SHORT FORM ORDER

INDEX NO. 07-5311
CAL. NO. 08-02338-MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 19 - SUFFOLK COUNTY

***PRESENT:***

Hon. SANDRA L. SGROI
Justice of the Supreme Court

MOTION DATE 2-10-09
ADJ. DATE 4-2-09
MOT. SEQ. # 002 MD

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| CASEY HARRIOTT, an infant under the age of three (3) years by his mother and natural guardian Suzanne Harriott and SUZANNE HARRIOTT, individually, | AGOGLIA, HOLLAND & AGOGLIA<br>Attorneys for Plaintiffs<br>500 North Broadway Suite 237<br>Jericho, NY 11753 |
| Plaintiffs, | WAGNER, DORMAN & LETO, P.C.<br>Attorneys for Defendants 24/7 and Crough<br>227 Mineola Boulevard<br>Mineola, NY 11501 |
| – against – | |
| TWENTY FOUR SEVEN EMERGENCY CARE, P.C., MITCHELL CAPLIN, M.D., DANIEL CROUGH, M.D. and SOUTHAMPTON HOSPITAL, | MULHOLLAND, MINION & ROE<br>Attorneys for Defendant Caplin<br>374 Hillside Avenue<br>Williston Park, NY 11596 |
| Defendants. | BARTLETT, McDONOUGH et al.<br>Attorneys for Defendant Hospital<br>300 Old Country Road<br>Mineola, NY 11501 |

Upon the following papers numbered 1 to 41 read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1 - 18 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 19 - 36 ; Replying Affidavits and supporting papers 37 - 41 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that the motion by defendant Southampton Hospital for summary judgment dismissing the complaint against it is denied.

On September 8, 2005, infant plaintiff Casey Harriott was brought to the emergency department of defendant Southampton Hospital by his mother, plaintiff Suzanne Harriott, with a

complaint of fever. Plaintiff, who resides in Connecticut with her family, was vacationing with her children in Montauk, New York when infant plaintiff became ill. Plaintiff sought emergency medical care from the hospital because she was concerned infant plaintiff, who was born with birth defects of the urinary and reproductive systems and had a kidney removed when he was six months old, might have a urinary tract infection. Prior to presenting at the emergency department, plaintiff put a urine collection bag on infant plaintiff, who was not quite 19 months old. Plaintiff had previously been instructed by infant plaintiff's treating pediatricians and pediatric urologist to collect a urine specimen if she suspected infant plaintiff may be suffering from an infection in his urinary system. Infant plaintiff was treated in the emergency department by defendant Mitchell Caplin, M.D. After conducting a physical examination of infant plaintiff and ordering a urinalysis test and culture of the specimen collected in the bag, Dr. Caplin discharged infant plaintiff from the emergency department without a diagnosis. Dr. Caplin allegedly advised plaintiff that her son might be suffering from an upper respiratory infection, and that he should be brought back to the emergency department if his condition worsened or he stopped taking fluids. Dr. Caplin also provided plaintiff with the telephone number of a local pediatrician in case she wanted to seek additional medical treatment for infant plaintiff.

Two days later, at approximately 2:00 p.m., infant plaintiff was brought by ambulance to Southampton Hospital's emergency department. After seeking medical treatment for both of her children at a medical clinic earlier in the day, plaintiff called for an ambulance to transport infant plaintiff to the hospital. According to plaintiff's deposition testimony, she called an ambulance because infant plaintiff was running a fever, was refusing to eat or drink, was crying inconsolably, and had spit up some blood. After arriving at the hospital, plaintiff retrieved a message on her cell phone from someone at the hospital advising that infant plaintiff should be brought back to the emergency department, because the urine culture started after his first visit was positive for bacteria. Plaintiff allegedly communicated this information to an emergency department nurse while she was waiting for infant plaintiff to be seen by a physician.

