met the standard of care with regard to providing proper anticipatory guidance to the infant plaintiff's mother at that time.

Dr. Resmovits further sets forth his opinion that the infant plaintiff received blood lead testing at appropriate intervals up to the time that the first elevated blood lead test result was obtained in May 12, 2003 at the Connecticut clinic. He explains that before the test at the Connecticut clinic, the infant plaintiff had been tested in the years 2000, 2001, and 2002, and all of these results had been normal. He further refers to the fact that prior to the abnormal test result at the Connecticut clinic, the previous blood lead test for the infant plaintiff had been conducted about seven months before that time at Park Slope, and it had shown a normal blood lead level of 4 ug/dL. He states that since no further blood lead testing was warranted following the October 17, 2002 test result of 4 ug/dL, there would have been no way for Park Slope to discover an elevated blood lead level prior to the May 12, 2003 blood lead test at the Connecticut clinic. He concludes that no delay in diagnosing the elevated blood lead level can possibly be attributed to Park Slope.

Dr. Resmovits, therefore, opines, within a reasonable degree of medical certainty, that all of the care and treatment rendered by Park Slope and Methodist to the infant plaintiff were in accordance with the standards of good and accepted medical practice and in no way caused or contributed to the injuries complained of in this lawsuit. Dr. Resmovits further states that based upon his review of the infant plaintiff's school records and the deposition testimony, the infant plaintiff exhibits no signs or symptoms suggestive of ill effects from

lead poisoning or lead exposure. He also finds, based upon these records and testimony, and a September 5, 2007 report by Dr. Stephen Wolf, a pediatric neurologist, that there is no evidence of any neurological, cognitive, or other physical problem or impairment suffered by the infant plaintiff.

By the foregoing expert affirmation and the submission of the infant plaintiff's medical records and Dr. Gelman's deposition testimony, Park Slope and Methodist have made a prima facie showing of their entitlement to judgment as a matter of law, shifting the burden to the infant plaintiff to demonstrate, by admissible evidentiary proof, that a genuine triable issue of fact exists (*see Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562). In opposition to the motion, the infant plaintiff has submitted the expert affidavit of William Savarese, an EPA-certified lead paint professional and risk assessor. He opines, within a reasonable degree of lead detection and risk assessment certainty, that the infant plaintiff was exposed to and ingested lead-based paint and paint chips containing lead and/or lead dust which existed in the St. John's Place apartment during the infant plaintiff's residence there, and that this was a significant contributing factor in causing the infant plaintiff's elevated blood lead levels during the infant plaintiff's residence at that apartment.

The infant plaintiff has also submitted the Functional Assessment report of Vicki Sudhalter, Ph.D. (Dr. Sudhalter), a neuropsychologist who evaluated the infant plaintiff on January 20, 2007. Dr. Sudhalter, based upon neuropsychological testing and neurofunctional testing, opines that the infant plaintiff has impairments of recall for visuospatial material, planning, and cognitive flexibility, which are indicative of pediatric brain injury. Park Slope

and Methodist, however, point out that Dr. Sudhalter's Functional Assessment Report indicates that the infant plaintiff has an IQ of 110, placing her in the 75th percentile, which is described in the report as being in the "high average range." They also note that it remains undisputed that no deficits or problems have been identified in the infant plaintiff's school performance.

The infant plaintiff does not make any allegations as to any improper care on the part of Park Slope concerning her treatment after July 31, 2003 in terms of responding to her elevated blood lead level. The infant plaintiff has, however, submitted the expert affirmation of Douglas B. Savino, M.D. (Dr. Savino), a physician who is board-certified in pediatrics. According to Dr. Savino, "[t]he standard of good and accepted medical care in [the] Greater New York City Metropolitan Area relating to the care, treatment and prevention of infant lead poisoning imposes . . . an affirmative duty to perform timely Risk Assessments at every visit; to perform blood lead testing on a timely basis, . . . [to time] . . . follow-up blood lead testing dependent on the child's categorization as 'high risk' or not; and to render Anticipatory Guidance for Lead Poisoning at every visit concerning . . . the hazards of infant lead poisoning and how to avoid same to the parents of children aged from 6 months to 6 years." He explains that this standard flows from at least three sources: (1) the October 1991 Statement by the Federal Centers for Disease Control entitled "Preventing Lead Poisoning in Young Children" (the 1991 CDC Statement); (2) the American Academy of Pediatrics (the AAP); and (3) 10 NYCRR Part 67-1. Dr. Savino disagrees with Dr. Resmovits' expert opinion that Park Slope and Methodist acted entirely in accordance with the standards of

