

Brisco v Lau

2010 NY Slip Op 30034(U)

January 8, 2010

Supreme Court, Suffolk County

Docket Number: 04-4210

Judge: Arthur G. Pitts

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Plaintiff further alleges that defendants' departures caused the infant plaintiffs to sustain severe damage to their brains and nervous systems, resulting in, among other things, cerebral palsy and developmental delays in plaintiff Brittany Brisco; and fine and gross motor problems and developmental delays in plaintiff Juliana Brisco. Defendants George Lau, M.D. and Winthrop University Hospital (hereinafter referred to as "Winthrop") move separately for summary judgment dismissing the action. Winthrop also moves for an extension of time for the submission and consideration of its motion for summary judgment pursuant to CPLR 2004.

Initially, that branch of Winthrop's motion which seeks an extension of time to submit its motion for summary judgment is granted unopposed.

The record reveals that plaintiff first presented to defendant Lau on September 28, 1993 at which time defendant determined that plaintiff was six weeks pregnant. The estimated date of confinement was May 21, 1994. Regular monthly examinations were performed by defendant. At the appointment on October 16, 1993, a sonogram revealed twin fetuses. Due to her advanced age of 37 and the twin gestation, defendant Lau identified the pregnancy as high risk. Defendant Lau advised plaintiff to undergo an amniocentesis and genetic counseling. The genetic counseling revealed that one twin had the triple X chromosome syndrome, which would likely result in an increased risk of learning disabilities and mental retardation. Defendant Lau counseled plaintiff regarding the option of terminating the affected fetus and advised her to also seek further genetic counseling. The pregnancy progressed uneventfully until February 3, 1994 when plaintiff notified defendant of bright red bleeding for the first time. Defendant Lau advised immediate admission to defendant Winthrop. Defendant Lau ordered tocolytics and corticosteroids, to prolong the pregnancy and assist the twins' respiratory development. However, on February 12, 1994, the twins were delivered by cesarean section at 26 weeks. They remained at Winthrop until May, 1994.

The requisite elements of proof in a medical malpractice case are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (*Amsler v Verrilli*, 119 AD2d 786, 501 NYS2d 411 [2d Dept 1986]; *De Stefano v Immerman*, 188 AD2d 448, 591 NYS2d 47 [2d Dept 1992]). 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 (*Winegrad v N.Y. University Medical Center*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; *Zuckerman v New York*, 49 NY2d 557, 562, 427 NYS2d 595 [1980]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404, 165 NYS2d 498 [1957]). A hospital may be held liable for the malpractice of a physician with whom it has an employment relationship, yet mere affiliation of a physician with a hospital is insufficient to impute the physician's negligent conduct to the hospital (see, *Hill v St. Clare's Hospital*, 67 NY2d 72, 499 NYS2d 904 [1986]).

In support of his motion, defendant Lau submits, *inter alia*, the pleadings, the bill of particulars, the plaintiff's office medical record, the plaintiff's Winthrop medical records and affirmations by Richard Berkowitz, M.D. and Mark J. Rosen, M.D. By way of the bill of particulars, plaintiff alleges, *inter alia*, that defendant Lau departed from accepted medical standards of care in failing to advise bed rest in a timely manner, in failing to timely treat her shortness of breath, in failing to take the vital signs of the mother and infants, in failing to appreciate the risks to the infant fetuses of a premature delivery,

in failing to timely admit the plaintiff to the hospital for the remainder of her pregnancy, in failing to order a high risk obstetrics consult, in failing to instruct plaintiff to stop work, in failing to address plaintiff's complaints of vaginal staining, in failing to treat plaintiff's coughing, in failing to treat plaintiff's upper respiratory infection, in carelessly treating the pregnancy as routine, in carelessly and negligently causing trauma to the infant plaintiffs, in failing to stop or prevent labor, in failing to arrange for immediate home monitoring to prevent the onset of labor and/or hemorrhage, in failing to prescribe steroids so as to mature the fetal lungs, in allowing uterine irritability to progress thereby causing premature labor, in prescribing tocolytics in insufficient amounts, in failing to utilize diagnostic testing at appropriate times, and in failing to properly support the infants' respiratory efforts.

