

Avolio v Schirripa

2009 NY Slip Op 32291(U)

September 15, 2009

Supreme Court, Richmond County

Docket Number: 103158/06

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index.103158/06
Motion No.:001,002**

**GIANNA AVOLIO, by her Mother and Natural Guardian,
SAMANTHA GATTI, and
SAMANTHA GATTI, Individually,**

Plaintiffs

against

DECISION & ORDER

HON. JOSEPH J. MALTESE

**MICHAEL A. SCHIRRIPA, M.D.,
DORIS RAMIREZ, M.D.,
ROBERT BOHNENBERGER, M.D., and
ST. VINCENT'S CATHOLIC MEDICAL CENTER,**

Defendants

The following items were considered in the review of the following motions for summary judgment.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1, 2
Answering Affidavits	3
Replying Affidavits	5, 6, 7
Memoranda of Law	4
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendants, Michael A. Schirripa, M.D., Doris Ramirez, M.D., Robert Bohnenberger, M.D. and St. Vincent's Catholic Medical Center, move for summary judgment pursuant to CPLR § 3212 for an order dismissing the plaintiff's complaint. The defendants' motion is granted to the extent it seeks to dismiss Dr. Bohnenberger.

Facts

This is an action for medical malpractice to recover damages allegedly sustained as a result of the negligent care and treatment of the infant plaintiff by the defendants during the

plaintiff's delivery.

After taking a home pregnancy test Samantha Gatti presented to Dr. Schirripa. After examination Dr. Schirripa confirmed the home pregnancy test results and acted as Samantha Gatti's prenatal care. At the time of Samantha Gatti's first visit with Dr. Schirripa, she was 4'11" in height and weighed approximately 100 pounds. Notwithstanding Samantha Gatti's small stature, Dr. Schirripa planned to delivery her baby vaginally, and if the need presented itself during labor proceed with a cesarian section. During his examination before trial, Dr. Schirripa testified to the following:

- Q. If you wanted pelvimetry done, is this something you could have ordered for the patient?
- A. Pelvimetry is not something that's commonly used in modern obstetrics. It's practically obsolete, so I don't think it's really appropriate.

- Q. Did you make a determination if the patient's pelvis was adequate at any time during your involvement with her pregnancy?
- A. Usually, the tensions of labor is what determine if the pelvis is adequate or not, and I did make assessment of her pelvic adequacy during labor.

- Q. With respect to your determination of the adequacy of the pelvis prior to the admission in labor?
- A. Usually, the patient is examined from 37 weeks on in the office with a pelvic exam to see if the baby's head a – floating or engaged, and those assessments were made for the last three weeks of pregnancy as per normal routine.¹

Samantha Gatti presented to St. Vincent's Hospital on the evening of January 9, 2003

¹ Michael A. Schirripa, M.D. transcript at 38 -39.

experiencing labor pains at 9:45 P.M. At the time of admission Samantha Gatti was 1 cm dilated with a fetal heart rate between 140 and 180 beats per minute. At Samantha Gatti's request she was administered an epidural.

At 12:15 A.M. the following day Dr. Schirripa observed that Samantha Gatti was 2-3 cm dilated, seventy percent effaced, at -2 station. Concurrently Dr. Schirripa artificially ruptured her membranes that released a clear fluid. At that time the fetal heart rate was between 150 and 160 beats per minute.

Samantha Gatti was next seen at 1:22 A.M. where the fetal heart rate of 150 to 160 beats per minute was observed. An examination at 2:27 A.M. noted the fetal heart rate between 140 and 150 beats per minute with decelerations recorded down to approximately 80 beats per minute. At 3:11 A.M. the fetal heart rate decelerated down to 90 beats per minute for approximately 30 seconds. This deceleration was communicated to Dr. Schirripa.