good and accepted medical practice, the New York State Department of Health guidelines, and the CDC guidelines. He opines that Park Slope departed from the requisite standard of care by Dr. Gelman's failure to perform a risk assessment, and by his failure to provide proper anticipatory guidance for lead poisoning.

The 1991 CDC Statement (at 27) states that the pediatric health care provider should "[p]rovide anticipatory guidance about childhood lead poisoning and its prevention." The 1991 CDC Statement (at 42) advises that "[s]tarting at 6 months of age and at each regular office visit thereafter, pediatric health-care providers should discuss childhood lead poisoning (provide Anticipatory Guidance for Lead Poisoning), and assess the child's risk for high-dose exposure (perform Risk Assessment)." According to the 1991 CDC Statement (at 28), Risk Assessment is "determining the child's risk for high-dose lead exposure by asking a few questions." The 1991 CDC Statement (at 27) defines anticipatory guidance as "teaching parents about major sources of lead and how to prevent [lead] poisoning."

Included among the 1991 CDC Statement's examples of how pediatric health care providers should provide information about simple ways in which parents can reduce their children's exposure to lead is:

> "If the house was built before about 1960 and has hard surface floors, wet mop them at least once a week with a high phosphate solution . . . Other hard surfaces (such as window sills and baseboards) should also be wiped with a similar solution. Do not vacuum hard surface floors or window sills or wells, since this will disperse dust. Vacuum cleaners with agitators remove dust from rugs more effectively than vacuum cleaners with suction only" (1991 CDC Statement at 89).

The New York State guidelines for lead poisoning is entitled "Physician's Handbook on Childhood Lead Poisoning Prevention," and in chapter 3 concerning "Risk Assessment and Anticipatory Guidance," under the title "Ways to Prevent or Decrease Exposure," these guidelines state:

> "Housecleaning and dusting -- by wet mopping and damp dusting. Recommend thorough cleaning of floors, window sills and window well, kitchen floors and counter tops with a solution containing a heavy duty household cleaner . . . If lead dust is suspected, avoid the use of regular vacuum cleaners that may spread the lead dust."

The AAP directs pediatric providers to provide anticipatory guidance and education to parents. It also directs pediatric providers to assess a history of possible lead exposure using risk questions to identify children at high risk who should be screened more frequently for blood lead levels.

With respect to risk assessment, anticipatory guidance, and screening for lead poisoning, 10 NYCRR 67-1.2 (a) provides:

> "(a) Lead screening and follow-up of children by primary healthcare providers. (1) At each *routine well-child visit*, or at least annually if a child has not had routine well-child visits, primary health care providers shall assess each child who is at least six months of age but under six years of age, for high dose lead exposure using a risk assessment tool based on currently accepted public health guidelines. Each child found to be at risk for high dose lead exposure shall be screened or referred for lead screening.
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> (2) Primary health care providers shall provide the parent or guardian of each child under six years of age anticipatory guidance on lead poisoning prevention as part of *routine care*.

> (3) Primary health care providers shall screen or refer each child for blood lead screening, at or around one and two years of age, preferably as part of *routine well child care.*
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> . . .
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> (7) Primary health care providers shall provide or make reasonable efforts to ensure the provision of risk reduction education and nutritional counseling for each child with an elevated blood lead level equal to or greater than 10 micrograms per deciliter of whole blood" (emphasis supplied).

Dr. Savino, in rendering his expert opinion, relies upon the chart for the infant plaintiff's October 17, 2002 visit, which had a section entitled Laboratory Assessment." Under this, it states: "Lead test" with boxes for "High Risk"and "Low Risk." Dr. Savino notes that neither one of these boxes was checked off. He states that "[t]his indicates to [him] that a [r]isk [a]ssessment was not performed."