Dr. Berkowitz affirms that he is duly licensed to practice medicine in the State of New York. He avers that he is board certified in obstetrics and gynecology with a sub-specialty in maternal fetal medicine. It is his opinion that the treatment the plaintiffs received from defendant Lau was at all times in accordance with good and accepted medical practice. It is also his opinion that the treatment rendered was not the proximate cause of the injuries to the infant plaintiffs. He further states that the alleged injuries complained of by plaintiff occur in the absence of medical malpractice.

Dr. Berkowitz states that when plaintiff first presented to defendant's office on September 28, 1993 for prenatal care, a thorough history was obtained and a complete physical examination and pelvic examination were performed. He notes that the medical records reveal that plaintiff was 37 years old at the time and reported a prior history of endometriosis and rupture of an ovarian cyst. She had a seven year history of infertility. The records also indicated that she smoked two packs of cigarettes per day prior to her pregnancy and was smoking 10 cigarettes per day during her pregnancy. At that appointment, defendant advised plaintiff to undergo an amniocentesis and genetic counseling due to her advanced maternal age.

On October 16, 1993, plaintiff called defendant complaining of abdominal cramping but no vaginal bleeding. Defendant properly instructed plaintiff to come to the office immediately for a sonogram which was read to be within normal limits and revealed the presence of a twin gestation. Defendant then treated plaintiff's pregnancy as high risk and counseled plaintiff on the signs and symptoms of premature labor. On October 22, 1993, plaintiff was treated by an outside physician for signs and symptoms of bronchitis and notified defendant. On November 20, 1993, plaintiff received genetic counseling, which revealed the presence of triple X syndrome in one twin. Defendant advised plaintiff that the effect of such a condition increased the risk of learning disabilities and mental retardation and that she had the option of terminating the affected fetus, which plaintiff elected to forego. He also advised plaintiff to seek further genetic counseling.

On December 20, 1993, plaintiff complained of a bad cold. Defendant acted within the standard of care by putting plaintiff on bed rest and instructed her to drink plenty of fluids. On January 13, 1994, at a regular prenatal visit at 21 weeks pregnant, the physical examination was normal and plaintiff had no complaints of cramping. A sonogram showed the presence of viable twin fetuses. Defendant appropriately reminded plaintiff to refrain from exercise and travel. On January 31, 1994, plaintiff notified defendant that she experienced brown vaginal discharge. Upon examination in the office defendant noted that the cervix was closed and a sonogram was within normal limits. He appropriately

instructed plaintiff to stop working and decrease her activities. Defendant also properly advised plaintiff to watch for premature labor and to follow up in one week. Dr. Berkowitz avers that any allegation that defendant should have administered tocolytics at this time is improper since plaintiff was not in premature labor. Vaginal staining is common in pregnancy. Defendant correctly determined that there was no evidence of placenta previa or abruption.

On February 2, 1994, plaintiff called defendant complaining of a brownish vaginal discharge and coughing and sneezing. She denied cramps, clots, contractions, back pain or leakage of fluid. Defendant advised bed rest and to visit the office the next day. On February 3, plaintiff presented to defendant's office. The physical examination revealed no change in the cervix and the sonogram was normal. Defendant appropriately sent plaintiff home on bed rest and again instructed her not to work. On the evening of February 3, plaintiff called defendant complaining of bright red vaginal bleeding for the first time. Defendant advised plaintiff to go immediately to Winthrop, where she was admitted at 24 ½ weeks gestation.

Dr. Berkowitz opines that plaintiff received appropriate care throughout the admission at Winthrop, including labor and delivery. Defendant timely examined and provided an appropriate plan of treatment, ordered antibiotics to treat plaintiff's respiratory symptoms and requested maternal fetal medicine and pulmonary consults. At the time of the admission, Dr. Berkowitz opines that plaintiff was in preterm labor, which occurs in the absence of medical negligence. Upon admission, defendant appropriately administered tocolytics in an attempt to suppress the labor, and steroids were administered to mature the fetal lungs. Such administration was appropriate and necessary, inasmuch as plaintiff did not deliver until February 12, 1994. Thus, this was a significant and effective suppression of labor and provided sufficient time for the corticosteroids to aid with the preterm fetuses' lung development.

