

**Bacani v Rosenberg**

2009 NY Slip Op 31190(U)

May 20, 2009

Supreme Court, New York County

Docket Number: 118041/05

Judge: Joan B. Carey

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: Honorable Joan B. Carey  
Justice

PART 29

MARIA TERESA BACANI Individually,  
and as Administrator of the Estate  
of Jonathan Bacani, Deceased, and  
ABRAHAM BACANI

INDEX NO. 118041/05

Plaintiffs,

- v -

Motion Sequence No. 7.8

LISA ROSENBERG, M.D., DEEPAK  
NANDA, M.D., ARTHUR FOUNGNER,  
M.D., ADIEL FLEISCHER, M.D., LONG  
ISLAND JEWISH MEDICAL CENTER and  
SONOSCAN, INC.,

**FILED**  
JUN 01 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Defendants.

The following papers, 1- 69, were read on this motion by defendant Lisa Rosenberg, M.D. for summary judgment dismissing the complaint; cross-motion by defendant Deepak Nanda, M.D. for summary judgment dismissing the complaint; cross-motion by plaintiffs for summary judgment against defendants Lisa Rosenberg, M.D. and Deepak Nanda, M.D. as to liability; and separate motion by defendant Arthur Fougner, M.D. for summary judgment dismissing the complaint.

Motion Sequence Number 7:

Papers Numbered

- Notice of Motion (Lisa Rosenberg, M.D.) -
- Affidavits - Exhibits
- Notice of Cross-Motion (Deepak Nanda, M.D.) -
- Affidavits - Exhibits
- Notice of Motion Cross-Motion (Plaintiffs) -
- Affidavits In Support/Opposition- Exhibits
- Affirmation In Opposition/Reply (Lisa Rosenberg, M.D.)
- Exhibits
- Affirmation In Opposition/Reply (Deepak Nanda, M.D.)
- Replying Affirmation/Further Support (Plaintiffs)
- Exhibit

- | 1-15
- | 16-21
- | 22-49
- | 50-51
- | 52
- | 53-54

Motion Sequence Number 8:Papers Numbered

Notice of Motion (Arthur Fougner, M.D.)

- Affidavits - Exhibits - Memo of Law

Affirmation in Opposition - Affidavits - Exhibits

Replying Affirmation - Exhibits

55-68(22-49)69Cross-Motion:  Yes  No

On February 26, 2004, plaintiff Mrs. Bacani, presented to defendant Lisa Rosenberg, M.D., an OB/GYN, for prenatal care and delivery of her baby. During this first visit, Dr. Rosenberg noted that Mrs. Bacani, who was approximately thirty-nine years old at the time, was approximately seven weeks pregnant. Mrs. Bacani was referred to an imaging center called Sonoscan for a sonogram. On March 12, 2004, Mrs. Bacani presented to Sonoscan for the performance of the sonogram. According to the chart notes relating to this visit, as well as the deposition testimony of Guy Pierno, a medical assistant employed by Sonoscan, Mrs. Bacani's sonogram was performed by Mr. Pierno. Notwithstanding, according to Mrs. Bacani, this sonogram was performed by defendant Arthur Fougner, M.D., who is an independent contractor at Sonoscan.<sup>1</sup> In any event, Dr. Fougner reviewed the sonogram and confirmed that Mrs. Bacani was nine weeks pregnant, and also noted the presence of the fibroid in her uterus. Dr. Fougner reported the results of the sonogram to Dr. Rosenberg, advising Dr. Rosenberg of the presence of the fibroid and its size.

Mrs. Bacani followed up with Dr. Rosenberg on March 25, 2004, and again May 3, 2004. Dr. Rosenberg was aware of the presence and the size of the fibroid in Mrs. Bacani's uterus at this time, as indicated in Mrs. Bacani's medical records, as well as the deposition testimony of Dr. Rosenberg. Notwithstanding, Dr. Rosenberg believed that Mrs. Bacani had a very low risk of fetal demise, and, according to Mrs. Bacani, Dr. Rosenberg indicated to her that everything was fine with her pregnancy. Mrs. Bacani was referred for another sonogram and presented to Sonoscan on May 13, 2004. During this visit she was evaluated by Natalie Meirowitz, M.D., a board certified OB/GYN, whose specialty is maternal-fetal medicine. Dr. Meirowitz reviewed an ultrasound and noted the existence of the fibroid. Additionally, it is noted in Mrs. Bacani's records that Dr. Meirowitz discussed the risks associated with fibroids in pregnancy with Mrs. Bacani.

