

McKenzie v Clarke
2009 NY Slip Op 33406(U)
February 17, 2009
Supreme Court, Kings County
Docket Number: 9370/06
Judge: Randolph Jackson
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At an IAS Term, Part 11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 17th day of February, 2009.

P R E S E N T:

HON. RANDOLPH JACKSON,

Justice.

-----X
MONIE MCKENZIE, an infant by her mother and
natural guardian, SIMONA GRAHAM,

Index No. 9370/06

Plaintiffs,

- against -

HEATHER CLARKE, ET AL.,

Defendants.

-----X
The following papers numbered 1 to 13 read on this motion:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____

Papers Numbered

1 - 4 5 - 7

Opposing Affidavits (Affirmations) _____

9 - 11

Reply Affidavits (Affirmations) _____

12 13

_____ Affidavit (Affirmation) _____

Other Papers _____

Upon the foregoing papers, the motion by defendant Louis D. Camilien, M.D. (Dr. Camilien) for an order, pursuant to CPLR 3212, granting summary judgment dismissing all claims and cross claims against him and the cross motion by defendant Nagaraj Gabbur, M.D. (Dr. Gabbur) for an order granting summary judgment dismissing the complaint against him are denied.

At approximately 11:55 p.m. on July 14, 1996, the plaintiff mother, Simona Graham, who was pregnant at the time, presented to SUNY Downstate Medical Center with complaints of

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abdominal pain. At 1:30 a.m. on the next morning, Dr. Camilien made the decision to perform a Cesarean section. The infant-plaintiff was delivered at approximately 2 a.m. According to the complaint herein, Dr. Camilien and Dr. Gabbur (a third-year resident) failed, among other things, to follow good and accepted medical practices and, as a consequence, the infant-plaintiff, Monee McKenzie, suffered brain damage, intrauterine growth retardation, hydrocephalocele and severe learning disabilities.

In his motion, Dr. Camilien asserts that he did not deviate from the standard of care which was required of him. For example, he performed a timely Cesarean section and immediately delivered the infant-plaintiff. Although he concedes that the infant-plaintiff has "multiple abnormalities," he characterizes them as "congenital abnormalities associated with developmental anomalies," rather than as the result of any malpractice on his part. In support of his contentions, he submits the affirmations of Dr. Nancy Wolfert Kirshenbaum (Dr. Kirshenbaum), an obstetrician/gynecologist, and Dr. Barry Kosofsky (Dr. Kosofsky), a neurologist. According to Dr. Kirschenbaum, Ms. Graham was appropriately monitored and evaluated by the medical staff at the hospital and, in light of the decelerations on the fetal heart monitor strips, Dr. Camilien's decision to deliver the infant by Caesarean section at 1:30 a.m. was likewise appropriate. In his affirmation, Dr. Kosofsky opines that none of the infant-plaintiff's injuries were caused by Dr. Camilien's care and treatment and that they were, in fact, congenital in nature. In particular, Dr. Kosofsky notes that the infant-plaintiff's APGAR scores were 7 at one minute and 8 at five minutes and that a blood test done on the infant's umbilical cord indicated a normal gas pH reading of 7.2. Given that the infant blood gases were "normal," Dr. Kosofsky opines that she did not suffer a hypoxic event.

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In his cross motion, Dr. Gabbur argues that the cord blood gas analysis provides an objective measure of the neonatal condition at birth and the infant's normal umbilical cord blood values "virtually eliminate any diagnosis of significant hypoxia or birth asphyxia." Since the infant did not suffer from oxygen deprivation while in utero and defendants are not responsible for her congenital defects, Dr. Gabbur likewise maintains that the complaint against him should be dismissed. Dr. Gabbur submits the affirmation of Dr. Leonard Benedict to support his contentions. Dr. Gabbur further contends that plaintiff has not demonstrated that there was any independent act of negligence on his part; rather, he asserts that he merely followed the orders of the attending physician, Dr. Camillien.

In opposition to the motion and cross motion, plaintiff characterizes the affirmations submitted by defendants as "conclusory" since they allegedly fail to address each of her claims of departures from good and accepted medical practice, including, but not limited to, "the asphyxia during delivery which resulted in [the] infant-plaintiff's developmental delays." According to plaintiff, in the emergency room she came under the care of Dr. Gabbur, a third-year resident, and he applied a fetal heart monitor which showed "severe variable decelerations" in the infant's heartbeat. Such decelerations were also noted by Dr. Camilien. Plaintiff asserts that she remained in the obstetrical triage department (as opposed to the labor and delivery room) for 1 ½ hours and that, during this time period, the infant-plaintiff "had prolonged exposure to a hostile intrauterine environment greatly increasing the risk of hypoxia and brain damage which ultimately occurred in this case." Plaintiff charges that the affirmations proffered by defendants are without merit because they do not address the delay in performing the Caesarean section and were not based upon examinations of the infant-plaintiff. With respect to the cross motion, plaintiff asserts that it is