Infant plaintiff was evaluated by defendant Daniel Crough, M.D., an emergency medicine physician working in the emergency department that day. It is noted that Dr. Caplin and Dr. Crough are officers and shareholders of defendant 24/7 Emergency Care, P.C., s/h/a Twenty Four Seven Emergency Care, P.C., which provides physician staffing for the emergency department of Southampton Hospital. Dr. Crough wrote orders on infant plaintiff's chart for blood tests, a urinalysis test, a urine culture, and a chest x-ray. He also ordered a straight urethral catheterization to obtain a urine specimen from infant plaintiff, Tylenol with codeine, and an oral antibiotic after the catheterized specimen was collected. Erin McKay, the emergency department nurse taking care of infant plaintiff, first drew blood samples from veins in infant plaintiff's arms. Approximately one hour later, after the chest x-ray was performed, Nurse McKay performed a straight urethral catheterization of infant plaintiff, but was unable to obtain a urine specimen. It is noted that according to plaintiff's deposition testimony, Nurse McKay actually placed two different catheters in infant plaintiff's urethra during her first attempt to obtain a urine

specimen, and blood was present in the second catheter when it was removed. It also is noted that Dr. Crough testified at a pretrial deposition that he knew the results of the urinalysis test conducted on September 8, 2005 and the urine culture when he was treating infant plaintiff, and that he considered the possibility that the culture was positive for bacteria because the specimen had been contaminated. Both Dr. Crough and Nurse McKay testified that Dr. Crough was advised of the failure to obtain a urine specimen, and that Nurse McKay was instructed to tell plaintiff to encourage infant plaintiff to drink fluids and to perform another urethral catheterization of infant plaintiff. Plaintiff testified that Dr. Crough returned to the treatment area after the catheterization failed to produce a urine specimen, and that she advised him she was concerned her son was not eating or drinking. She testified she also asked Dr. Crough to contact infant plaintiff's pediatric urologist, Dr. Kevin Burbige. Sometime after this conversation, Dr. Crough paged Dr. Burbige.

Nurse McKay performed a second urethral catheterization of infant plaintiff approximately one hour after the first catheterization procedure, and again no urine was obtained. Plaintiff testified Nurse McKay provided water for her son as they were waiting in the treatment area, but he continued to refuse to drink. She testified she informed Nurse McKay of her belief that infant plaintiff was dehydrated and requested he be given fluids intravenously. After the second urethral catheterization procedure of infant plaintiff, Dr. Crough was contacted by Dr. Burbige, who also spoke with plaintiff, by telephone. At approximately 7:00 p.m. Nurse McKay gave infant plaintiff Tylenol with codeine. After consulting with Dr. Crough, Nurse McKay performed a third urethral straight catheterization of infant plaintiff approximately one hour after the second catheterization procedure, but no urine specimen was obtained. According to plaintiff's pretrial testimony, Nurse McKay repeatedly inserted and removed the catheter in infant plaintiff's urethra during the third catheterization procedure, and blood was present in the catheter each time it was removed.

Dr. Crough went off duty at approximately 7:45 p.m. that day, just after the third catheterization procedure was performed by Nurse McKay, and infant plaintiff's case was transferred to another emergency department physician, Dr. Ameres. Sometime after the third urethral catheterization infant plaintiff vomited the Tylenol. Yet another attempt was made by Nurse McKay to obtain a catheterized urine specimen from infant plaintiff approximately 1½ hours after the third catheterization procedure. No urine specimen was obtained. Plaintiff testified that during the fourth catheterization procedure she instructed Nurse McKay that she did not want another urethral catheter placed in her son. Against the medical advice of Dr. Ameres, plaintiff and her husband took infant plaintiff from the emergency department at approximately 11:00 p.m. and brought him back to the hotel in Montauk where plaintiff and the children were staying.

