

<b>Butler-Carr v St. Catherine of Sienna Med. Ctr.</b>
2009 NY Slip Op 31047(U)
May 7, 2009
Supreme Court, Suffolk County
Docket Number: 06-4316
Judge: Patrick A. Sweeney
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SHORT FORM ORDER

INDEX No. 06-4316  
CAL. No. 08-01266-MM  
5-7-09

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 29 - SUFFOLK COUNTY

**PRESENT:**

Hon. PATRICK A. SWEENEY  
Justice of the Supreme Court

MOTION DATE 10-27-07  
ADJ. DATE 1-15-09  
Mot. Seq. # 005 - MD  
# 006 - MD

-----X  
STEPHANIE BUTLER-CARR, an infant by her :  
mother and natural guardian, SUZANNE BUTLER :  
and SUZANNE BUTLER, individually, :  
:  
Plaintiffs, :  
:  
- against - :  
:  
ST. CATHERINE OF SIENNA MEDICAL :  
CENTER, PERSONAL WOMAN'S CARE, P.C. :  
and KEITH SOMMERS, M.D., :  
:  
Defendants. :  
-----X

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Upon the following papers numbered 1 to 67 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 38; 39 -55; Notice of Cross Motion and supporting papers \_\_\_\_\_; Answering Affidavits and supporting papers 56 - 63; Replying Affidavits and supporting papers 64 - 65; 66 - 67; Other \_\_\_\_\_; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motions by defendants for orders granting summary judgment dismissing the complaint against them are denied.

The complaint in this action sets forth causes of action sounding in medical malpractice and lack of informed consent on behalf of infant plaintiff, Stephanie Butler-Carr, with a derivative cause of action for loss of services asserted on behalf of Suzanne Butler, mother of the infant plaintiff. In plaintiffs' bill of particulars, it is asserted that defendants Personal Woman's Care, PC and Dr. Keith Sommers were medically negligent and departed from accepted standards of care in the treatment of plaintiffs during the pre-natal period, labor, delivery, and immediate post-natal period. Plaintiffs also allege, among other things, that defendants failed to timely and closely review the fetal heart monitor strips; failed to properly heed plaintiffs symptoms; subjecting the fetus to hypoxic injury; failing to diagnose and respond to decelerations in fetal heart rate; permitting the fetus to suffer hypoxia and brain damage; and

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failing to perform a timely cesarean section delivery. With respect to defendant St. Catherine of Sienna Medical Center (hereinafter "St. Catherine"), plaintiffs allege that the hospital was medically careless, culpable and departed from accepted standards of care by failing to properly and adequately supervise, monitor and oversee its employees, and in failing to ensure that established protocols were followed. Plaintiffs claim that as a result of these departures, infant plaintiff suffered injuries including, among other things, static encephalopathy, irreversible brain damage, hypotonia, severe hypotonus, significant motor development delays, joint contractures, ocular torticollis, ptosis, strabismus, amblyopia, tracheomalacia, and gastroesophageal reflux.

Defendants Dr. Sommers and Personal Woman's Care, P.C. now move for summary judgment in their favor dismissing the complaint against them on the grounds that their care and treatment of plaintiff mother and infant plaintiff in no way departed from good and accepted medical standards of care. In support of their motion, they submit, among other things, the pleadings; medical records related to plaintiffs' treatment from St. Catherine, Personal Woman's Care, Pediatric Associates, Brookhaven Memorial Hospital Medical Center, and Stony Brook University Hospital. Defendants also submit a copy of the transcript of plaintiff Suzanne Butler's deposition testimony; medical records of Dr. Robert Trepel and Dr. Rosemarie Sy-Kho, pediatric neurologists; medical records of Dr. Joyce Fox, a genetics specialist, medical report of Dr. Dennis Carey, a pediatric endocrinologist, a medical report of Dr. Nirmala Mitra, a child neurologist, expert affirmations from Dr. Victor Klein, a physician board certified in obstetrics and gynecology; Dr. Yitzak Frank, a physician board certified in psychiatry and neurology; Dr. Robert Zimmerman, a physician board certified in diagnostic radiology; and Dr. Kwame Anyane-Yeboa, a physician board certified in pediatrics and medical genetics.

St. Catherine also moves for summary judgment in its favor on the ground that its staff provided good and appropriate nursing care to plaintiff and infant plaintiff, that its staff did not depart from accepted standards of nursing practice, and that the care rendered was not proximately related to any claimed hypoxic event and its sequela. In support, it submits the pleadings, the medical records related to plaintiffs' care at the hospital, a copy of infant plaintiff's fetal heart tracings; transcripts of the deposition testimony of Dr. Sommers and Bette Weter, a registered nurse employed at St. Catherine; an expert affidavit of Maureen Reeves, a registered nurse; and an expert affirmation of Dr. Victor Klein, a physician board certified in obstetrics and gynecology.