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untimely since it was filed more than 60 days after she filed her note of issue. She also faults Dr. Gabbur because the cross motion did not specify "the time and place of the hearing, the supporting papers upon which it is based, the relief demanded and the grounds therefor." Moreover, plaintiff argues that Dr. Gabbur was "significantly involved in the delivery and labor treatment" rendered to her since he performed a pelvic examination, observed fetal decelerations and recommended her admission to the hospital. In opposition to the motion and cross motion, plaintiff submits three affirmations, two of which have the names of the affiants redacted. In the affirmation of a New Jersey obstetrician/gynecologist, the affiant states that the APGAR scores "were not consistent with the fetal condition described in the medical records" and that it was a departure from good and accepted medical standards to have waited 1½ hours before taking plaintiff to the delivery room. The physician also pointed out that an amniotic fluid insufficiency was noted in the medical records, which insufficiency increased the likelihood of an oxygen deprivation. In the affirmation of a South Carolina physician, the doctor asserted that a base excess value of -9 was documented after the umbilical cord blood gas test was conducted, which "is indicative of metabolic acidosis from an oxygen deficit," and, therefore, he opined that "an hypoxic, anoxic event occurred to infant Monee during delivery that is proximately related to [her] neurological deficits." The affirmation of Dr. Daniel Adler, a pediatrician, describes the permanent neurological disabilities of the infant, including "motor delay, fine and gross motor in coordination, intrauterine growth retardation and hydrocephalus."

In his reply papers, Dr. Camilien maintains that the affirmations of plaintiff's experts are "contrary to the objective medical record," including the APGAR scores and the 7.21 pH result from the cord blood gas. With respect to plaintiff's suggestion that the APGAR scores were incorrect,

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given the infant's heart rate and grayish color at birth, Dr. Camillien's attorney asserts that "babies who are born somewhat depressed at birth . . . can come up quickly after birth and often within the first minute, especially with the correct interventions by the medical staff as we have in this case." The attorney also notes that, "[w]hile the base excess and partial pressure findings relied upon by plaintiff's counsel and plaintiff's experts were important for the clinicians treating the infant plaintiff after her birth . . . , the most important finding, in retrospect, that is used by a pediatric neurologist in determining causation is the PH," which, in this case, was "normal."

In reply, Dr. Gabbur asserts that the cross motion should be considered timely because a timely motion for summary judgment was made which seeks "nearly identical" relief. According to Dr. Gabbur, there is agreement among all the parties that the infant experienced considerable congenital conditions in utero and he asserts that plaintiff has failed to refute the assertion that the infant's medical conditions were not due to a lack of oxygen. Dr. Gabbur relies upon the APGAR scores and cord blood values to establish that there was no reduction in oxygen to the infant and that the Caesarean section was done before any damage to the infant could occur.

Initially, the court notes that it may consider an untimely cross motion for summary judgment made after the expiration of the statutory period (or, in this case, after the 60-day period set by Rule 13 of the Kings County Uniform Civil Term Rules), even in the absence of good cause, where a timely motion for summary judgment was made seeking relief nearly identical to that sought by the cross motion (*see Filannino v Triborough Bridge and Tunnel Auth.*, 34 AD3d 280, 281 [2006]; *Fahrenheit v Security Mut. Ins. Co.*, 32 AD3d 1326, 1328 [2006]). Here, the cross motion concerns the same issue of causation raised by the motion of Dr. Camillien and, therefore, it will be considered on its merits.

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In order to establish the liability of a physician for medical malpractice, a plaintiff must prove that the physician deviated from good and accepted medical practice and that the departure was a proximate cause of the plaintiff's injuries (*see e.g. Lovett v Interfaith Medical Center*, 52 AD3d 578 [2008]; *Roca v Perel*, 51 AD2d 757, 758 [2008]). Consequently, on a motion for summary judgment in a medical malpractice case, the defendant physician must come forward with evidence in admissible form establishing, *prima facie*, either that he or she did not deviate from good and accepted medical practice or that, if there was such a departure, it was not the proximate cause of the plaintiff's injuries (*see e.g. Germaine v Yu*, 49 AD3d 685, 686 [2008]; *Rebozo v Wilen*, 41 AD3d 457, 458 [2007]). Dr. Camilien and Dr. Gabbur have demonstrated, *prima facie*, that they did not depart from good and accepted medical practice and that nothing they did or failed to do proximately caused the infant-plaintiff's injuries.

An expert affidavit submitted in opposition to a defendant physician's motion for summary judgment must aver that the defendant departed from good and accepted medical practice and that the departure was a competent producing cause of the injury (*see Domaradzki v Glen Cove Ob/Gyn Assoc.*, 242 AD2d 282 [1997]). General and conclusory allegations of medical malpractice, however, unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat the motion (*see Thompson v Orner*, 36 AD3d 791, 792 [2007]). Here, the affirmation of the South Carolina pediatrician has raised an issue of fact as to whether the infant-plaintiff was deprived of oxygen and whether her physical appearance and medical measurements should have alerted defendants to her condition. The physician cites a base excess value of -9, as well as the infant's color and heart rate, as indicative of an oxygen deficit. Although Dr. Camilien seeks to dismiss the "base excess and partial pressure findings relied upon

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by [plaintiff]" as not being as important as the pH measurement, that medical conclusion is put forth by Dr. Camilien's attorney, rather than a medical expert. Even if that opinion had been offered by an expert, this court would nevertheless find that the papers submitted herein present "a credibility battle between the parties' experts" (*Barbuto v Winthrop Univ. Hosp.*, 305 AD2d 623, 624 [2003] [internal citations omitted]) and would warrant denial of the motion and cross motion (see *Zarzana v Sheepshead Bay Obstetrics & Gynecology*, 289 AD2d 570, 571 [2001]).

The foregoing constitutes the decision and order of this court.

ENTER,

J. S. C.

HON. JUSTICE RANDOLPH JACKSON
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