Dr. Savino explains that "[t]he October 17, 2002 well-child visit turned out to be the only opportunity that the [infant plaintiff's] parents could have learned the danger of lead poisoning and the prevention of lead poisoning before [the infant plaintiff] was later lead poisoned. He claims that if Dr. Gelman had performed a risk assessment on October 17, 2002, he would have learned that the infant plaintiff was at high risk for lead poisoning because of the deteriorating and peeling paint in her apartment. He opines, to a reasonable degree of medical certainty, that such failure to perform a risk assessment constituted a departure from good and accepted medical practice, and a departure from the standard of medical care applicable to this case.

Dr. Savino's opinion regarding Park Slope's departure from the standard of medical care in failing to perform a risk assessment on October 17, 2002 is wholly unsupported by the medical record for that date. The medical record for October 17, 2002 reflects that under "Laboratory Assessment," alongside "Lead test" and the boxes for "High Risk" and "Low Risk," a box "to be done today" was checked. The infant plaintiff, in responding to this, argues that the checking of the "to be done today" box meant that the blood lead test, not the risk assessment, was to be done that day. This distinction, however, is without moment since the purpose of a risk assessment is to determine if the infant plaintiff is at risk for lead poisoning and, thus, to determine if a blood lead test is necessary. The 1991 CDC Statement (at 42) provides that "[t]he questions [to assess risk] are not a substitute for a blood lead test." The 1991 CDC Statement (at 43) notes that if, upon assessing the risk of high-dose exposure to lead, it is determined that "the child is potentially at high risk for high-dose lead exposure . . . a blood lead test should be obtained."

Dr. Gelman testified, at his deposition, that when the "Lead Prevention" box is checked on his office chart, "it implies that [the physician] did a lead risk assessment for that patient on that visit" (Dr. Gelman's Dep. Transcript at 30-31). Dr. Gelman testified that if a doctor at Park Slope gave the lead risk assessment, and the responses were positive to the questions (i.e., such as there was peeling paint at the apartment), the way to discern that the responses were positive was that a lead test on that visit would be ordered (Dr. Gelman's Dep. Transcript at 31). As noted above, a lead test was, in fact, ordered on October 17, 2002 when the infant plaintiff was brought in for a well-child visit.

Dr. Savino further notes that the October 17, 2002 chart also had a section entitled "Health Education," under which "Lead prevention" is listed as one of the subjects for education. He observes that the box for "Lead prevention" was checked, and concedes that it, thus, appears that anticipatory guidance was given. However, he points to Dr. Gelman's deposition testimony that when he gave anticipatory guidance, he would not mention anything with regard to mopping, sweeping, and vacuuming (Dr. Gelman's Dep. Transcript at 28). He opines that advising the infant plaintiff's mother concerning the methods of housecleaning in order to prevent lead ingestion was essential to providing anticipatory guidance for lead poisoning and was required under the New York State guidelines and the 1991 CDC Statement. He further opines that the failure to give such anticipatory guidance constituted a departure from the required standard of care.

The infant plaintiff, in opposition to the motion, has also submitted the affidavit of her mother, Elaine Cole. Elaine Cole asserts, in her affidavit, that the doctors at Park Slope never provided her with information concerning the actions which she could take to prevent the infant plaintiff from becoming lead poisoned, and that she has now learned that this information is called anticipatory guidance for lead poisoning. She states that if she had been given anticipatory guidance for lead poisoning, she would have known not to vacuum the floors in trying to get rid of the paint chips and paint dust, but would have wet mopped all surfaces instead.

Dr. Gelman, however, testified at his deposition, that he provided anticipatory guidance "at every well visit," and that when anticipatory guidance for lead was provided,

a doctor would note this in the patient's chart by checking off, under "Health Education," the "Lead prevention" box (Dr. Gelman's Dep. Transcript at 28-31). The fact that Dr. Gelman, in providing anticipatory guidance, did not specifically discuss how Elaine Cole should clean her apartment, cannot be a basis upon which to predicate liability under the facts of this case. At the October 17, 2002 visit to Park Slope, the infant plaintiff did not test positive for lead poisoning, and, thus, did not indicate the need for this specific instruction. In addition, Elaine Cole, at her deposition, testified that prior to taking her daughter to Park Slope on July 31, 2003, the DOH had called her and told her that the infant plaintiff's blood lead level was elevated, and that she had read pamphlets which she had received from the DOH (Elaine Cole's Dep. Transcript at 263, 276).