At 5:45 A.M. Dr. Schirripa examined Samantha Gatti and noted that she was 5 cm dilated, ninety percent effaced and still at -1 station. The fetal heart rate was noted as being between 150 to 160 beats per minute. Dr. Schirripa examined Samantha Gatti again at 7:50 A.M. and observed that she was 7 cm dilated. Shortly thereafter, Dr. Doris Ramirez a third year medical resident examined Samantha Gatti at 8:05 A.M. The fetal monitoring strips reveal a two minute deceleration of the fetal heart rate to approximately 90 beats per minute. During her examination before trial Dr. Ramirez testified as follows:

MR. HUGHES: What tracings would you have reviewed when you first saw the patient?

THE WITNESS: When I first saw the patient, I would review the tracing in front of me. I would have flipped through it and probably saw the first hour or two of it.

MR. HUGHES: What time would that be in the morning of the 10th?

THE WITNESS: Like 6, 6:30 in the morning.

- MR. HUGHES: At approximately six o'clock in the morning, you would have reviewed the tracings on the 10th.
- Q. Let's go to the tracings then at six o'clock, from 6 to 8. Tell me about those.
- MR. FERRETTE: Note my objection.
- A. Fetal heart rate is in the 140's, 150's. Nice reactive tracing with accelerations. Contracting every two minutes. It was pretty much like that until 8:10.
- Q. Any decels?
- A. There is a decel, about two minutes, down to the 90's.
- Q. At what time?
- A. 8:05.
- Q. Is that with the contraction, early or late?
- A. It looks like she is hyperstimulated. She is contracting every one minute.
- Q. Was she getting any Pitocin?
- A. No.
- Q. Do you know why she was hyperstimulated?
- A. No.
- Q. What, if anything, do you do for that?

- A. Normally at the time when I would see this, I would put the patient on the side, on the left side, give her oxygen, increase her fluids. If it was my general service patient, I would examine her.
- Q. That was a private patient?
- A. Yes.
- Q. So you wouldn't have examined here; is that right?
- A. She was already examined ten minutes ago, I believe.²

There is no testimony that indicates whether the deceleration that occurred at 8:05 A.M. was ever communicated to Dr. Schirripa. According to notations made by Marie Fadale, R.N. by 8:45 A.M. Samantha Gatti experienced a fever with a temperature of 100.2° F and fetal monitoring strips indicate that the fetal heart rate once again decelerated to 90 beats per minute for approximately 20 seconds. Notes taken by Nurse Fadale indicate at 9:45 A.M. a vaginal

² Doris Ramirez Nessetti, M.D. transcript at 28-30.

exam of Samantha Gatti failed to show any changes, and a note at 10:40 A.M. states that the fetal heart rate was approximately 170 beats per minute with decelerations to approximately 110 beats per minute for twenty to forty seconds. At 11:30 A.M. Dr. Schirripa examined Samantha Gatti and concluded that she was fully dilated and was at zero station. Subsequently, at 11:45 A.M. Dr. Schirripa told Samantha Gatti that the baby was in distress as the fetal heart rose to 200 beats per minute and that an emergency cesarian section needed to be performed.

The cesarian section commenced at 12:00 P.M. and was completed by 12:06 P.M. At the time of delivery Gianna Avolio was not crying and had to be revived. The operative report noted the presence of thick meconium. Additionally, Gianna Avolio's Apgar scores were 2, 4 and 7 at one, five and ten minutes after delivery. Gianna Avolio's discharge summary noted the following impressions: neonatal seizure, hypotonia, birth depression and status post metabolic acidosis. In addition, a CT scan showed a linear skull fracture with small sulcal traumatic subarachnoid hemorrhage or contusion in the left parietal region with significant mass effect on midline shift. Gianna Avolio was discharged from the hospital on phenobarbital to control seizures. As a result of the above actions the plaintiffs allege that Gianna Avolio sustained damages including but not limited to low muscle tone, motor delay and other developmental delays.

The defendants move for summary judgment utilizing the expert affirmations of Andrew Steele, M.D. who is board certified in pediatrics with a sub-certification in neonatal-perinatal medicine; Denise Guidetti, M.D., who is board certified in obstetrics and gynecology; and Yitzhak Frank, M.D., who is board certified in psychiatry and neurology with special competence in pediatric neurology.

In opposition, the plaintiffs submit the redacted expert affirmation of a medical doctor licensed to practice medicine in the State of Illinois who is board certified in obstetrics and gynecology. While the expert affirmation produced to the defendants is redacted, the court was provided with an un-redacted copy. In addition, the plaintiffs submit the affirmation of Daniel

Adler, M.D. who is board certified in pediatrics and psychiatry and neurology with a special qualification in child neurology.

Discussion

“The requisite elements for proof in a medical malpractice action are a deviation or departure from accepted community standards of practice and evidence that such departure was a proximate cause of the injury or damage.”³ “On a motion for summary judgment, a defendant doctor has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby.”⁴ Once a defendant satisfies his or her burden of demonstrating entitlement to summary judgment in a medical malpractice action, the plaintiff must adequately rebut the defendant’s prima facie showing by establishing a departure from accepted medical practice, as well as a nexus between the alleged malpractice and the plaintiff’s injury.⁵ “The plaintiff must submit a physician’s affidavit attesting to the defendant’s departure from accepted practice, which departure was a competent producing cause of the injury. General allegations that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat summary judgment.”⁶

“Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion.”⁷ Summary judgment should not be granted where there is any

³ *Flanagan v. Catskill Regional Medical Center*, 65 AD3d 563, [2d Dept 2009]; see *Geffner v. North Shore Univ. Hosp.*, 57 AD3d 839, [2d Dept 2008].

⁴ *Flanagan v. Catskill Regional Medical Center*, 65 AD3d 563, [2d Dept 2009]; see *Rebozo v. Wilen*, 41 AD3d 457, [2d Dept 2007].

⁵ *Merritt v. Saratoga Hosp.*, 298 AD2d 802, [3d Dept 2002].

⁶ *Flanagan v. Catskill Regional Medical Center*, 65 AD3d 563, [2d Dept 2009]; see *Rebozo v. Wilen*, 41 AD3d 457, [2d Dept 2007].

⁷ *Marine Midland Bank, N.A., v. Dino*, et al., 168 AD2d 610 [2d Dept 1990].

doubt as to the existence of a triable issue or where the existence of an issue is arguable.⁸ As is relevant, summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law.⁹ On a motion for summary judgment, the function of the court is issue finding, and not issue determination.¹⁰ In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.¹¹

Defendants' motions for Summary Judgment

The plaintiffs have determined not to oppose the motion as to Dr. Bohenberg. As such, the plaintiffs' complaint is dismissed with respect to Dr. Bohenberg. Additionally, the plaintiffs are not pursuing any claim with respect to any care rendered by the hospital or its staff after Gianna Avolio was born.

The defendants, Dr. Ramirez and St. Vincent's Catholic Medical Center ("SVCMC") offer the expert affirmations of Gary L. Mucciolo, M.D., who is board certified in obstetrics and gynecology; and Andrew Steele, M.D., who is board certified in pediatrics with a sub-certification in neonatal-perinatal medicine. Each of the experts relied upon all applicable medical records, deposition transcripts, and pleadings.

The defendant, Dr. Schirripa moves separately for summary judgment. In support of his

⁸ *American Home Assurance Co., v. Amerford International Corp.*, 200 AD2d 472 [1st Dept 1994].

⁹ *Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1978]; *Herrin v. Airborne Freight Corp.*, 301 AD2d 500 [2d Dept 2003].

¹⁰ *Weiner v. Ga-Ro Die Cutting*, 104 AD2d 331 [2d Dept 1984]. *Aff'd* 65 NY2d 732 [1985].

¹¹ *Glennon v. Mayo*, 148 AD2d 580 [2d Dept 1989].

motion the Dr. Schirripa offers the affidavits of: Denise Guidetti, M.D., who is board certified in obstetrics and gynecology; and Yitzhak Frank, M.D., who is board certified in psychiatry, neurology with special competence in pediatric neurology, and neuro-developmental disabilities.

The plaintiffs' complaint in their first cause of action for medical malpractice states in pertinent part that "the defendants were careless and negligent in the medical care and treatment of the plaintiffs, in among other things, failing to properly screen and test the plaintiffs prior to and during labor and delivery . . ." ¹²

Dr. Steele's affirmation relates solely to Gianna Avolio's neonatal care after her birth. As the plaintiffs' have determined not to pursue any claims relating to the care rendered to Gianna Avolio after her birth, this affirmation is of little significance.