The following morning, plaintiff and her husband drove to Connecticut and brought infant plaintiff to the emergency department at Stamford Hospital for treatment. Infant plaintiff

was treated and discharged from the Stamford Hospital emergency department within a few hours of his arrival. Thereafter, infant plaintiff began experiencing intermittent urine retention and difficulty urinating. Four cystoscopy procedures performed on infant plaintiff by Dr. Burbige during the period from October 2006 to January 2008 allegedly revealed that infant plaintiff was suffering from urethral strictures. Two of these endoscopic procedures also allegedly revealed infant plaintiff was suffering from hypertrophy of the bladder neck.

Subsequently, plaintiff commenced this action on behalf of infant plaintiff to recover damages for alleged medical malpractice. She also sued derivatively for loss of services and for future medical expenses. Plaintiff alleges that improper and repeated insertion of urethral catheters in infant plaintiff during his September 2005 treatment at Southampton Hospital's emergency department caused traumatic injury to his urethra and bladder. Plaintiff further alleges that the emergency department nurses and physicians were negligent, among other things, in failing to take an adequate medical history of infant plaintiff; in failing to diagnose and treat infant plaintiff's dehydration; in continuing to order and perform urethra catheterization procedures after prior attempts failed to produce urine specimens; and in failing "to obtain both pediatric and urologic consults from specialists in the disciplines when same were readily available as part of the hospital protocol."

Southampton Hospital now moves for summary judgment dismissing the complaint against it. The hospital argues that as both Dr. Caplin and Dr. Crough are employed by 24/7 Emergency Care, and as the duty of its nursing staff is to carry out the orders and instructions of the attending emergency department physicians, it "cannot be held responsible for the decisions regarding [the] diagnosis and treatment" of infant plaintiff. The hospital further asserts that the evidence in the record shows Nurse McKay properly performed the urethral catheterization procedures of infant plaintiff, and that infant plaintiff was not dehydrated. Southampton Hospital's submissions in support of the motion include copies of the pleadings; transcripts of the deposition testimony of plaintiff, Dr. Crough and Nurse McKay; and an affirmation of Dr. Timothy Haydock. Plaintiffs oppose the motion, arguing that the hospital failed to demonstrate prima facie that the emergency medical care rendered to infant plaintiff conformed with good and accepted medical practice. Plaintiffs further argue issues of fact exist as to whether the hospital's alleged failure to have a protocol for urology consults when infant patients are difficult to catheterize. Plaintiffs' submissions in opposition to summary judgment include an affirmation of Dr. Diane Sixsmith, an alleged expert in emergency medicine; an affirmation of Dr. Burbige; and copies of records of the New York Department of Health pertaining to a complaint against Southampton Hospital about the emergency department's failure to obtain pediatric and urology consults during its treatment of infant plaintiff.

A physician owes a patient three basic duties of care: (1) the duty to possess the same knowledge and skill that is possessed by an average member of the medical profession in the locality where the physician practices; (2) the duty to use reasonable care and diligence in the

exercise of his or her professional knowledge and skill; and (3) the duty to use best judgment applying his or her knowledge and exercising his or her skill (*see* ***Nestorowich v Ricotta***, 97 NY2d 393, 740 NYS2d 668 [2002]; ***Pike v Honsinger***, 155 NY 201, 49 NE 760 [1898]). Significantly, the rule requiring a physician to use his or her best judgment "does not hold him [or her] liable for a mere error in judgment, provided he [or she] does what he [or she] thinks is best after careful examination" (***Pike v Honsinger***, *supra*, at 210, 49 NE 760; *see* ***Davis v Patel***, 287 AD2d 479, 731 NYS2d 204 [2d Dept 2001]). Thus, a physician may be liable for medical malpractice only if the physician's treatment decisions "do not reflect his or her best judgment, or fall short of the generally accepted standard of care" (***Nestorowich v Ricotta***, *supra*, at 399, 740 NYS2d 668).