On February 8, 1994, a pulmonary consult was performed resulting in orders for a change in antibiotics and a diuretic. However, plaintiff's significant cigarette smoking history greatly increased the risk of bronchitis during the pregnancy. In any event, the respiratory symptoms were appropriately managed by defendant. On February 12, 1994, plaintiff experienced rupture of the membranes of Twin A and mild contractions at 26 weeks gestation. A cesarean section was performed due to the malpositioning of the twins. The twins were then delivered and cared for by the neonatal staff. Dr. Berkowitz opines that defendant appropriately delivered the twins by cesarean delivery to prevent the possibility of umbilical cord prolapse.

Dr. Berkowitz opines that the resulting complications experienced by the twins were associated with their extreme prematurity. The alleged injuries were not the result of any lack of good care by defendant and there was no act or omission by defendant that either caused or contributed to the infants' injuries. The mean gestational age for delivery of twins is 35 ½ weeks. However, in approximately two to three percent of all twin deliveries, such injuries occur due to extreme prematurity and in the absence of negligence or medical malpractice, as occurred in this instance.

Dr. Rosen affirms that he is duly licensed to practice medicine in the State of New York and is board certified in pulmonary medicine, internal medicine and critical care medicine. It is his opinion that the pulmonary care received by the plaintiff from defendant Lau was at all times in accordance with

good and accepted medical practice. It is also his opinion that the treatment rendered was not the proximate cause of the injuries alleged by the plaintiffs.

He states that a review of the record reveals that plaintiff has a significant history of smoking cigarettes which causes a "smoker's cough." Thus, based on her smoking history and continuous smoking of cigarettes during pregnancy, she was at increased risk of developing a cough, which cannot be controlled well with medication. Moreover, her history of smoking greatly increased the risk of bronchitis and other respiratory problems during the pregnancy at issue. Thus, it is his opinion that her history of smoking caused or contributed to the respiratory symptoms experienced during her pregnancy and labor. He also opines that all of plaintiff's respiratory complaints were diagnosed and treated aggressively with antibiotics and cough suppressants. Her respiratory condition was closely followed by defendant. On January 7, an x-ray revealed a left lower lobe infiltrate which was suggestive of pneumonia. Defendant appropriately treated the problem with antibiotics, IV fluids and a venti mask. In addition, a pulmonary consult was obtained on January 8, 1994. It is Dr. Rosen's opinion that defendant acted within the standard of accepted medical practice in treating plaintiff's pulmonary issues. However, plaintiff continued to suffer from coughing even though all appropriate measures were instituted. Dr. Rosen further opines that the pulmonary issues did not cause the premature labor. As such, none of the acts or omissions by defendant caused the infants' alleged injuries.

Based on the above submissions, defendant has made a *prima facie* showing sufficient to warrant judgment in his favor, as a matter of law, by establishing that he did not depart from accepted standards of medical care, shifting the burden to plaintiff to demonstrate the existence of a triable issue of fact (*see, Baez v Lockridge*, 259 AD2d 573, 686 NYS2d 496 [2d Dept 1999]).

In support of its motion for summary judgment, defendant Winthrop University Hospital submits, *inter alia*, the bill of particulars, and the affirmation of Victor R. Klein, M.D. By way of the bill of particulars, plaintiff alleges that Winthrop, through its employees, was negligent in the medical care and treatment rendered to plaintiff in failing to properly monitor both fetal heart rates, in failing to train nursing staff to monitor twin fetal heart rates, in failing to perform proper ultrasound studies to assess the position and presentation of each fetus, in failing to have appropriate support staff and physicians present at delivery, in failing to enforce compliance with existing hospital rules, standards and procedures, in failing to properly suction the infants immediately following delivery, in failing to provide the infants with sufficient oxygenation after delivery, in failing to assure that the infants were placed in an appropriately warm incubator following delivery, in failing to timely obtain a patent airway, in failing to timely detect respiratory and fetal distress, in negligently permitting inappropriately trained personnel to care for these infants, in failing to train nurses with regard to the signs and symptoms of high risk deliveries, in failing to inform the appropriate physicians of the status of the infants, in failing to place an internal fetal heart monitor, in failing to counsel the plaintiff on bed rest, and in failing to stop premature labor.