The requisite elements of proof in an action to recover damages for medical malpractice are a deviation or departure from accepted practice and evidence that such departure was a proximate cause of injury or damage (*Feinberg v Feit*, 23 AD3d 517, 806 NYS2d 661 [2005]; *Lyons v McCauley*, 252 AD2d 516, 675 NYS2d 375 [1998] *lv denied* 92 NY2d 814). To make a prima facie showing of entitlement to summary judgment in an action to recover damages for medical malpractice, a defendant physician must establish through medical records and competent expert affidavits that the defendant did not deviate or depart from accepted medical practice in defendant's treatment of the patient (*Mendez v City of New York*, 295 AD2d 487, 744 NYS2d 847 [2002]). To rebut a prima facie showing by the defendant 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 [2004]);

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*Domaradzki v Glen Cove OB/GYN Assocs.*, 242 AD2d 282, 660 NYS2d 739 [1997]).

On a motion for summary judgment dismissing a medical malpractice action, a defendant has the initial burden of establishing that the treatment he or she rendered did not deviate from good and accepted medical practice, or that the plaintiff was not injured by such treatment (*see Shahid v New York City Health & Hosps. Corp.*, 47 AD3d 800, 850 NYS2d 519 [2008]; *Rebozo v Wilen, supra*; *Thompson v Orner*, 36 AD3d 791, 828 NYS2d 509 [2007]; *Williams v Sahay*, 12 AD3d 366, 783 NYS2d 664 [2004]). To make a prima facie showing of entitlement to judgment as a matter of law, defendant must establish through medical records and expert affidavits that he or she did not depart from accepted medical practice in the treatment of the plaintiff (*see Jones v Ricciardelli*, 40 AD3d 935, 836 NYS2d 879 [2007]; *Mendez v City of New York, supra*). If the defendant makes such a showing, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact by submitting an expert's affidavit or affirmation attesting to a departure from accepted medical practice and opining that the defendant's acts or omissions were a competent producing cause of the plaintiff's injuries (*see Rebozo v Wilen, supra*; *Vera v Soohoo*, 41 AD3d 586, 838 NYS2d 154 [2007]).

In Dr. Klein's affirmation he opines within a reasonable degree of medical certainty that the care and treatment rendered by Dr. Sommers was in accordance with proper and accepted medical practice and was not the proximate cause of the injuries alleged by plaintiffs. Dr. Klein states that his review of the various medical records shows Suzanne Butler began treating with Personal Woman's Care as a gynecology patient in 1998 and in December 2002, at 39 years of age, became pregnant. He states that Butler was admitted to St. Catherine on August 12, 2003 at around 1:45 a.m. for observation due to complaints of bleeding and cramping at about 39 weeks gestation. Dr. Klein states that from 8:10 a.m. to 8:55 a.m. transient fetal heart rate abnormalities, which resolved spontaneously were noted and that Dr. Sommers was notified by telephone at 8:55 a.m. regarding plaintiff's condition. He further states that Dr. Sommers performed a vaginal exam at 9:35 a.m. and noted that the cervix was only one centimeter dilated. He states that Dr. Sommers ordered the staff to prepare for a Caesarean section due to "non-reassuring fetal heart rate," although the fetal heart rate was normal prior to delivery. Dr. Klein states that infant plaintiff was delivered at 10:50 a.m. and infant's APGAR score was eight at one minute and nine at five minutes. Dr. Klein states that a nuchal cord was noted to be wrapped around infant plaintiff's neck. He also states that cord blood gas was drawn and sent to the laboratory was normal, and that infant plaintiff, spontaneously breathed and cried upon delivery and had no abnormalities.

Dr. Klein states that the neonatologist's exam notes that infant plaintiff had a normal-shaped head, eyes within normal appearance, clear breath sounds in the lungs; it states the final impression was that plaintiff delivered a full term normal baby girl. Dr. Klein further indicates that it is not until four months after infant's birth that notations of neurological impairment are seen in infant's pediatric records. He concludes that infant plaintiff's developmental delays were not caused by the care and treatment rendered by Dr. Sommers, either prenatally or at the time of labor and delivery.

In Dr. Frank's affirmation, he states that the care rendered by Dr. Sommers was in accordance with proper and accepted medical practice and was not the proximate cause of the injuries alleged by plaintiffs. Dr. Frank states that there were no signs or symptoms of Hypoxic Ischemic Encephalopathy (HIE) due to fetal distress at the time of infant plaintiff's birth, and that no further care by Dr. Sommers

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could have prevented her developmental delay. Dr. Frank further opines that, within a reasonable degree of medical certainty, infant plaintiff's developmental delays are related to a genetic disorder involving the gyri of the brain, and are wholly unrelated to the care and treatment rendered to her or her mother. He states that developmental delay can have many different causes, but given the post-delivery laboratory values of the infant, mainly umbilical cord gases within normal limits, APGAR scores indicative of a neurologically intact infant, and no hypotonia noted at birth, it is his opinion that the developmental delay was not a result of the care and treatment rendered by Dr. Sommers.