Although a hospital generally may not be held liable for malpractice committed by a private attending physician not in its employment (*see* ***Hill v St. Clare's Hosp.***, 67 NY2d 72, 499 NYS2d 904 [1986]; ***Salvatore v Winthrop Univ. Med. Ctr.***, 36 AD3d 887, 829 NYS2d 183 [2d Dept 2007]), an exception exists when a patient presents at an emergency department seeking treatment from the hospital and not from a particular physician of the patient's own choosing (*see* ***Sampson v Contillo***, 55 AD3d 588, 590, 865 NYS2d 634 [2d Dept 2008]; ***Salvatore v Winthrop Univ. Med. Ctr.***, *supra*; ***Johnson v Jamaica Hosp. Med. Ctr.***, 21 AD3d 881, 800 NYS2d 609 [2d Dept 2005]; ***Orgovan v Bloom***, 7 AD3d 770, 776 NYS2d 879 [2d Dept 2004]). Under this exception, liability is predicated on the hospital's apparent or ostensible agency over the independent physician (*see* ***Hill v St. Clare's Hosp.***, *supra*; ***Hannon v Siegel-Cooper Co.***, 167 NY 244, 60 NE 597 [1901]; ***Sampson v Contillo***, *supra*; ***Dragotta v Southampton Hosp.***, 39 AD3d 697, 698, 833 NYS2d 638 [2d Dept 2007]). Moreover, a hospital may be held concurrently liable with a private physician if its employees commit independent acts of negligence or fail to inquire about the correctness of a private physician's orders that are contrary to normal practice (*see* ***Martinez v La Porta***, 50 AD3d 976, 857 NYS2d 194 [2d Dept 2008]; ***Cerney v Williams***, 32 AD3d 881, 822 NYS2d 548 [2d Dept 2006]; *see also* ***Toth v Community Hosp. at Glen Cove***, 22 NY2d 255, 265 n.3, 292 NYS2d 440 [1968]).

Furthermore, the requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted standards of medical practice, and (2) evidence that such departure was a proximate cause of the plaintiff's injury or damage (*see* ***Myers v Ferrara***, 56 AD3d 78, 864 NYS2d 517 [2d Dept 2008]; ***Sheenan-Conrades v Winifred Masterson Burke Rehabilitation Hosp.***, 51 AD3d 769, 858 NYSd 280 [2d Dept 2008]; ***Rebozo v Wilen***, 41 AD3d 457, 838 NYS2d 121 [2d Dept 2007]; ***Biggs v Mary Immaculate Hosp.***, 303 AD2d 702, 758 NYS2d 83 [2d Dept], *lv denied* 100 NY2d 506, 763 NYS2d 812 [2003]). On a motion for summary judgment dismissing a medical malpractice action, a defendant has the initial burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby (*see* ***Larsen v Loychusuk***, 55 AD3d 560, 866 NYS2d 217 [2d Dept 2008]; ***Shahid v New York City Health & Hosps. Corp.***, 47 AD3d 800, 850 NYS2d 519 [2d Dept 2008]; ***Thompson v Orner***, 36 AD3d 791, 828 NYS2d 509 [2d Dept 2007]; ***Williams v***

***Sahay***, 12 AD3d 366, 783 NYS2d 664 [2d Dept 2004]). If the defendant makes such a showing, the burden shifts to the plaintiff to lay bare his or her proof and demonstrate the existence of a triable issue of fact (*see* ***Luu v Paskowski***, 57 AD3d 856, 871 NYS2d 227 [2d Dept 2008]; ***DiGiaro v Agrawal***, 41 AD3d 764, 839 NYS2d 212 [2d Dept 2007]; ***Kaplan v Hamilton Med. Assoc.***, 262 AD2d 609, 692 NYS2d 674 [2d Dept 1999]; ***Holbrook v United Hosp. Med. Ctr.***, 248 AD2d 358, 669 NYS2d 631 [2d Dept 1998]). However, summary judgment is inappropriate in a medical malpractice action where the parties present conflicting opinions by medical experts (*see* ***Adjetey v New York City Health & Hosps. Corp.***, 63 AD2d 865, 881 NYS2d 472 [2d Dept 2009]; ***Barbuto v Winthrop Univ. Hosp.***, 305 AD2d 623, 760 NYS2d 199 [2d Dept 2003]).

