SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 17

Present: HON. WILLIAM R. LaMARCA
Justice

Scan

CYNTHIA FREEMAN, an Infant by her Mother and Natural Guardian DAWN JACKSON,
Plaintiff,
-against-
MERCY MEDICAL CENTER, DR. NICHOLAS TARRICONE, DR. R.L. BEZALEL #973 as designated by Mercy Medical Center, DR. "JOHN" LU #964 as designated by Mercy Medical Center, DR. A. DEELCRY, DR. E. BAKNER, DR. COLIN WALTERS and DR. MARK BRANDON,
Defendants.

Motion Sequence #005, #7
Submitted February 8, 2008
Motion Sequence #6
Submitted December 21, 2007

INDEX NO: 14778/05

MERCY MEDICAL CENTER,
Third-Party Plaintiff,
-against-
NASSAU HEALTHCARE CORPORATION, NASSAU UNIVERSITY MEDICAL CENTER and NASSAU COUNTY MEDICAL CENTER,
Third-Party Defendant.

The following papers were read on these motions:

COUNTY and WALTERS Notice of Motion (#5).....1
MERCY Affirmation in Opposition.....2
Plaintiff's Affirmation in Opposition.....3
Reply Affirmation.....4
TARRICONE Notice of Motion (#6).....5
MERCY Affirmation in Opposition.....6
Reply Affirmation.....7
Plaintiff Notice of Cross-Motion (#7).....8

Requested Relief

Third-party defendant, COUNTY OF NASSAU (hereinafter referred to as the "COUNTY"), moves for an order, pursuant to CPLR §3212, granting summary judgment dismissing the plaintiff's complaint against defendant , Dr. COLIN WALTERS (hereinafter referred to as "Dr. WALTERS"), and dismissing the third-party complaint and any cross-claims against the COUNTY. Subsequently, defendant, Dr. NICHOLAS TARRICONE (hereinafter referred to as "Dr. TARRICONE"), moves for an order, pursuant to CPLR §3124, to compel defendant, MERCY MEDICAL CENTER (hereinafter referred to as "the Hospital"), to produce and permit discovery of copies of the charts of the patients, redacted by name, who presented to the Hospital's prenatal clinic on June 6, 1996, and August 8, 1996, and to compel the Hospital to provide the roster sheet for August 8th, and copies of pages of the 1996 appointment book for five (5) dates. In a cross-motion, plaintiffs, CYNTHIA FREEMAN, an infant by her mother and natural guardian, DAWN JACKSON, seek leave of the Court to serve an amended bill of particulars. The motions and cross-motion are determined as follows:

Background

This is a medical malpractice action arising out of the birth of plaintiff, CYNTHIA FREEMAN, on September 13, 1996, after only twenty-three (23) weeks gestation. Due to her severe prematurity, the infant suffers, *inter alia*, from profound brain damage, spastic quadriplegia and cerebral palsy. Plaintiff, DAWN JACKSON, the mother of the infant

plaintiff, received prenatal care at the Hospital's clinic on six (6) occasions from May 30, 1996, to September 10, 1996. She was admitted to the Hospital on September 12, 1996 with pelvic pressure and bulging membranes. CYNTHIA FREEMAN was born the next day.

The alleged malpractice at the Hospital's clinic was the failure to properly evaluate and treat Ms. JACKSON's incompetent cervix, which is described as premature dilation of the cervix. The treatment for an incompetent cervix is cervical cerclage, namely, a stitch in the incompetent cervix to avoid premature delivery. The alleged malpractice at the Hospital on September 12, 1996, was the failure to give adequate tocolytic medication to stop pre-term labor and the failure to give adequate steroid therapy to accelerate the maturity of the fetal lungs.

Dr. TARRICONE, is a board-certified attending physician in Obstetrics and Gynecology, whom plaintiffs claim was the attending physician at the Hospital's prenatal clinic on June 6, July 11 and August 8, 1996. At his deposition, Dr. TARRICONE testified that he only saw DAWN JACKSON at the clinic on one (1) occasion, July 11, 1996. He further testified that his duties involved seeing patients in the clinic every third Thursday.

Defendants, Dr. BEZALEL, Dr. LU, Dr. DEELCRY and Dr. BAKNER, were never served and have not appeared.

Defendant, Dr. WALTERS, was a resident physician employed by the COUNTY at the Nassau County Medical Center, who was doing a six (6) month rotation at the defendant Hospital. Dr. WALTERS' signature was on the clinic's records for DAWN JACKSON from June 6, 1996, and he delivered CYNTHIA FREEMAN at the Hospital.

Defendant, Dr. BRANDON, is a board-certified attending physician in Obstetrics and Gynecology, who was an attending physician at the clinic in 1996, generally on Tuesdays. Dr. BRANDON saw DAWN JACKSON at the clinic on June 18, 1996. At his deposition, Dr BRANDON testified that he discussed all patients with the residents on the days that he covered the clinic.

On her first visit to the clinic, on May 30, 1996, DAWN JACKSON was seen only by a nurse, as was the custom at the clinic. Ms. JACKSON states that, at that time, she gave information including her prior obstetrical history of giving birth to a premature baby at 32 weeks in 1991, and that she had an incompetent cervix. On May 31, 1996, DAWN JACKSON was seen in the emergency room of the Hospital, where the doctor's note indicates that there was probably some element of cervical incompetence and that follow-up at the clinic was recommended.

On June 6, 1996, Ms. JACKSON returned to the clinic for her first examination by a physician. Plaintiff testified at her deposition that she told the clinic's physician of her prior history of premature delivery and of an incompetent cervix, and that she was told that cervical cerclage would be scheduled at approximately thirteen (13) to sixteen (16) weeks of gestation. The examination note of June 6, 1996, was co-signed by Dr. WALTERS and did not mention an incompetent cervix or cervical cerclage.

At his deposition, Dr. WALTERS testified that delivery of a baby of five (5) pounds, eleven (11) ounces, involving more than eighteen (18) hours of labor is not consistent with a diagnosis of an incompetent cervix (WALTERS' Transcript, p. 22), although it was possible for a baby to develop to such a size and for so many weeks in a mother with an

incompetent cervix (WALTERS' Transcript, p. 23). Dr. TARRICONE also testified that the facts of Ms. JACKSON's prior delivery were inconsistent with a diagnosis of incompetent cervix (TARRICONE Transcript, p.31).

Ms. JACKSON was seen in the Hospital emergency room on June 15, 1996. It is noted in her emergency room record that there was a plan for cerclage at thirteen (13) to fifteen (15) weeks.

Dr. TARRICONE saw Ms. JACKSON at the clinic on July 11, 1996. He testified that her "cervix appeared normal" and that cervical incompetence "cannot be commented on with physical examination at eight weeks gestation" (TARRICONE Transcript, p.57, 59).

Cervical cerclage was never scheduled.

On September 12, 1996, at approximately twenty-three (23) weeks gestation, DAWN JACKSON was admitted to the Hospital with a dilated cervix. In the early morning of September 13, 1996, Ms. JACKSON's membranes ruptured. She was started on tocolytic medications to stop labor contractions and steroids to promote fetal lung maturity in the event the baby had to be delivered. Dr. WALTERS reviewed a sonogram, and discussed it with Ms. JACKSON. The sonogram indicated that the baby weighed approximately 482 grams and Dr. WALTERS testified that he advised Ms. JACKSON that a baby of such low birth weight was "well below, you know, the weight we consider a fetus to be viable (WALTERS Transcript, p. 55). Dr. WALTERS testified that a decision was made for conservative management, letting nature "take its course" (WALTERS Transcript, p. 56). Dr WALTERS then discontinued the tocolytic medications and stopped further doses of steroids. CYNTHIA FREEMAN was born at 10:29 PM. Dr. WALTERS delivered

the infant.

The COUNTY and Dr. WALTERS seek summary judgment and argue that the treatment decisions in this case could not have been made independently by any resident physician. They insist that the Hospital and the attending physicians were ultimately responsible for the care rendered to DAWN JACKSON, and that the Hospital owes a defense and indemnification to the County pursuant to the Interinstitution (Two-Way) Rotation Agreement (the "Agreement"), annexed as Exhibit "H" to the moving papers by the COUNTY and Dr. WALTERS.

In support of their position, the COUNTY and Dr. WALTERS submit an expert opinion by Dr. Hock. Dr. Hock states that, in the clinic's notes dated May 30, 1996, the patient reported that she had one (1) prior pregnancy, that she delivered at thirty-two (32) weeks, that she was told she had an incompetent cervix, and that for all future pregnancies she would need a cervical cerclage. He opines that good and accepted medical practice required the Hospital to provide an attending physician to supervise residents, and that decisions regarding cervical cerclage and the discontinuance of tocolytic and steroid therapy would have to have been approved by an attending physician.

Plaintiffs oppose the motion on the grounds that triable issues of fact exist as to whether medical decisions, alleged to have been departures from accepted medical practice, were made by the private attending physician or the resident physician. Plaintiffs' expert, Dr. Newhouse, opines that, both on June 6, 1996 and September 13, 1996, Dr. WALTERS' conduct departed from good and accepted medical practice and, that as a result, CYNTHIA FREEMAN was born prematurely and with low birth weight.

The Hospital also opposes the motion and insists that the COUNTY failed to make a *prima facie* case because it cannot show that Dr. WALTERS was acting at all times pursuant to the direction of an attending physician. The Hospital's expert is Dr. Cooper, who opines that residents have a duty to accurately present to supervising attending physicians all relevant information regarding a patient. Dr Cooper raises the questions of whether the residents at the clinic presented all relevant information to the supervising attending physicians, and whether resident physicians rendered care to Ms. JACKSON pursuant to orders and decisions of attending physicians, or independently.

The Law

To establish a *prima facie* case of liability in a medical malpractice case, a plaintiff must prove that the defendant deviated from accepted medical practice, and that such deviation was the proximate cause of the plaintiff's injuries (*Manuka v Crenshaw*, 43 AD3d 886, 841 NYS2d 782[2nd Dept. 2007]; *Salvatore v Winthrop University Medical Center*, 36 AD3d 887, 829 NYS2d 183 [2nd Dept. 2007]). The evidence must be scrutinized carefully in the light most favorable to the party opposing the motion for summary judgment (*Warney v Haddad*, 237 AD2d 123, 654 NYS2d 138 [1st Dept. 1997]; *Menzel v Plotnick*, 202 AD2d 558, 610 NYS2d 50[2nd Dept. 1994]), and the court should refrain from resolving issues of credibility which are for the jury (*SJ Capelin Assoc. Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [1974]).

While a hospital may not be held liable for the negligence of a private attending physician practicing at its facility, it may be held concurrently liable with a private physician for the independent negligence of its staff (*Pearce v Klein*, 293 AD2d 593, 741 NYS2d 89

[2nd Dept. 2002]; *see generally*, *Johanessen v Singh*, 259 AD2d 670, 686 NYS2d 830 [2nd Dept. 1999]). A private physician may be vicariously liable for conduct of a resident physician where the resident is under the direct supervision and control of the private physician at the time of the conduct (*Ross v Mandeville*, 45 AD3d 755, 846 NYS2d 276 [2nd Dept. 2007]). The key is whether the resident exercises independent medical judgment (*Muniz v Katlowitz*, __ AD3d __, __ NYS2d __, 2008 WL 607152 [2nd Dept. 2008]).

In the case at bar, although Dr. WALTERS had no specific recollection of Ms. JACKSON (WALTERS Transcript, pp. 18, 25), he did testify that, at the clinic, attending physicians examined and treated patients simultaneously with residents and physicians' assistants, and that matters of significance required consultation (WALTERS Transcript, p. 19, 29-30), and that his practice at the hospital was to discuss cases with the attending physicians (WALTERS transcript, p. 61-61). At her deposition, Nurse Sprague testified that the attending physicians supervised every visit by patients to the clinic. She stated that residents never discharge the patients without discussing the patient with the attending physician (Sprague Transcript, p. 16-17). Overall, the Court finds that a *prima facie* case is presented that supervision of the resident physician was provided.

Nevertheless, triable issues of fact have been raised as to whether Dr. WALTERS exercised independent medical judgment on June 6, 1996, in failing to discuss the issue of cervical cerclage with the clinic's attending physician, and on September 13, 1996, with respect to (a) his discussion with Ms. JACKSON as to viability or the lack thereof of the fetus; and (b)his decision to discontinue tocolytic and steroid medications (*see generally*, *Petty v Pilgrim*, 22 AD3d 478, 802 NYS2d 217[2nd Dept. 2005]). Based on the foregoing,

the Court finds that triable issues of fact remain as to whether the resident physician's actions were under the direct supervision of the attending physician and the COUNTY's motion for summary judgment dismissing plaintiffs' complaint against Dr. WALTERS must be denied.

For the record, the COUNTY's attempt to exclude from consideration the affirmation of plaintiffs' expert, Dr. Newhouse, is rejected. An expert need not be a specialist in the particular area at issue to offer an opinion (*Humphrey v Jewish Hospital and Medical Center of Brooklyn*, 172 AD2d 494, 567 NYS2d 737 [2nd Dept. 1991]). Any lack of skill or expertise goes to the weight of his opinion as evidence, not its admissibility (*Texter v Middletown Dialysis Center, Inc.*, 22 AD3d 831, 803 NYS2d 687 [2nd Dept. 2005]).

The Hospital also opposes the COUNTY's motion, and contends that the indemnification clause in the Agreement requires the COUNTY to indemnify the Hospital for claims arising from the act or omissions of residents, and that any alleged lack of supervision of the resident physician by the attending physicians does not render the indemnification clause inapplicable. Review of the Agreement reveals that at subdivision 12 the parties agreed to reciprocal indemnification obligations. The Hospital agreed to indemnify the COUNTY for all claims arising out of acts or omission of the Hospital, its agents, officers, employees, residents , faculty or invitees. Likewise, the COUNTY agreed to indemnify the Hospital against all claims arising out of the acts or omissions of the COUNTY, its agents, officers, employees, residents or invitees. The Court finds that the parties intended that their agents, employees, and residents would work together, and that indemnification would be triggered by an act or omission of the respective parties. As

triable issues of fact are presented concerning the conduct of the various defendants, resolution of the issue of contractual indemnification is premature. Consequently dismissal of the third-party complaint and the COUNTY's cross claim/counterclaims is denied.

The TARRICONE Motion

With respect to the TARRICONE motion to compel discovery, the Court emphasizes that New York favors open and far-reaching pretrial discovery (*Kavanaugh v Ogden Allied Maintenance Corp.*, 92 NY2d 952, 683 NYS2d 156, 705 NE2d 1197 [C.A. 1998]). As to the pages from the 1996 appointment book and the roster sheet for August 8, 1996, the Hospital insists that it has provided all documents available. Under these circumstances, the Hospital is directed to provide co-defendant with an affidavit, from a person with knowledge, attesting that a search was made for the requested documents and they could not be located.

Dr. TARRICONE further seeks redacted prenatal charts of the patients who were seen at the clinic on June 6, 1996, and August 8, 1996, the two (2) dates on which he believes he was not the attending physician at the clinic. The Hospital argues that the records are on microfiche and would only make illegible copies, although Dr. TARRICONE notes that the Hospital has produced legible copies from microfiche of DAWN JACKSON's chart in the past. In addition, the Hospital insists that production of all of the prenatal charts on the two (2) requested dates would be burdensome.

According to records of the clinic, nineteen (19) patients were seen on June 6, 1996, and twenty-one (21) patients were seen on August 8th, 1996. Dr. TARRICONE admits that the entire chart need not be provided, but seeks notes and entries on the charts, especially

the "discharge sheets" for each patient for the two (2) dates. Weighing the request for discovery with the burden to the opponent, the Court finds that the balance tips in favor of limited further discovery of the patient prenatal charts. Therefore, Dr. TARRICONE's motion is granted to the limited extent that the Hospital is directed to produce, for the 40 patients seen at the clinic on June 6, 1996, and August 8, 1996, the cover sheet or first page of the clinic record, together with the discharge sheets, with all names, addresses, and phone numbers for the 40 patients redacted. Illegibility cannot be an excuse for non-production.

The Plaintiffs' Cross-Motion

On the cross-motion, the Court notes that, while leave to amend a bill of particulars is ordinarily to be freely given in the absence of prejudice or surprise (*see CPLR 3025(b)*), when leave is sought on the eve of trial, judicial discretion should be exercised sparingly (*Cohen v Ho*, 38 Ad3d 705, 833 NYS2d 542 [2nd Dept. 2007]; *Rosse-Glickman v Beth Israel Medical Center Kings Highway Div.*, 309 AD2d 846, 766 NYS2d 67 [2nd Dept. 2003]; *Davidian v County of Nassau*, 175 AD2d 908, 573 NYS2d 525 [2nd Dept. 1991]). In exercising its discretion, the court should consider how long the party seeking the amendment was aware of the facts upon which the motion is predicated, whether a reasonable excuse for the delay is offered, and whether prejudice results therefrom (*Cohen v Ho, supra*; *see*, *Volpe v Good Samaritan Hospital*, 213 AD2d 398, 623 NYS2d 330 [2nd Dept. 1995]).

The malpractice alleged in this action took place nearly twelve years ago, and this action was commenced against the Hospital and Dr. TARRICONE nearly six (6) years ago.

The Note of Issue was filed in August 2007, and counsel advises the Court that this case was scheduled to appear in the Central Control Part (CCP) in February 2008. In preparing their opposition to the motion by the COUNTY, the plaintiffs' expert opined for the first time that the failure by defendants to effectively treat Ms. JACKSON's urinary tract infections may have contributed to the premature delivery of CYNTHIA FREEMAN and her resulting injuries.

The information regarding Ms. JACKSON's urinary tract infections was set forth in the clinic and hospital records available to plaintiffs at the inception of this action. No excuse has been offered for the delay in offering the proposed amendment (*Cohen v Ho, supra*), and this amendment would clearly prejudice defendants by inserting a new contributory theory of liability into the case, virtually on the eve of trial (*see, Davidian v County of Nassau, supra*; *cf. Grande v Peteroy*, 39 AD3d 590, 833 NYS2d 615 [2nd Dept. 2007] (accident took place in 2001, cross-motion for leave to amend took place in 2005, no evidence that the amendment was sought on the eve of trial). On this record, plaintiffs' request for leave to serve an amended bill of particulars is denied.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: April 28, 2008

WILLIAM R. LaMARCA, J.S.C.

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