Moreover, the 1991 CDC Statement with regard to mopping is only listed as an example of a simple way parents can reduce their children's exposure to lead. It does not prohibit the use of vacuum cleaners, and, in fact, instructs that vacuum cleaners with agitators remove dust from rugs more effectively than vacuum cleaners with suction only." The 1991 CDC Statement is "not meant to create an enormous burden on primary pediatric health care providers" (1991 CDC Statement at 4). In addition, 10 NYCRR 67-1.2 (a) (7) simply "requires reasonable efforts to ensure the provision of risk reduction education."

Elaine Cole, in her affidavit, further states that when she brought the infant plaintiff back to Park Slope on July 31, 2003, the doctor at Park Slope made no mention of the kind of diet helpful for a lead poisoned child. She states that the first time that she heard any advice was when the public health advisor from the DOH called Junior Lowhar in August

2003, and told him what kinds of food the infant plaintiff should eat to ameliorate the harmful effect of lead poisoning. She claims that this was a failure by Park Slope to provide her with anticipatory guidance.

In contrast to Elaine Cole's present statement in her affidavit that the physicians at Park Slope did not provide her with nutritional counseling, Elaine Cole had previously testified, at her deposition, when asked if the doctor at Park Slope, on July 31, 2003, had discussed the care and treatment for an elevated blood lead level with her, that she did not recall "because [she] was more caring [sic] about the level of what [the lead] was than anything else so [she] d[idn't] recall him telling [her] anything" (Elaine Cole's Dep. Transcript at 272). Elaine Cole also testified that she did not recall if the doctor had given her any literature, pamphlets, or handouts (Elaine Cole's Dep. Transcript at 273), and she could not recall if any change in diet was discussed (Elaine Cole's Dep. Transcript at 275).

Elaine Cole also inconsistently testified that on July 31, 2003, when she discussed the infant plaintiff's lead poisoning, she told the doctor at Park Slope that the DOH had given her information in a pamphlet about iron and leafy vegetables and that the doctor agreed with this nutritional information (Elaine Cole's Dep. Transcript at 275). A plaintiff cannot create an issue of fact by making statements in an affidavit which contradict his or her prior sworn deposition testimony (*see Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318, 320 [2000]; *Matter of Kalati v Independent Diamond Brokers*, 209 AD2d 412, 413 [1994]). Such a feigned factual issue tailored to avoid summary judgment must be disregarded (*see*

Fernandez v VLA Realty, LLC, 45 AD3d 391, 391 [2007]; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 383 [2007]; *Phillips*, 268 AD2d at 320).

Furthermore, while Elaine Cole, in her affidavit, claims that she first received nutritional information, which she obtained from the DOH in August 2003, she does not state that she would have changed the infant plaintiff's diet in any way if she had received this information from Park Slope on July 31, 2003, a few weeks earlier. In addition, Junior Lowhar, at his deposition, recalled speaking to a doctor at Park Slope and the doctor "telling [him and Elaine Cole] about what to give the infant plaintiff to eat like . . . stuff with iron and stuff like that" (Junior Lowhar's Dep. Transcript at 38). He also testified that the infant plaintiff consistently ate healthy food (Junior Lowhar's Dep. Transcript at 71). Thus, the infant plaintiff has failed to raise any triable issue of fact with respect to the adequacy of the anticipatory guidance provided by Park Slope on October 17, 2002 or July 31, 2003.

Dr. Savino also points to the fact that at the infant plaintiff's May 3, 2002, September 19, 2002, December 13, 2002, February 4, 2003, and March 5, 2003 visits there is no indication in the Park Slope medical records of any risk assessment being performed or any anticipatory guidance for lead poisoning being provided. Dr. Savino opines that the physicians at Park Slope should have provided Elaine Cole with anticipatory guidance for lead poisoning and risk assessment at every visit, and that the failure to do so was a deviation from the accepted standard of care.