In Dr. Zimmerman's affirmation, he states that a radiologist's review of a CT Scan of the infant's brain performed on November 8, 2003 reported a normal looking brain with no signs of abnormal shading or graying, which would be indicative of hypoxia. Dr. Zimmerman further states that after reviewing a CT scan of infant plaintiff's dated December 25, 2003 and an MRI of her brain dated July 15, 2005, he concludes that there are no signs of hypoxia on the films, as there are no demarcations on the film to suggest a hypoxic event. He opines that the films do demonstrate the existence of a brain anomaly to the gyri (the most outer portion of the brain known as gray matter), and that the gyri, which is thicker than normal in the temporal and parietal lobes of infant plaintiff's brain, a condition known as Pachygyri, caused developmental delays.

In Dr. Anyane-Yebo's affirmation, he opines that, within a reasonable degree of medical certainty, the care rendered by Dr. Sommers was not the proximate cause of the injuries to infant plaintiff. He states that infant plaintiff's developmental delays are related to a genetic disorder involving the gyri of the brain and wholly unrelated to the care and treatment by Dr. Sommers. He further states that a diagnosis of developmental delay in a newborn, three months after birth, does not connote a causal connection between Dr. Sommers care of plaintiff mother and infant plaintiff's developmental delay.

In Maureen Reeves' affidavit, she states that, based upon a reasonable degree of nursing certainty, St. Catherine, through its nursing staff, exercised good and accepted professional judgment in their care and treatment of plaintiff and did not deviate from accepted standards of nursing practice. She states that at 8:10 a.m., Bette Weter, the nurse caring for plaintiff, correctly interpreted the fetal heart tracings, which revealed occasional variable decelerations, and properly noted it. She opines that based on her review of the fetal heart tracings, no supplemental oxygenation was necessary. She further states that the variable decelerations were correctly attributed to cord compression and did not evidence fetal distress. She concludes that the nursing staff at St. Catherine acted appropriately in assessing plaintiff's changing condition and timely advised her obstetrician.

Here, through defendants' submissions, they established their prima facie entitlement to summary judgment dismissing the cause of action sounding in medical malpractice (*see Bengston v Wang*, 41 AD3d 625, 839 NYS2d 159 [2007]). Plaintiffs oppose defendants' motions and argue that defendants departed from accepted standards, failed timely to deliver the distressed fetus, and proximately caused the fetus to suffer hypoxic injury. In support of their motion, they submit, among other things, three physician affirmations, genetic testing records, hospital records, and an MRI report of infant plaintiff's brain.

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An affirmation by plaintiffs' expert, a physician board certified in obstetrics and gynecology, opines that the attending obstetrician and the hospital staff who cared for plaintiff and infant plaintiff during the delivery failed to provide medical services within accepted standards. The affirmation states that a review of the labor and delivery records reveals that two significant medical errors were made during labor: failure to recognize that the fetus was in distress, and failure to deliver the fetus in a timely fashion. Plaintiffs' expert states that according to the hospital records, infant plaintiff was delivered by cesarean section due to non-reassuring fetal heart rate, meaning the baby appears not to be tolerating labor well. The expert states that Suzanne Butler was placed on a fetal heart rate monitor when she arrived at the hospital around midnight, and at that time the fetal heart rate was stable and balanced. Plaintiffs' expert states that at 4:00 a.m. the fetal heart monitor showed changes in the heart rate in that the heart rate had risen from 120 beats per minute to 150 beats, and was beginning to show early signs that the fetus was not tolerating the labor well. At this point, according to the expert, while there is no fetal distress, proper medical care required that the fetus be closely monitored. The expert states that at 6:00 a.m. the fetal heart monitor began to "flatten out" and the beat-to-beat variability of the fetal heart rate began to diminish. It states that soon after, as "late decelerations" occurred, the heart rate climbed over 150 beats per minute and became tachycardic, there were clear signs that the fetus was not able to tolerate prolonged labor. The expert states that at 7:00 a.m. the fetal heart rate was intensifying to 160 beats per minute and the beat-to-beat variability was markedly diminished with no reassuring accelerations. At 7:20, the fetal heart sustained a "particularly ominous late deceleration, falling off by almost 70 beats per minute and remaining decelerated for over one minute." The expert physician opines that at this time, there were clear and accepted indicators that the fetus was compromised in that the abnormal fetal rate suggested that the heart was unable to supply sufficient oxygen to the vital organs, leaving the fetus vulnerable to oxygen-deprivation injuries.