Thereafter, Mrs. Bacani followed up with Dr. Rosenberg on May 17, 2004, and June 14, 2004, and, according to Mrs. Bacani, Dr. Rosenberg indicated to her that everything was fine with her pregnancy. Mrs. Bacani returned to Sonoscan on July 20, 2004. According to the chart notes relating to this visit to Sonoscan, as well as the deposition testimony of Guy Pierno, Mrs. Bacani's sonogram of July 20, 2004 was performed by Mr. Pierno. However, according to Mrs. Bacani, this sonogram, like the one performed in March of 2004, was performed by Dr. Fougner. It is undisputed that Dr. Fougner reviewed this sonogram, and in a report, again, he confirmed

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<sup>1</sup> According to Dr. Fougner's deposition testimony he was board certified in obstetrics and gynecology, but his practice presently, and at the time of the treatment at issue herein, was limited to diagnostic ultrasound and fetal evaluation.

the presence of the fibroid in Mrs. Bacani's uterus, and noted its size. Dr. Fougner reported the results of the sonogram to Dr. Rosenberg.

Mrs. Bacani followed up with Dr. Rosenberg again on July 22, 2004, and August 16, 2004. According to Mrs. Bacani, Dr. Rosenberg continued to indicate to her that everything was fine with her pregnancy. Notwithstanding, on her visit of August 16, 2004, Dr. Rosenberg referred her to Deepak Nanda, M.D., a specialist in maternal fetal medicine, for ultrasound studies involving fibroids. Mrs. Bacani sets forth in an affidavit submitted in connection with the instant motions that on her visit of August 16, 2004, Dr. Rosenberg advised her, for the first time, that her pregnancy was "high risk." Dr. Rosenberg, testified at her deposition, that Mrs. Bacani remained at minimal risk for fetal demise at this time. Mrs. Bacani presented to Dr. Nanda on August 31, 2004. The extent of the examination performed by Dr. Nanda is disputed by the parties. Despite Dr. Nanda's testimony that he always performs a thorough examination that can last for over 30 minutes, plaintiffs allege that Dr. Nanda's examination of Mrs. Bacani was "half-hearted" and was performed while Dr. Nanda was eating potato chips and talking on the telephone. In any event, Dr. Nanda found no indication of uterine-placental insufficiency during his examination. Mrs. Bacani was instructed to return to Dr. Nanda in two weeks, for a reevaluation. Thereafter, on September 6, 2004, Mrs. Bacani presented to Dr. Rosenberg, and, according to Mrs. Bacani, she was once again advised by Dr. Rosenberg that everything was fine with her pregnancy. The records indicate that there was "much fetal movement" during this examination.

Thereafter, Mrs. Bacani was seen by Dr. Nanda, on September 17, 2004. At this visit Dr. Nanda noted fetal demise. Mrs. Bacani immediately was admitted to defendant Long Island Jewish Medical Center where the fetal demise was confirmed. Shortly thereafter, Dr. Rosenberg, in conjunction with Dr. Nanda and defendant Adiel Fleischer, M.D., decided to await spontaneous labor. Mrs. Bacani was instructed to return to Long Island Jewish Medical Center for the spontaneous delivery of the fetus when she went into labor. Notwithstanding, Mrs. Bacani presented to New York Presbyterian Hospital on or about September 27, 2004, where the deceased fetus was removed via cesarean section. The plaintiffs named the unborn fetus "Johnny."

Plaintiffs commenced the instant medical malpractice action against above captioned defendants with the filing of a summons and complaint on or about December 30, 2005. Plaintiffs allege, *inter alia*, defendants performed inadequate fetal surveillance and monitoring despite the increased risk of fetal death occasioned by Mrs. Bacani's advanced age, and the presence of a large uterine fibroid. Plaintiffs further allege that Mrs. Bacani was never informed by the defendants about the risks posed by her age and the presence of the fibroid in her uterus. Plaintiffs complaint also contains a cause of action asserted by her husband, Abraham Bacani, for loss of consortium, as well as a wrongful death claim asserted by plaintiffs' for the loss of their unborn child.

Discovery has been completed, a note of issue/certificate of readiness has been filed, and this action is now ready for trial. Defendant Lisa Rosenberg, M.D. presently moves for summary judgment dismissing the complaint as asserted against her. Defendant Deepak Nanda, M.D. presently cross-moves for summary judgment dismissing the complaint as asserted against him. Plaintiffs also have submitted a cross-motion, seeking summary judgment against defendants Lisa Rosenberg, M.D. and Deepak Nanda, M.D. on the issue of liability. By way of separate motion, defendant Arthur Fougner, M.D. seeks summary judgment dismissing the

complaint as asserted against him.

“[T]he remedy of summary judgment is a drastic one, which should not be granted when there is any doubt as to the existence of a triable issue or where the issue is even arguable, since it serves to deprive a party of his day in court.” (*Byrnes v. Scott*, 175 AD2d 786 [1st Dept. 1991], quoting *Gibson v. Am. Export*, 125 AD2d 65 [1st Dept. 1987]). Initially, “the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; see also *Winegrad v. New York Univ. Med. Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). A failure by the movant in demonstrating, *prima facie*, its entitlement to judgment as a matter of law requires the denial of summary judgment, regardless of the sufficiency of the opposing papers (see *Alvarez v. Prospect*, *supra*; *Winegrad v. New York Univ. Med. Center*, *supra*). Where a *prima facie* showing of entitlement to judgment as a matter of law has been properly demonstrated, the burden then shifts to the party opposing the motion to produce evidence that establishes the existence of material issues of fact which require a trial in the action (see *Alvarez v. Prospect*, *supra*; *Zuckerman v. City of New York*, *supra*).

Defendant Lisa Rosenberg, M.D.

Defendant Lisa Rosenberg, M.D. presently moves for summary judgment dismissing the complaint as asserted against her, arguing that the care and treatment she rendered to Mrs. Bacani was in accordance with good and accepted medical practice. Dr. Rosenberg relies upon, *inter alia*, the expert affidavit of a physician who is board certified in obstetrics and gynecology. Dr. Rosenberg’s expert opines that the medical care and treatment rendered to Mrs. Bacani by Dr. Rosenberg “was at all times appropriate and in accordance with good and accepted medical practice as they existed in 2004.” According to Dr. Rosenberg’s expert, Dr. Rosenberg’s office evaluations of Mrs. Bacani on February 26, 2004, March 25, 2004, May 17, 2004, June 14, 2004, July 22, 2004, August 16, 2004 and September 6, 2004 were appropriately performed and the monitoring of Mrs. Bacani during these office visits was timely and appropriate. The expert adds that Dr. Rosenberg was aware of the existence of the fibroid, and undertook the appropriate surveillance and monitoring, both clinically and by sonogram. Dr. Rosenberg’s expert further opines that Dr. Rosenberg’s decision to await the spontaneous delivery of Mrs. Bacani’s fetus throughout the course of the pregnancy was appropriate, as there was no indication for an emergent delivery of the fetus prior to September 17, 2004. It is also the opinion of this expert that Dr. Rosenberg’s recommendation of a spontaneous delivery on September 17, 2004, and thereafter, was in accordance with the standard of care.

In opposition to Dr. Rosenberg’s motion for summary judgment plaintiffs’ submit, *inter alia*, an expert affidavit of a physician who is board certified in obstetrics and gynecology. With respect to the care and treatment rendered to Mrs. Bacani by Dr. Rosenberg, plaintiffs’ expert opines that Dr. Rosenberg departed from good and accepted medical practice, as it existed in 2004, “through her failure to prescribe and have performed antepartum fetal surveillance and testing of the unborn child “Johnny”, at least on a weekly basis, commencing at least as early as the thirty-second (32<sup>nd</sup>) week of gestation and continuing for so long as ‘Johnny’ was alive through the termination of the pregnancy.” Plaintiffs’ expert sets forth that Mrs. Bacani presented with an increased risk of fetal death based upon her advanced age, and the presence of a large uterine fibroid. According to plaintiffs’ expert, the failure to perform such antepartum fetal surveillance was a substantial factor in causing the fetal death of Mrs. Bacani’s unborn

child. Plaintiffs' expert additionally opines that it was a departure on the part of Dr. Rosenberg in not advising and counseling Mrs. Bacani on the benefits of having such antepartum fetal surveillance and testing, and discussing with her the risks of not performing such surveillance. The failure to have such discussion with Mrs. Bacani, according to the expert, was a substantial factor in causing the fetal death of Mrs. Bacani's unborn child. Lastly, with respect to the care and treatment rendered to Mrs. Bacani by Dr. Rosenberg, plaintiffs' expert opines that Dr. Rosenberg departed from good and accepted medical practice in failing to direct, order and/or indicate to Dr. Nanda that antepartum fetal surveillance and testing should be performed when referring Mrs. Bacani to Dr. Nanda for treatment. According to the expert, this departure was also a substantial factor in causing the fetal death of Mrs. Bacani's unborn child.

Plaintiffs' expert sets forth in his affidavit that:

"[a] review of the records indicates that 'Johnny' died from uteroplacental insufficiency caused by both advanced maternal age and a uterine myoma. Both have a potential to reduce placental blood flow and the presence of both increases the risk over that of each individually. Perinatal mortality in patients over 35 is increased even when controlling for diabetes, hypertension, and placental abruption indicating a specific risk for age. With advanced maternal age there is an increased risk of fetal death from uteroplacental insufficiency. This is increased by the presence of a large uterine myoma. Uterine myomas result in decreased blood flow to the uterine lining in the area of the myomas. The portion of the placenta implanting over the myoma has reduced uteroplacental flow as a result of the myoma. Fetal death from uteroplacental insufficiency is preventable by antepartum fetal surveillance and testing with non-stress tests, oxytocin challenge tests and biophysical profiles."

Dr. Rosenberg submitted an expert affidavit in reply to plaintiffs' expert's affidavit. In reply, Dr. Rosenberg's expert states the type of antepartum fetal surveillance and testing that plaintiffs' expert suggests should have been performed was not the standard of care in 2004, and was not indicated in this case. Dr. Rosenberg's expert further states that the cause of the fetal demise herein, as stated in the autopsy report, is not known, and, thus, plaintiffs' expert cannot definitively state the fetal demise was preventable through additional surveillance and testing.

In response, plaintiffs' expert submitted an additional affidavit, reiterating that in 2004, the standard of good and accepted medical practice would have required antepartum fetal surveillance and testing of Mrs. Bacani, based upon her advanced age, and the presence of the fibroid in her uterus. Additionally, plaintiffs' expert states in this affidavit that despite Dr. Rosenberg's expert's opinion to the contrary, the results of fetal autopsy are consistent with his opinion that the defendants' departures were a substantial factor in causing fetal death. The expert sets forth that the autopsy report noted "multifocal chronic and acute infarcts in the placenta" suggesting "uteroplacental insufficiency." As the expert explains, "[i]nfarcts appear when there is a lack of blood supply to the placenta, and are caused by uteroplacental insufficiency. When the placenta is deprived of an adequate blood supply, the fetus is deprived of oxygen." The expert further explains that the deprivation of oxygen is a known cause of depression of the cardiac muscle, which may result in cardiac failure and terminal cardiac arrest. According to plaintiffs' expert, the proper surveillance and testing of Mrs. Bacani would have shown that the fetal heart was being deprived of oxygen due to uteroplacental insufficiency, and,

thus, a failure to perform such testing was a substantial factor in causing fetal death.

Based upon the conflicting expert affidavits submitted by the parties, it appears that issues of fact and credibility exist in connection with, *inter alia*, whether antepartum fetal surveillance and testing of Mrs. Bacani's unborn child should have been performed by Dr. Rosenberg, at least on a weekly basis, commencing at least as early as the thirty-second (32<sup>nd</sup>) week of gestation and continuing for so long as the fetus was alive through the termination of the pregnancy. Such issues cannot be resolved on this motion for summary judgment (see Bradley v. Soundview Healthcenter, 4 AD3d 194 [1st Dept. 2004]; Morris v Lenox Hill Hosp., 232 AD2d 184 [1996]).

Defendant Deepak Nanda, M.D.

Defendant Deepak Nanda, M.D. presently cross-moves for summary judgment dismissing the complaint as asserted against him, arguing that he did not depart from the applicable standard of care in rendering care and treatment to Mrs. Bacani, and did not proximately cause any of the injuries alleged herein. In support of his motion Dr. Nanda relies upon, *inter alia*, the expert affidavit of a physician who is board certified in obstetrics and gynecology, as well as maternal fetal medicine. Dr. Nanda's expert sets forth that Mrs. Bacani, on or about August 31, 2004, was referred to Dr. Nanda by Dr. Rosenberg, who was managing the prenatal care, for the performance of a sonogram, to address the pregnancy in light of the diagnosis of fibroids in Mrs. Bacani's lower uterine segment. Dr. Rosenberg did not request that Dr. Nanda perform a complete consultation. Dr. Nanda's expert notes that prior to the one examination of Mrs. Bacani by Dr. Nanda, Mrs. Bacani had an unremarkable course with regard to abnormal prenatal symptomatology, *i.e.*, no signs or symptoms of vaginal bleeding, abdominal pain, or other vaginal discharge or abnormality. According to Dr. Nanda's expert, the sonogram interpreted by Dr. Nanda appropriately described the fetal growth, as well as the location and the size of the fibroids in Mrs. Bacani's lower uterine segment. This expert further states that Dr. Nanda correctly concluded that there was no fetal compromise. Despite the presence of the myoma (fibroid), which was noted in Mrs. Bacani's lower uterine segment, there was normal development, no abnormalities, no signs of fetal distress, no retardation in development or compromise of the amniotic fluid. Based upon the foregoing, Dr. Nanda's expert opines that there were no indications that warranted the consideration or performance of an emergency cesarean section, at that time.

Dr. Nanda's expert also states that Dr. Nanda appropriately expressed his concerns of potential complications and implication of the fibroids on the pregnancy with Mrs. Bacani, and properly reported his evaluations and recommendations to Dr. Rosenberg. Notwithstanding, when Mrs. Bacani returned to Dr. Nanda for her scheduled follow-up visit on September 17, 2004, she was diagnosed with fetal demise. According to the expert, based upon the examination and the findings made by Dr. Nanda on August 31, 2004, it was appropriate and proper to request a follow-up evaluation in two weeks. Further, based upon the examination and the findings made by Dr. Nanda on August 31, 2004, no additional fetal testing or monitoring was warranted.

In conclusion, Dr. Nanda's expert sets forth that:

“[t]o a reasonable degree of Perinatal and Obstetrical certainty, the interpretation of the sonogram of August 31<sup>st</sup>, the subsequent consultations by Dr. Nanda with the patient, Dr. Nanda's reporting of his findings to Dr. Rosenberg and Dr. Nanda's scheduled follow-up with the patient, Dr. Nanda did not deviate from good and accepted standards of obstetrical and perinatal medical practice in the evaluation and treatment of this patient.”

In opposition to Dr. Nanda's motion for summary judgment plaintiffs' obstetrics and gynecological expert opines that Dr. Nanda departed from good and accepted medical practice, as it existed in 2004, “through his failure to prescribe and/or perform antepartum fetal surveillance and testing of the unborn child ‘Johnny’, at least on a weekly basis, commencing August 31, 2004 and continuing for so long as ‘Johnny’ was alive through the termination of the pregnancy.” Again, according to this expert, Mrs. Bacani presented with an increased risk of fetal death based upon her advanced age, and the presence of a large uterine fibroid. The expert sets forth that the failure to perform such antepartum fetal surveillance was a substantial factor in causing the fetal death of Mrs. Bacani's unborn child. Additionally, plaintiffs' expert opines that it was a departure on the part of Dr. Nanda in not advising and counseling Mrs. Bacani on the benefits of having such antepartum fetal surveillance and testing, and discussing with her the risks of not performing such surveillance. The failure to have that discussion with Mrs. Bacani, according to the expert, was a substantial factor in causing the fetal death of Mrs. Bacani's unborn child.

Plaintiffs' expert further opines that Dr. Nanda departed from the applicable standard of medical care in failing to make an assessment of the risk of fetal death during his examination of Mrs. Bacani on August 31, 2004, and that such a departure was a substantial factor in causing the fetal death of Mrs. Bacani's unborn child. The expert also opines that Dr. Nanda should have considered scheduling a follow-up visit for the next week, on September 6, 2004, for testing and surveillance. According to the expert, Dr. Nanda's failure to do so was a substantial factor in causing the fetal death of Mrs. Bacani's unborn child.

Based upon the conflicting expert affidavits submitted by the parties, it appears that issues of fact and credibility exist in connection with, *inter alla*, whether antepartum fetal surveillance and testing of Mrs. Bacani's unborn child should have been performed by Dr. Nanda during his examination of Mrs. Bacani on August 31, 2004; and whether Dr. Nanda should have made an assessment of the risk of fetal death during his examination of Mrs. Bacani on August 31, 2004. Such issues cannot be resolved on this motion for summary judgment (see Bradley v. Soundview Healthcenter, 4 AD3d 194 [1st Dept. 2004]; Morris v Lenox Hill Hosp., 232 AD2d 184 [1996]).

## Plaintiffs

Plaintiffs have submitted a cross-motion, seeking summary judgment against defendants Lisa Rosenberg, M.D. and Deepak Nanda, M.D. on the issue of liability. However, as set forth above, issues of fact exist in connection with whether Dr. Rosenberg and/or Dr. Nanda departed from good and acceptable medical practice in their respective care and treatment of Mrs. Bacani, requiring a trial of this action, on the question of liability, as to these defendants. Accordingly, plaintiffs' cross-motion seeking summary judgment against defendants Dr. Rosenberg and Dr. Nanda on the issue of liability, is denied.

### Defendant Arthur Fougner, M.D.

By separate motion, defendant Arthur Fougner, M.D. moves for summary judgment dismissing the complaint. Dr. Fougner argues that summary judgment is warranted and the complaint, as asserted against him, should be dismissed because he did not depart from good and accepted medical practice in his treatment and care of Mrs. Bacani, and that such treatment was not the proximate cause of any injury. In support of his motion, Dr. Fougner relies on, *inter alia*, the expert affidavit of a physician who is board certified in radiology, with a certification in diagnostic radiology. According to Dr. Fougner's expert, plaintiffs have "misguidedly asserted several theories of purported negligence against Dr. Fougner . . . ." The expert first sets forth that Dr. Fougner did not fail to inform Mrs. Bacani that the fibroid tumor in her uterus was growing large enough to injure her fetus. The expert states that it is the duty of a patient's obstetrician to discuss the risks associated with fibroids during pregnancy, and not that of Dr. Fougner, who was simply responsible for evaluating ultrasounds. The expert further states that the medical records indicate that Natalie Melrowitz, M.D., a maternal fetal medicine specialist at Sonoscan, discussed the risks of fibroids during pregnancy with Mrs. Bacani, and, thus, Dr. Fougner would not have a duty to discuss these risks with her for a second time. With respect to causation, Dr. Fougner's expert sets forth that the injuries alleged herein would have not been avoided even if Dr. Fougner advised Mrs. Bacani of the risks presented by fibroids during pregnancy.

Dr. Fougner's expert also opines that Dr. Fougner did not depart from good and accepted medical practice in connection with the level of antepartum fetal surveillance and testing provided to Mrs. Bacani. This expert, again, reiterates that Dr. Fougner's role in Mrs. Bacani's care was to evaluate ultrasounds and report to Dr. Rosenberg, which according to the expert, he properly did. The expert sets forth that "[i]t would not be Dr. Fougner's role to manage the pregnancy or recommend additional monitoring based upon [his] review of the ultrasounds." Dr. Fougner may have had a duty to order additional studies if there was a problem with the quality or interpretation of the sonograms he reviewed. However, in the opinion of his expert, there were no such problems encountered by Dr. Fougner herein. Dr. Fougner's expert adds that Mrs. Bacani received sufficient antepartum fetal surveillance and testing, and that additional testing would not have avoided the injuries alleged, in this action. Lastly, Dr. Fougner's expert addresses the issue of whether Dr. Fougner departed by failing to deliver Mrs. Bacani's fetus prior to death, stating that it would have been a departure on Dr. Fougner's part if he did attempt to deliver the fetus. As the expert explains, Dr. Fougner's practice is limited to performing diagnostic studies, he does not have any privileges to admit patients to any hospital, and he did not have the ability to deliver the fetus.

The aforementioned affidavit of Dr. Fougner's expert is detailed, specific and factual in nature and does not merely assert in simple conclusory form that Dr. Fougner acted within the accepted standards of medical care. This affidavit is sufficient to make a *prima facie* showing of entitlement to judgment as a matter of law, demonstrating the absence of any material issues of fact with respect to the adequacy of the medical treatment provided by Dr. Fougner to Mrs. Bacani (see Suib v. Keller, 6 AD3d 805 [3rd Dept. 2004]; Juba v. Bachman, 255 AD2d 492 [2d Dept. 1998]; see also Alvarez v. Prospect Hospital, *supra*). The burden, therefore, shifts to plaintiff to come forward with evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial in the action (see Alvarez v. Prospect, *supra*; Zuckerman v. City of New York, *supra*). Plaintiffs' expert affidavit submitted in opposition to the motion of Dr. Rosenberg and the cross-motion of Dr. Nanda does not address any of the treatment provided to Mrs. Bacani by Dr. Fougner. Plaintiffs have not provided any medical expert affidavit alleging that Dr. Fougner departed from good and accepted medical practice in his treatment of Mrs. Bacani. Without such competent medical evidence, plaintiffs are unable to raise a triable issue of fact, and defeat summary judgment (see Suib v. Keller, *supra*; Juba v. Bachman, *supra*; Frimmerman v. Bernstein, 107 AD2d 795 [2d Dept. 1985]; Fileccla v. Massapequa General Hospital, 99 AD2d 796 [1984]). Accordingly, Dr. Fougner's motion is granted.

The Court acknowledges that plaintiffs contend that Dr. Fougner was present in the room during Mrs. Bacani's sonograms of March 12, 2004 and July 20, 2004, which is disputed by Dr. Fougner. Notwithstanding, according to his expert, Dr. Fougner simply did not have a duty to manage Mrs. Bacani's pregnancy, and his care of Mrs. Bacani was limited to the interpretation of these sonograms. Despite plaintiffs' argument to the contrary, simply whether or not Dr. Fougner was present in the room during the performance of the sonograms does not alter his role in the treatment of Mrs. Bacani, and does not create a material issue of fact with respect to the adequacy of the medical treatment he provided to Mrs. Bacani. Without competent medical evidence setting forth that Dr. Fougner departed from good and accepted medical care in his treatment of Mrs. Bacani, plaintiffs are unable to defeat summary judgment.

Based on the foregoing, it is hereby

ORDERED that defendant Lisa Rosenberg, M.D.'s motion for summary judgment dismissing the complaint as asserted against her is denied; and it is further

ORDERED that by defendant Deepak Nanda, M.D.'s cross-motion for summary judgment dismissing the complaint as asserted against him is denied; and it is further

ORDERED that plaintiffs' cross-motion for summary judgment against defendants Lisa Rosenberg, M.D. and Deepak Nanda, M.D. as to liability is denied; and it is further

ORDERED that defendant Arthur Fougner, M.D.'s motion for summary judgment dismissing the complaint. As asserted against him is granted; and it is further

ORDERED that counsel for all parties are to appear before the court on May 22, 2009, at 9:30am, at 60 Centre Street, room 228, Part 29, for a pre-trial conference.

Dated: 5/20/2009

*Joan B. Carey*  
\_\_\_\_\_  
J.S.C.

Check one:  FINAL DISPOSITION       NON- FINAL DISPOSITION  
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*Joan B. Carey*  
\_\_\_\_\_  
JOAN B. CAREY

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JUN 01 2009  
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