Dr. Klein avers that he is board certified in obstetrics with a sub-certification in maternal fetal medicine and is also board certified in clinical genetics. He opines that at all times the medical treatment provided to the plaintiff and infant plaintiffs during the labor and delivery period by the resident and nursing staff at Winthrop comported with good and accepted medical practice. It is further

his opinion that the medical care and treatment provided by the resident and nursing staff was not the proximate cause of the infant plaintiffs' alleged injuries. Therefore, he opines that the resident and nursing staff at Winthrop did not perform any acts or omissions that proximately caused any injury to the infant plaintiffs.

Dr. Klein avers that the plaintiff had an established relationship with defendant Lau and was admitted to his private obstetrical service. Lau exclusively managed and directed the plaintiff's prenatal care. Lau was present at Winthrop on February 3, 1994 and upon plaintiff's arrival, he issued appropriate admission orders. Lau further testified that he saw plaintiff on a daily basis and managed her care throughout the labor and delivery period with consultations by the maternal fetal medicine department. Lau established an appropriate treatment plan which was appropriately carried out by the resident and nursing staff.

Dr. Klein opines that it is the responsibility of an attending physician to order diagnostic testing and medications, to coordinate consultations and to make decisions regarding the timing, manner and method of delivery. Further, it is the responsibility of the attending doctor to monitor the results and outcomes of the ordered studies and consults. This is not the role of the Winthrop employees. The resident and nursing staff acted under Lau's direct supervision to treat the plaintiff's respiratory issues and properly followed his orders. Thus, the Winthrop resident and nursing staff did not proximately cause any injuries to the infant plaintiffs.

Based on the above submissions, defendant Winthrop has made a *prima facie* showing sufficient to warrant judgment in its favor, as a matter of law, by establishing that its resident and nursing staff did not depart from accepted standards of medical care, shifting the burden to plaintiff to demonstrate the existence of a triable issue of fact (*see, Baez v Lockridge*, 259 AD2d 573, 686 NYS2d 496 [2d Dept 1999]).

The burden then shifted to the plaintiff to 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 principles containing an opinion that defendant's acts or omissions were a competent producing cause of the injuries of the patient (*see, Lifshitz v Beth Isr. Med. Center-Kings Highway Div.*, 7 AD3d 759, 776 NYS2d 907 [2d Dept 2004]). In opposition, plaintiff submits, *inter alia*, the affirmations of three medical experts, whose names have been redacted in accordance with *Carrasquillo v Rosencrans*, 208 AD2d 488, 617 NYS2d 51 (2d Dept 1994). The original unredacted affirmations have been submitted to the court for inspection under separate cover.¹ The first expert avers that he is a physician duly licensed to practice medicine in the State of New York and is board certified in obstetrics and gynecology. He opines that defendant Lau committed several departures from accepted standards of medical care and practice which were substantial contributing factors in causing the injuries sustained by the infant

¹ The Court has conducted an in-camera inspection of the original unredacted affirmations and finds them to be identical in every way to the redacted affirmations in plaintiff's opposition papers with the exception of the redacted experts' names. In addition, the Court has returned the unredacted affirmations to the plaintiff's attorney.

plaintiffs. He states that defendant failed to obtain a maternal fetal medicine and/or high risk consult either initially or when plaintiff complained of staining on January 31, 1994. In addition, on that date, he states that defendant Lau failed to admit the plaintiff to the hospital, failed to place the plaintiff on bed rest, failed to obtain a high risk consult and failed to perform testing to evaluate for contractions. He further agrees with plaintiff's second expert who opined that defendants failed to suppress plaintiff's cough and failed to support her oxygen blood levels during the hospitalization. In addition, the expert avers that defendants failed to support plaintiff's respiratory and circulatory systems and failed to prevent the premature delivery of the infant plaintiffs. The expert further states that Lau departed from accepted standards of medical care in failing to plan for the multiple risk factors and anticipate the complications which occurred under the circumstances.

The second expert avers that he is a physician duly licensed to practice medicine in the State of New York and is board certified in pulmonary medicine, internal medicine and critical care medicine. It is his opinion that defendants Lau and the Winthrop staff departed from accepted standards of medical care and practice which were a substantial contributing cause of the premature rupture of membranes and the premature delivery of the infant plaintiffs. Such departures were substantial contributing factors in causing the brain injuries sustained by both infant plaintiffs. The expert states that defendant Lau downplayed plaintiff's complaints of cough and cold symptoms, and failed to continually monitor her oxygen levels and have a proper plan in place to achieve an optimal level of oxygenation, where the record reveals that the plaintiff was severely hypoxic. In addition, defendants departed from accepted standards of care by failing to make certain that the plaintiff's oxygen levels remained high enough to prevent hypoxic injury to the babies from occurring, since the fetuses receive their oxygen from the maternal blood supply. It is this expert's opinion that the departures from accepted standards of medical care and practice on behalf of defendants Lau and Winthrop with regard to monitoring and maintaining the plaintiff's respiratory status did in fact result in premature rupture of the membranes and the premature delivery of the infant plaintiffs at 26 weeks gestation, which were substantial contributing factors in causing injury to the infant plaintiffs.

The third expert states that he is a physician duly licensed to practice medicine in the State of New York and is board certified in pediatrics, psychiatry and neurology with a special qualification in child neurology. He states that he conducted physical examinations of the infant plaintiffs. Upon examination of Brittany Brisco, he noted that she has significant neurological disabilities. She was diagnosed with the triple X chromosomal abnormality, which he opines is not the source of her permanent neurologic injuries. Instead, he opines that the cause of her neurologic injuries is due to her severe premature birth and the complications she experienced as a consequence. He observed that Brittany has scoliosis which has required many surgeries and also has spastic quadri paresis and motor language delays. The expert states that had the defendants obtained a delay in this girl's delivery, it would have significantly mitigated the possibility that brain injury would have occurred.

The expert's examination of Juliana Brisco revealed that she has a mild degree of lingual dysarthria and spasticity of her extremities to the extent that she also suffers from spastic quadri paresis. It is his opinion that Juliana's injuries are causally related to her premature delivery and causally related to the departures from accepted standards of care that caused and contributed to her severely premature birth. He opines that had Juliana not been born as prematurely as she was, she would be neurologically

Bisco v Lau
Index No. 04-4210
Page No. 8


normal today. He further opines that the twins will not be able to live independently and will require lifelong supervision either at home or at a residential setting.

The conflicting opinions by plaintiff's experts preclude a finding of summary judgment (*Viti v Franklin General Hospital*, 190 AD2d 790, 593 NYS2d 840 [2d Dept 1993]) with regard to defendant Lau. However, the court finds that plaintiff has failed to raise an issue of fact that Winthrop departed from accepted standards of care or that it was negligent in the care and treatment of the plaintiff, or that its staff failed to follow Lau's orders. The primary duty of Winthrop's resident and nursing staff was to follow the orders of the attending physician, defendant Lau, who directed the course of treatment which was administered to the plaintiff (see, *Toth v Community Hosp. at Glen Cove*, 22 NY2d 255, 292 NYS2d 440 [1968], *rehearing den.* 22 NY2d 973).

Accordingly, the motion by defendant Lau is denied and the motion by Winthrop University Hospital is granted. The plaintiff's claims against Winthrop University Hospital, dismissed herein, are severed and the plaintiff's remaining claims shall continue.

Settle judgment.

Dated: January 8, 2010



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION