

Corvera v Nassau County Health Care Corp. Nassau Univ. Med. Ctr.

2008 NY Slip Op 31592(U)

June 2, 2008

Supreme Court, Nassau County

Docket Number: 5807-06/

Judge: Roy S. Mahon

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

MG

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON
Justice

YOCELIN CORVERA, an infant under the age of
14 years by her mother and natural guardian,
MARIA RUBIO and MARIA RUBIO, individually,

Plaintiff(s),

TRIAL/IAS PART 9

INDEX NO. 5807/06

MOTION SEQUENCE
NO. 1

- against -

MOTION SUBMISSION
DATE: March 25, 2008

NASSAU COUNTY HEALTH CARE CORPORATION
NASSAU UNIVERSITY MEDICAL CENTER,
DR. ELSIE SANTANA-FAX, DR. GABRIELA A. OLARU-
CIOCLOV, DR. WHITE (I.D. #04902), DR. MAIQUEL
CARRASCO, DR. REGINA L. ARVON, DR. GEOFFREY L.
KAMEN, DR. ORESEI, DR. AKSELROD,

Defendant(s).

The following papers read on this motion:

Notice of Motion	X
Affirmation in Opposition	X
Reply Affirmation	X

Upon the foregoing papers, the motion by the plaintiffs for an Order striking the defendants' answers for spoliation of the fetal monitoring strips and setting this matter down for an immediate inquest on damages is determined as hereinafter provided:

The Court initially observes that after conference call with counsel for the respective parties and the Court on May 28, 2008 and pursuant to the written stipulation entered into by counsel for the respective parties, the plaintiffs requested relief is amended to read as follows:

"Relief requested: For an Order of this Court striking the respective answers of Nassau County Health Care Corporation and Nassau University Medical Center for spoliation of the fetal monitoring strips, setting this matter down for an immediate Inquest on damages, together with such other and further relief as this Court deems just and proper."

This medical malpractice action arises out of the delivery of the infant plaintiff Yocelin Corvera on

August 10, 2001 at the defendant Nassau University Medical Center. In substance, the plaintiffs contend that the respective defendants deviated from good and accepted medical practice in the care and treatment of the plaintiff Maria Rubes and the birth of Yocelin Corvera resulting in severe brain damage to the infant.

A review of the plaintiffs' submission establishes that the defendants Nassau County Health Care Corporation and/or Nassau University Medical Center and their counsel were on notice of the plaintiffs' request to preserve and provide the fetal monitoring strips in relation to the fetal monitoring performed on the plaintiff Maria Rubio between approximately 5:00 am to 6:00 am on the morning of August 10, 2001 (see *Plaintiffs' Exhibits "F"; "G"; "H"; "I"; "J"; "K"; "L" and "M"*). In pertinent part, the defendants Nassau County Health Care Corporation and Nassau University Medical Center's Response To Discovery Demands of the plaintiff (*Plaintiffs' Exhibit M*) provides:

"6. The hospital has no record of any non-stress testing being performed on this patient in July or August of 2001. If the patient had had a non-stress test, it would be contained in the original hospital record which, as you know, has been marked as Plaintiff's Exhibit 3 of February 13, 2007. There is no evidence on that record of fetal non-stress testing being performed. There is no log book for non-stress tests done at Nassau University Medical Center in August of 2001."

In pertinent part, the deposition of the defendant Maiquel Carrasco, MD sets forth:

"Q. Now in the orders that were given, one of the orders was for electronic fetal monitoring. Do you see that?

A. Yes.

Q. Is that a standard order for patients that come in labor?

A. Yes.

Q. And the initial next to that, that's an indication that the nurse did that?

A. Yes.

Q. From your review of the chart, have you seen any indication that fetal monitoring was done of Mrs. Rubio?

A. Yes.

Q. What is that?

A. Its on the History and Physical by Dr. Kamen. He mentions that the heart rate of the maybe was 130-140 reactive, contractions q two minutes.

Q. So as of the time Dr. Kamen examined Mrs. Rubio on her admission, a fetal monitor was already in place?

A. Yes.

Q. And the fetal monitor is to check for the well-being of the fetus, correct?

A. Yes.

Q. And the fetal monitors at the hospital in August '01 had a printout that would show what the fetal heart rate was, correct?

A. Yes.

Q. They're called fetal strips, correct?

A. Yes.

Q. And does Mrs. Rubio's chart have the fetal strips for the electronic monitoring that was done on August 10th, 2001?

A. No.

Q. Have you ever seen those strips?

A. I possibly saw it the day of the event; not after that.

- Q. Was there an electronic fetal monitor in place when Mrs. Rubio was brought to the Delivery Room?
- A. Yes.
- Q. Was there an electronic fetal monitor in place while she was in the Delivery Room waiting that fifteen or twenty minutes for anesthesia to be placed?
- A. No.
- Q. When was the fetal monitor removed?
- A. The fetal monitor is done during the initial, I guess, encounter in the Emergency Room, but when we called the STAT cesarean section and brought the patient to the back, there is an opportunity to put a fetal monitor over there if it takes more than five or ten minutes to get the anesthesia going and everything else. But it wasn't put after that.
- MR. MCANDREW: Could I have that back, please
(Whereupon, the reporter read back the portion of the record requested)
- Q. The initial orders were done at 5:30, correct?
- A. As per the chart, yes.
- Q. And Mrs. Rubio was taken to the Delivery Room at 6:00 am correct?
- A. Yes.
- Q. So during the half hour from when Mrs. Rubio came into the Emergency Room, until she was taken to the Delivery Room at 6:00 am, was there a fetal monitor in place.
- A. The answer is yes.
- Q. The initial reading from Dr. Kamen's Admission Note of 130 to 140 reactive, how would you interpret that?
- A. The baby's heart rate was between 130 and 140s, and reactive means that it was a good heart rate.
- Q. So as of that time, there's no indication of any distress from the fetal monitor strips, correct?
- A. Correct.
- Q. Now, the fetal monitor that we're referring to is an external monitor, is that right?
- A. Yes.
- Q. In addition to the external monitor, is there any other monitoring devices that's used in the hospital? Is there an internal or a Fetone?
- A. Yes.
- Q. When Mrs. Rubio was brought to the Delivery Room at 6:00 am, was there an electronic fetal monitor in place at that time, when she was first brought in?
- A. Brought in where?
- Q. To the Delivery Room.
- A. To the back?
- MS. BRISTOL: You call it the back; he calls it the Delivery Room.
- Q. Is that where the delivery's done? In the back?
- A. Yes. The Delivery Room is the entire unit, I'm sorry.
- Q. That's okay; we'll use your terms then. The room where the cesarean is done, what do you call that?
- A. The back room.
- Q. Okay.
- A. I'm sorry.

Q. That's okay. When Mrs. Rubio was brought into the back room, was a fetal monitor in place at that point?

A. Not that I can recall.

The answer is no, because we don't have a portable machine that we can attach to the patient, and since it was a STAT cesarean section, we have to move the stretcher as quick as we can.

Q. Once she arrived in the back room, was any device placed to monitor the fetus at that point?

A. No.

Q. Was there any reason why no device was placed once she arrived in the back room?

A. It was a STAT cesarean section.

Q. And what does that mean?

A. The baby has to come out now."

see deposition transcript of Miguél Carrasco at pgs 24-29

The Court observes that the defendants Nassau County Health Care Corporation and Nassau University Medical Center's counsel sets forth in said counsel's affirmation in opposition that the fetal monitoring strips were "simply lost".

In examining an application to strike a pleading based upon the spoliation of fetal monitoring strips, the Court in **Bagleo v St. John's Queens Hospital**, 303 AD2d 341, 755 NYS2d 427 (Second Dept., 2005) states.

"It is well settled that when a party negligently loses or intentionally destroys key evidence, thereby depriving the non-responsible party from being able to prove its claim or defense, the responsible party may be sanctioned by the striking of its pleading (*see DiDomenico v C & S Aeromatik Supplies*, 252 AD2d 41, 53, 682 NYS2d 452; *Squiteri v City of New York*, 248 AD2d 201, 202, 669 NYS2d 589; *see also Foncette v LA Express*, 295 AD2d 471 744 NYS2d 429). A pleading may be stricken "even if the evidence was destroyed before the spoliator became a party, provided it was on notice that the evidence might be needed for future litigation" (*DiDomenico v C & S Aeromatik Supplies*, *supra* at 53, 682 NYS2d 452; *see New York Cent/ Mut. Fire Ins. Co. v Turnerson's Elec.*, 280 AD2d 652, 721 NYS2d 92).

In the instant case, we agree with the plaintiffs that the Hospital's negligent loss of the fetal monitoring strips warrants striking its answer. The plaintiff's evidence demonstrated that "[t]he fetal monitoring strips are the most critical evidence to determine fetal well-being at the time of treatment, and in evaluating the conduct of health care providers with regard to obstetrical management thereafter." Further, under the facts of this case, the fetal monitoring strips would give fairly conclusive evidence as to the presence or absence of fetal distress, and their loss deprives the plaintiff of the means of proving her medical malpractice claim against the Hospital (*see Foncette v LA Express*, *supra*; *Long Is. Diagnostic Imaging v Stony Brook Diagnostic Assocs.*, 286 AD2d 320, 728 NYS2d 781; *New York Cent. Mut. Fire Ins. Co. v Turnerson's Elec.*, *supra*; *Di-Domenico v SA & S Aeromatik Supplies*, *supra*; *see also Velasquez v Brocorp. Inc.*, 283 AD2d 423, 723 NYS2d 870)."

Baglio v St. John's Queens Hospital at pg 428

In support of the instant application the plaintiffs have established through the plaintiffs' submission and in particular the affirmation of the plaintiffs' expert Bernard Nathanson, MD, that the fetal monitoring strips are integral to a determination of the medical condition of the infant plaintiff Yocelin Corvera prior to her delivery on the morning of August 10, 2001 and as such integral to the plaintiffs' case. As such, the plaintiffs' application for an Order striking the respective answers of Nassau County Health Care Corporation and Nassau University Medical Center for spoliation of the fetal monitoring strips, setting this matter down for an immediate Inquest on damages, is **granted** to the extent that the answers of Nassau County Health Care Corporation and Nassau University Medical Center are stricken. The assessment of damages as to said defendants is referred to the trial of the action as to the remaining defendants.

SO ORDERED.

DATED:

6/2/2008

Roy S. Makon
..... J.S.C.

ENTERED

JUN 04 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**