With respect to this opinion by Dr. Savino, however, it is noted that the May 3, 2002, September 19, 2002, December 13, 2002, February 4, 2003, and March 5, 2003 visits were

for specific treatments of asthma and skin rashes, and not routine well-child office visits. While Dr. Savino contends that Dr. Gelman's deposition testimony that he only conducted lead prevention at well-child visits (Dr. Gelman's Dep. Transcript at 28) is a departure from the standard care, this contention is not supported by the 1991 CDC Statement or 10 NYCRR Part 67-1.

As to anticipatory guidance, the 1991 CDC Statement (at 42) only requires it "at each regular office visit." 10 NYCRR 67-1.2 (a) (2) similarly requires primary health care providers to provide anticipatory guidance as part of "routine care." As to risk assessment, the 1991 CDC Statement (at 27) provides that pediatric providers should discuss the potential hazards of lead as an "integral part of *well child care*" (emphasis supplied). The 1991 CDC Statement (at 42) requires the performance of risk assessment only "at each regular office visit." Similarly, 10 NYCRR 67-1.2 (a) (1) requires risk assessment only "at each routine well child visit, or at least annually if a child has not had routine well-child visits," and if a child is found to be at risk for lead exposure, he or she is to be "referred for lead screening." "Additionally, 10 NYCRR 67-1.2 (a) (3) requires "blood lead screening at or around one and two years of age, preferably as part of routine child care." Dr. Gelman testified that he had performed the blood lead test at the October 17, 2002 visit because he did not have a two-year-old blood lead test available to him (Dr. Gelman's Dep. Transcript at 93). In so doing, he acted in accordance with the requirement of 10 NYCRR 67-1.2 (a) (3) (*compare S.S. v New York City Health & Hosps. Corp. [Harlem Hosp.]*, 11 Misc 3d 1071 [A], 2006 NY Slip Op 50514 [U], *6 [2006]).

The 1991 CDC Statement provides that "[t]he urgency and type of follow-up depends on the screening blood lead test result" (1991 CDC Statement at 42). Here, at the time of the infant plaintiff's first routine well-child visit at Park Slope on October 17, 2002, the infant plaintiff had previously had two negative lead test results. On that October 17, 2002 visit, the infant plaintiff was given anticipatory guidance and was screened and tested for lead poisoning. As noted above, the screening blood lead level test result on October 17, 2002 showed that the infant plaintiff only had a 4 ug/dL blood lead level (which was within the normal range). The infant plaintiff's last visit to Park Slope (which was for a skin rash) before being diagnosed with lead poisoning at the Connecticut clinic, was on March 5, 2003, only five months after her last blood test had shown a 4 ug/dL blood lead level. As opined by Dr. Resmovits, no need for a follow-up blood lead testing was indicated at a non-routine visit based upon the short (under six-month) time interval since the infant plaintiff's last blood lead test, which had showed a negative lead test result (*see Breeden v Valentino*, 17 Misc 3d 1116 [A], 2007 NY Slip Op 52033 [U], *3 [2007]).

Thus, the infant plaintiff has failed to raise any triable issue of fact with regard to any departure from the applicable standard of care as to the risk assessment or anticipatory guidance given by Park Slope or that any such departure was the proximate cause of injury to her (*see id.*; *compare Rivas v Danza*, 18 Misc 3d 1129 [A], 2008 NY Slip Op 50237 [U], *4 [2008]; *Medina v New York City Health & Hosps. Corp. [Woodhull Med. Mental Health Ctr.]*, 18 Misc 3d 1102 [A], 2007 NY Slip Op 52382 [U], *7 [2007]; *S. S.*, 2006 NY Slip Op 50514 [U], *6-7). Summary judgment dismissing the infant plaintiff's complaint as against

Park Slope is, therefore, warranted (*see* CPLR 3212 [b]; *Breeden*, 2007 NY Slip Op 52033 [U], *3). Since the infant plaintiff only alleges that Methodist may be vicariously liable for Park Slope's medical malpractice because Park Slope is located and is operated in Methodist's campus, Methodist is likewise entitled to summary judgment (*see* CPLR 3212 [b]).

Accordingly, Methodist and Park Slope's motion for summary judgment dismissing the infant plaintiff's complaint as against them, is granted.

This constitutes the decision, order, and judgment of the court.

E N T E R,

J. S. C.