Plaintiffs' expert further states that at this time, the accepted standard of medical care required that attempts to deliver the baby in a normal spontaneous fashion be abandoned and that steps be taken to deliver the baby by cesarean section. The expert states that the standard of care required the baby be delivered within 30 minutes, which would be 7:50 a.m., at the latest. The expert states that while Dr. Sommers decided to perform a cesarean section at 9:35 a.m., he delayed delivery for more than one hour and 15 minutes. The expert concludes that delay in not delivering the baby until 10:50 a.m. is unacceptable and constitutes a deviation from accepted practice. The expert also states that post-delivery findings reveal that the umbilical cord was wrapped around infant plaintiff's neck, the fetal heart struggled to keep pace, and unable to withstand the stress of labor, the infant passed meconium in utero. The physician opines that deficits, including hypotonia and developmental delays, can be caused by deprivation of oxygen during labor, and that if infant plaintiff had been delivered by 7:50 a.m. she would not have suffered deprivation of oxygen to the brain and other tissues.

An affirmation by plaintiffs' second expert, a physician board certified in diagnostic radiology, states that the physician conducted a review of an MRI (magnetic resonance imaging) examination of infant plaintiff's brain taken in July 2005. The expert radiologist states that there is no evidence of any anomaly or abnormality in the brain, and no evidence of thickening of the temporal or parietal lobes. The expert radiologist states that the gyri appears normal in all planes, and disagrees with defendants' expert that the MRI study revealed the condition known as Pachygyri. The expert radiologist concludes that although the MRI study does not contain radiological findings which one may diagnose HIE, HIE

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may produce changes that are "sub-clinical in nature" and not visible on MR imaging or CT scans.

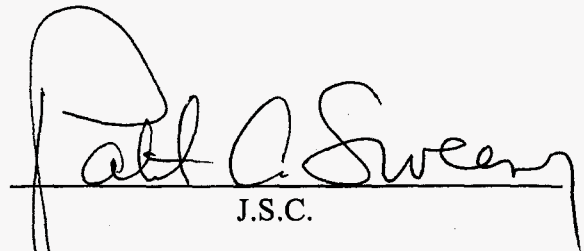
An affirmation by plaintiffs' third expert, a physician board certified in neurology, states that, within a reasonable degree of certainty, that perinatal ischemic hypoxia is a proximate cause of infant plaintiff's developmental delay. The expert neurologist further concludes that infant plaintiff's HIE was caused by events which occurred during the course of Suzanne Butler's labor, and had these events been prevented the HIE would not have occurred.

In reply, defendants Dr. Sommers and Personal Woman's Care PC contend that plaintiffs failed to raise an issue of fact due to deficiencies in their experts' submissions. Specifically, defendants contend that plaintiffs' experts failed to address defendants' argument that the alleged injuries were not due to an birth-related hypoxic event, that the signs and symptoms of developmental delay experienced by infant plaintiff occurred months after her birth, and that there were no signs or symptoms of HIE due to fetal distress at the time of birth. St. Catherine argues that plaintiffs' experts are silent as to the specific departures by the staff at St. Catherine and that plaintiff's expert failed to establish a causal connection between labor and delivery and infant's injuries.

Plaintiffs' expert physician specializing in obstetrics stated within reasonable medical certainty in the affidavit that if infant plaintiff had been delivered by 7:50 a.m., she would not have suffered deprivation of oxygen to the brain and other tissues. Contrary to defendants' contentions, plaintiffs' expert affidavits cannot be deemed conclusory or speculative, as such affidavits established the elements of a medical malpractice claim by specific factual references to the time that infant plaintiff was in fetal distress based on fetal monitoring and the time that Dr. Sommers delivered infant plaintiff (see *Wiands v Albany Med. Ctr.*, 29 AD3d 982, 816 NYS2d 162 [2006]; *Feinberg v Feit, supra*). 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 [2004]; *Barbuto v Winthrop Univ. Hosp.*, 305 AD2d 623, 760 NYS2d 199 [2003]). Such credibility issues can only be resolved by a jury (see *Feinberg v Feit, supra*). Here, plaintiffs raised triable issues of fact by submitting affirmations of the expert physicians which contradict defendants' experts by opining that departures by Dr. Sommers and the hospital staff in significantly delaying delivery of infant plaintiff while in fetal distress proximately caused her injuries, which were not necessarily unavoidable (see *Bengston v Wang, supra*).

Accordingly, the instant motions are denied.

Dated: 5-7-09

  
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J.S.C.

\_\_\_\_ FINAL DISPOSITION  X  NON-FINAL DISPOSITION