In his affirmation, Dr. Mucciolo avers that the plaintiffs' allegations contained in the Bill of Particulars are without merit. Dr. Mucciolo states that

Plaintiff's claim essentially is that the defendants and St. Vincent's staff departed from good and accepted practice by failing to properly recognize the presence of fetal distress, stress or compromised during the labor and delivery. ¹³

Dr. Mucciolo avers that based on his review of the medical data concerning the labor and delivery of the plaintiffs that, ". . . the fetal monitoring strips throughout labor were typical, revealing normal baselines with normal accelerations and occasional deceleration. The contraction pattern was also natural and spontaneous." ¹⁴ Furthermore, Dr. Mucciolo avers that all decisions relating to labor and delivery were made by Dr. Schirripa, and in the absence of any

¹² Avolio complaint at ¶ 38.

¹³ Affidavit of Gary L. Mucciolo, M.D. at ¶ 4.

¹⁴ *Id.* at ¶ 13.

observable distress the conduct of Dr. Ramirez and the St. Vincent's staff was keeping with acceptable standards of care and treatment.¹⁵

The court finds that Dr. Mucciolo's expert affidavit constitutes sufficient evidence to demonstrate the defendants' entitlement to summary judgment.

In opposition, the plaintiffs offer the expert opinion of a medical doctor licensed to practice medicine in the State of Illinois who is board certified in obstetrics and gynecology. The defendants object to this court considering the testimony of plaintiffs' expert based on the locality rule. The Court of Appeals stated that "[r]esidence alone neither bars a physician from testifying as an expert nor qualifies him to do so."¹⁶

In a more recent case, the Appellate Division, Third Department spoke to the import of the "locality rule" in modern medical malpractice actions. The court stated:

Although the "locality rule" was promulgated 100 years ago, it is still extant; however, the development of vastly superior medical schools and post graduate training, modern communications, the proliferation of medical journals, along with frequent seminars and conferences, have eroded the justification for the rule. Thus, where, as here, a medical expert proposes to testify about the minimum standards applicable throughout the United States, the locality rule should not be invoked.¹⁷

As the plaintiffs' expert purports to give his opinion with respect to the minimum standards of care upon physicians and hospitals participating in obstetrical and gynecological care in the United States, his affidavit is acceptable evidence in opposition to the defendants' motion for summary judgment.

¹⁵ *Id.* at ¶¶ 15 and 16.

¹⁶ *Meiselman v. Crown Heights Hosp.*, 285 NY 389 [1941].

¹⁷ *Payant v. Imobersteg*, 256 Ad2d 702, 705 [3d Dept 1998].

The plaintiff's expert avers that Dr. Doris Ramirez, a third year resident at SVCMC, failure to examine Samantha Gatti and contact Dr. Schirripa after a two minute deceleration of the fetal heart rate at 8:05 A.M. constituted a departure from the good an accepted medical practice.¹⁸ This court also notes that Dr. Ramirez's own testimony at her examination before trial revealed that her care of Samantha Gatti would have differed if she were a general service patient, rather than a private patient. Furthermore, the plaintiffs' expert avers that the repeated decelerations in the fetal heart rate were telltale signs of fetal distress that the defendants failed to heed. Such statements raise a triable issue of fact.

The court must also point out that neither, Dr. Mucciolo, nor Dr. Steele express any opinion with respect to the injuries allegedly sustained by Gianna Avolio. The letter written by Yitzchak Frank, M.D. and annexed to their motion does not constitute acceptable evidence on a motion for summary judgment.¹⁹

The court now turns its attention to the expert affidavit of Dr. Guidetti, submitted in support of Dr. Schirripa's motion for summary judgment. Dr. Guidetti's affidavit fails to address plaintiffs' claims for mismanagement of Samantha Gatti's prenatal care. A failure to address the specific allegations of medical malpractice as set forth in the plaintiffs bill of particulars precludes entitlement to judgment as a matter of law.²⁰ As such, the defendant, Dr. Schirripa, failed to demonstrate a prima facie entitlement to summary judgment, therefore the court need not consider the sufficiency of the plaintiffs' expert, with respect to the claims made by Dr. Guidetti.

However, assuming that the Dr. Schirripa met his burden and the plaintiffs' expert affirmations were considered by this court summary judgment would still be denied. The

¹⁸ Affidavit of Plaintiff's Expert at 6-7.

¹⁹ *See, Marquez v. City of New York*, 48 AD3d 241, [1st Dept 2008].

²⁰ *Drago v. Chung Ho King*, 283 AD2d 603, [2d Dept 2001]; *see Berkey v. Emma*, 291 AD2d 517 [2d Dept 2002].

plaintiffs' unnamed expert avers that Dr. Schirripa failed to render acceptable prenatal care to Samantha Gatti in that he failed to “. . . measure the maternal ischial spinous diameter and/or perform any pelvimetry.”²¹ In addition, the plaintiffs' expert also avers that Dr. Schirripa failed to recognize that Samantha Gatti's lack of progress in labor constituted “. . . a classic secondary arrest of labor . . .”²² Furthermore, the plaintiffs' expert avers that the repeated decelerations in the fetal heart rate were telltale signs of fetal distress that Dr. Schirripa failed to heed. Such statements raise a triable issue of fact.

In addition to Dr. Guidetti's affidavit, Dr. Schirripa submits the affidavit of Dr. Yitzchak Frank that addresses sole issue of damages allegedly sustained by Gianna Avolio. According to Dr. Frank, an examination of Gianna Avolio did not reveal any evidence of a neurological deficit.²³ The court finds that this affidavit is sufficient to demonstrate an entitlement to summary judgment.

In opposition, the plaintiffs' submit the affidavit of Daniel Adler, M.D., who is board certified in pediatrics and psychiatry and neurology with a special qualification in child neurology. Dr. Adler avers that as a result of the defendants' departures from the good and accepted medical practice led to perinatal depression, neonatal seizures, motor delay, low muscle tone, and seizure disorder. Dr. Adler conducted an examination of Gianna Avolio that revealed a decrease in muscle tone with some truncal hypotonia. Dr. Adler directly correlates Gianna Avolio's current low muscle tone with the events of her birth.²⁴ The plaintiffs' unnamed expert also concurs with the findings of Dr. Adler.²⁵

²¹ Affidavit of Plaintiff's Expert at 3.

²² *Id.* at 6

²³ Affidavit of Yitzchak Frank, M.D. at 4.

²⁴ Affidavit of Daniel Adler, M.D. at 6

²⁵ *Affidavit of Plaintiffs' Expert* at 12.

As such, the plaintiffs' expert raises issues of fact with respect to whether he departed from accepted community standards of practice and evidenced that such departure was a proximate cause of the injury or damage.

Conclusion

Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.²⁶ As is relevant, summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law.²⁷ In this case, this court finds that numerous issues of fact remain. On a motion for summary judgment, the function of the court is issue finding, and not issue determination. As such, the defendants' motions for summary judgment are denied.

Accordingly, it is hereby:

ORDERED, that Robert Bohnenberger, M.D.'s motion for summary judgment and deleting his name from the caption is granted and the complaint is hereby severed and dismissed as against Robert Bohnenberger, M.D., and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED, that Michael A. Schirripa, M.D., Doris Ramirez, M.D., and St. Vincent's Catholic Medical Center's motions for summary judgment are denied in their entirety; and it is

²⁶ *American Home Assurance Co., v. Amerford International Corp.*, 200 AD2d 472 [1st Dept 1994].

²⁷ *Rotuba Extruders v. Ceppos.*, 46 NY2d 223 [1978]; *Herrin v. Airborne Freight Corp.*, 301 AD2d 500 [2d Dept 2003].

further

ORDERED, that the parties return to DCM Part 3 for a pre-trial conference on Monday, October 19, 2009 at 9:30 A.M.

ENTER,

DATED: September 15, 2009

Joseph J. Maltese
Justice of the Supreme Court