Southampton Hospital's submissions are insufficient to show prima facie its entitlement to summary judgment in its favor. Here, it is undisputed that infant plaintiff presented at the emergency department seeking treatment from the hospital, not a particular physician. Therefore, to meet its initial burden on the motion for summary judgment, Southampton Hospital was required to present evidence demonstrating prima facie that Dr. Caplin's and Dr. Crough's emergency treatment of infant plaintiff did not depart from good and accepted medical practices or did not cause the injuries alleged in the action (*see* ***Abraham v Dulit***, 255 AD2d 345, 679 NYS2d 707 [2d Dept 1998]; ***Augeri v Massoff***, 134 AD2d 308, 520 NYS2d 787 [2d Dept 1987]; *cf.* ***Rizzo v Staten Is. Univ. Hosp.***, 29 AD3d 668, 815 NYS2d 162 [2d Dept 2006]; ***Christopherson v Queens-Long Island Med. Group, P.C.***, 17 AD3d 393, 792 NYS2d 608 [2d Dept 2005]). Dr. Haydock's affirmation, however, does not address any the allegations of medical malpractice asserted against Dr. Caplin. Further, the conclusory statements by Dr. Haydock that Dr. Crough obtained a proper medical history, and that his medical orders for catheterization, blood tests, Tylenol with codeine, the antibiotic Bactrim, and encouraged fluid intake were "entirely appropriate," are insufficient to show as a matter of law that Dr. Crough did not deviate from accepted medical care in his emergency treatment of infant plaintiff, as are his statements that Nurse McKay did not deviate from accepted practice when performing the catheterization procedures (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Johnson v Queens-Long Is. Med. Group, P.C.***, 23 AD3d 525, 806 NYS2d 614 [2d Dept 2005]; ***Williams v Howe***, 297 AD2d 671, 747 NYS2d 251 [2d Dept 2002]). Significantly, Dr. Haydock's opinions are unsupported by any description of the applicable standard for treating an infant patient presenting for emergency medical care with the various symptoms and preexisting medical conditions described by the deposition testimony, or the standard for treating a male infant when repeated attempts to obtain a catheterized urine specimen have been unsuccessful (*see* ***Passero v Puleo***, 17 AD3d 953, 793 NYS2d 637 [3d Dept 2005]; ***Torns v Samaritan Hosp.***, 305 AD2d 965, 761 NYS2d 126 [3d Dept 2003]; ***Williams v Howe***, *supra; cf.* ***Johnson v Jamaica Hosp. Med. Ctr.***, *supra*). Moreover, Dr. Haydock failed to address the allegations in the bill of particulars that the emergency physicians negligently failed to obtain pediatric and urology consults from specialists after the initial catheterization procedures failed to produce urine specimens, and that the repeated catheterizations caused traumatic injury to infant plaintiff's urethra and bladder (*see* ***Johnson v Queens-Long Is. Med.***

***Group***, *supra*; ***Williams v Howe***, *supra*). In any event, the affirmations of Dr. Sixsmith and Dr. Burbige are sufficient to raise triable issues of fact as to whether the emergency department physicians and nurses departed from good and accepted medical practice, particularly with respect to the multiple urethral catheterizations, and whether such departures were a proximate cause of infant plaintiff's alleged injuries to his urinary system (*see* ***Boutin v Bay Shore Family Health Ctr.***, 59 AD3d 368, 872 NYS2d 523 [2d Dept 2009] ***Darwick v Paternoster***, 56 AD3d 714, 868 NYS2d 698 [2d Dept 2008]; ***Golub v Sutton***, 281 AD2d 589, 723 NYS2d 59 [2d Dept 2001]). Accordingly, Southampton Hospital's motion for summary judgment dismissing the complaint against it is denied.

Dated: 8/14/09

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION